

Written Response by ILGA-Europe¹
European Commission Consultation on
New Anti-Discrimination Measures
(October 2007)

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¹ ILGA-Europe, the European Region of the International Lesbian and Gay Association, is a European NGO with more than 240 national and local lesbian, gay, bisexual and transgender (LGBT) member organisations in 47 European countries. ILGA-Europe is a member of the Platform of European Social NGOs (Social Platform).

EXECUTIVE SUMMARY

ILGA-Europe welcomes the opportunity to engage with the European Commission in relation to the consultation on new anti-discrimination measures and to be part of the discussion on new initiatives to prevent and combat discrimination outside employment.

This written response addresses the questions raised in the letter sent by the European Commission in July 2007, as well as ILGA-Europe's position on the need for further legislative measures to combat anti-discrimination and to advance effective equality.

Based on extensive evidence of discrimination based on sexual orientation (detailed in the Annex), ILGA-Europe strongly believes that there is a need for new EU anti-discrimination legislation against discrimination, including on grounds of sexual orientation, in areas outside employment (based on Article 13(1) of the Treaty establishing the European Community) to:

- **Ensure equal levels of protection against all forms of discrimination** included in Article 13 of TEC as well as against sex discrimination across the EU, and avoid perpetuating a "hierarchy of rights"
- Reaffirm the indivisibility of civil, political, social, cultural and economic rights, and **guarantee equality and non-discrimination in the enjoyment of all economic, social and cultural rights** enshrined in international and European human rights law
- **Harmonise protection against discrimination** throughout the European Union to allow for freedom of movement of citizens and workers, where unequal protection may act as a disincentive to move to certain Member States

ILGA-Europe further considers that:

- Any new legislation needs to include the possibility to invoke discrimination on one or a combination of grounds (**multiple discrimination**)
- A **single comprehensive anti-discrimination Directive**, covering grounds of age, disability, religion and belief, as well as sexual orientation, would be a more effective way of addressing multiple discrimination and ensuring that all grounds of discrimination are treated equally
- Looking at single protection against the grounds of discrimination listed in Article 13 should not be the occasion to undermine existing legal provisions but should allow for protection to be extended to other grounds of discrimination.

In the context of this response, ILGA-Europe wishes to make two important remarks:

- 1) It is important to consider discrimination in areas such as access to goods and services and to social protection not solely in individual terms as such discrimination occurs often by virtue of being with a partner of the same sex. For instance, it takes place when same-sex couples are refused a double room in a hotel, when a partner is not considered as next of kin in relation to health care or when social protection measures are refused to someone taking a leave of absence to care for his/her same-sex partner.
- 2) This document discusses discrimination experienced by lesbian, gay, bisexual and transgender (LGBT) people, which are not protected equally in EU existing legislation. Whilst LGB are usually protected under discrimination on the grounds

of sexual orientation, gender identity discrimination affecting transgender people is part of the sex/gender discrimination. Hence, at times, this response refers to issues faced by LGB and others to issues affecting LGBT people. This reflects the fact that the legislation protecting LGB and transgender people is different.

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INTRODUCTION

ILGA-Europe's vision is of a world in which the human rights of all are respected and everyone can live in equality and free from discrimination on the grounds of sexual orientation and gender identity or expression. As an organization, ILGA-Europe also believes that all human beings, being born free and equal in dignity and rights, as stated by the UN Universal Declaration of Human Rights, everyone in the European Union should have equal protection against discrimination, whether it is on grounds of sexual orientation, age, sex, disability, religion, race, and other status, such as gender identity or social status.

This fundamental principle of equal treatment and non-discrimination is inscribed in legally-binding international and European human rights obligations, as well as in the Treaty of the European Union:

- Article 6, par.1, of the **Treaty of the European Union** affirms that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”
- Article 21(1) of the **Charter of Fundamental Rights** clearly establishes that sexual orientation discrimination is unacceptable in all areas
- Article 26 of the **International Covenant on Civil and Political Rights** – to which all EU member states are party – recognizes that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination”.

In contrast to the ICCPR, current EU anti-discrimination law is generating an “equality hierarchy” and *does not treat “all persons” equal before the law as the law does not prohibit any discrimination and does not guarantee to all persons EQUAL protection against discrimination they are not entitled “to the equal protection of the law”*. Thus, this unequal level of protection in EU law does not respect Article 26 of the Covenant.

- Article 2 (2) of the **International Covenant on Economic, Social and Cultural Rights** stipulates that “*The States Parties [...] undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion,*

national or social origin, property, birth or other status.” The rights guaranteed by the ICESCR include: the right of everyone to social security, including social insurance (art.9); the right to adequate food, clothing and housing, and to the continuous improvement of living conditions (art.11); right of everyone to the enjoyment of the highest attainable standard of physical and mental health (art.12); the right to education (art.13)

In contrast to the ICESCR, current EU anti-discrimination law does not ensure that the rights guaranteed by the ICESCR are exercised without discrimination on grounds of sex and religion, and of disability and sexual orientation which have been interpreted by international human rights bodies as being encompassed under “other status”.

- Article 14 of the European Convention on Human Rights – to which all EU member states are party – prohibits discrimination and affirms that: *“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*²

Furthermore, it should be recalled that the European Court of Justice has emphasised that free movement is a fundamental right of EU citizens. However, as the mapping study carried out for the European Commission in 2006 concluded, the fact that most of the European countries provide protection from discrimination outside the employment context in excess of that required by EU law does not mean that a level playing field exists across Europe in the regulation of discrimination outside the employment sphere. Lack of harmonisation of anti-discrimination means that people would not be protected against sexual orientation discrimination to the same extent in all EU member states; as a result, they may be less willing to move within the EU to countries where they would have fewer rights.

In this framework, ILGA-Europe strongly believes that there is a need for new EU anti-discrimination legislation against discrimination, including on grounds of sexual orientation, in areas outside employment (based on Article 13(1) of the Treaty establishing the European Community) to:

- **Ensure equal levels of protection against all forms of discrimination** included in Article 13 of TEC as well as against sex discrimination across the EU, and avoid perpetuating a “hierarchy of rights”
- Reaffirm the indivisibility of civil, political, social, cultural and economic rights, and **guarantee equality and non-discrimination in the enjoyment of all economic, social and cultural rights** enshrined in international and European human rights law

² Article 1 of Protocol No. 12 to the European Convention on Human Rights guarantees that: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. The Protocol is in force only in five EU member states (Cyprus, Finland, Luxembourg, Netherlands, and Romania). Fourteen member states have signed it but have yet to ratify the protocol (Austria, Belgium, Czech Rep., Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Portugal, Slovakia, Slovenia, and Spain).

- **Harmonise protection against discrimination** throughout the European Union to allow for freedom of movement of citizens and workers, where unequal protection may act as a disincentive to move to certain Member States³

ILGA-Europe further considers that:

- Any new legislation needs to include the possibility to invoke discrimination on one or a combination of grounds (**multiple discrimination**)
- A **single comprehensive anti-discrimination Directive** would be a more effective way of addressing multiple discrimination and ensuring that all grounds of discrimination are treated equally
- Looking at single protection against the grounds of discrimination listed in Article 13 should not be the occasion to undermine existing legal provisions but should allow for protection to be extended to other grounds of discrimination.

1. NEED AND NATURE OF THE INITIATIVE

- a. Is there clear evidence of discrimination on any of the grounds covered by Article 13 of the Treaty, i.e. sex, religion or belief, disability, age or sexual orientation against which people have no legal protection?***

There is sound evidence of discrimination on the ground of sexual orientation outside of the field of employment. Firstly, a growing body of academic and community-based research has shown that lesbian, gay and bisexual (LGB) people across the European Union face discrimination in access to social protection, health care and services, education, housing, goods and services, among other areas. Secondly, there has been an increase in the number of complaints brought before equality bodies which have a mandate to work on sexual orientation discrimination, on discrimination outside employment. (Please refer to Annex and Selected Bibliography.)

In considering the evidence of discrimination on the ground of sexual orientation, it is important to take into consideration the interconnection between visibility of LGB people (“being out” and being with a partner of the same sex), the ability to name and identify discrimination, and to claim rights publicly. The difficulty is getting evidence of discrimination on grounds of sexual orientation was clearly explained Judit Takacs, from the Institute of Sociology of the Hungarian Academy of Science, who argues that:

“Achieving a certain degree of social visibility for social groups suffering from social disadvantages is a precondition for claiming rights: it is very hard, if not impossible, to articulate the interests or defend the rights of socially invisible actors.” [...] However, social visibility can also make LGBT individuals vulnerable and exposed to violent responses by certain groups in society (groups of religious fundamentalists and the extreme-right) and at times even by public authorities (police or civil servants). Since not

³ The mapping study on existing national legislative measures commissioned by the EC in 2006 concluded that “the fact that most of the European countries surveyed provide protection from discrimination outside the employment context in excess of that required by EU law does not mean that a level playing field exists across Europe in the regulation of discrimination outside the employment sphere.”

everyone can afford to come out, discrimination against LGBT people will remain hidden in many instances.”⁴

In this context, it is very important to take account of the fact that a significant number of LGB people across the European Union are not open about their sexual orientation, often because of a fear of facing a negative climate towards homosexuality, or persisting taboos and prejudice that exist in the general public.⁵ As a recent Eurobarometer showed, openness towards homosexuality tends to be quite limited, with a majority of people in Europe opposed to homosexual marriages and to child adoption by homosexual couples”.⁶ Similarly, bans and restrictions on LGBT Pride marches and other public events in various European cities constitute public expression of challenge and disapproval towards sexual minorities. Therefore, absence of evidence should not and cannot be interpreted as the absence of discrimination; on the contrary, it often is indicative of social exclusion and invisibility which prevents LGB people from articulating their needs publicly and claiming their rights.

In light of the Call for Tender issued by the Fundamental Rights Agency to carry out a comparative study on the situation concerning homophobia and discrimination on grounds of sexual orientation in the EU (FRA2-2007-3200-T05), which ILGA-Europe expects will provide data on discrimination on grounds of sexual orientation outside employment, we are here presenting a short depiction of the types of discrimination that people in Europe experience in access to social protection (including social security and healthcare), education, goods and services (including housing), because of their sexual orientation. This account is further substantiated by examples of cases and reports submitted by members of ILGA-Europe for the purpose of this consultation which can be found in the Annex.

A. Social protection, including social security and healthcare

1) Access to health care

Lesbian, gay and bisexual people, like other groups who experience forms of discrimination and exclusion, often face many obstacles in accessing health services,

4 Takacs, Judit. Data collection methods on discrimination of lesbian, gay, bisexual and transgender (LGBT) people in Europe, 2007. Takacs also adds that the decision to remain hidden can also be “explained in part with the preference of victims to avoid publicity on the individual level where fear of humiliation is an important factor. The hidden nature of discrimination against LGBT people can also be explained in part with the lack of appropriate responsiveness and incentives on the institutional level: existing but ineffectively functioning institutions can contribute to the fact that certain forms of discrimination remain hidden.”

5 For example, the recent survey conducted by Campaign against Homophobia and Lambda Warsaw in Poland found that “About 80% of respondents hide their sexual orientation at workplace and at school/university, close to two thirds hide their sexual orientation from their environment at the place where they live (e.g. from their neighbours), and at least half of them do it, even when living together with a partner in a same-sex relationship.” (Report on the situation of bisexual and homosexual persons in Poland 2005 and 2006, Campaign Against Homophobia & Lambda Warsaw Association, 2007)

6 On average, only 32% of Europeans feel that homosexual couples should be allowed to adopt children throughout Europe. In fact, in 14 of the 25 Member States less than a quarter of the public accepts adoption by homosexual couples. Public opinion tends to be somewhat more tolerant as regards homosexual marriages: 44% of EU citizens agree that such marriages should be allowed throughout Europe. It should be noted that some Member States distinguish themselves from the average result by very high acceptance levels: the Netherlands tops the list with 82% of respondents in favour of homosexual marriages and 69% supporting the idea of adoption by homosexual couples. Opposition is strongest in Greece, Latvia (both 84% and 89%, respectively) and Poland (76% and 89%). See Eurobarometer 66

including unequal treatment and discrimination. **Stigma and discrimination** play an important role in LGB people's experience with health services, and often act as a barrier to persons seeking care and treatment. Indeed, many LGB people are reluctant to seek care, because they fear insensitivity, dismissal, and discrimination from the medical community. As Associação ILGA Portugal reported in its contribution towards this consultation, "we do have knowledge of several instances where gay men or lesbian women have avoided looking for health care due to fear of being discriminated against. This insecurity is particularly problematic with respect to gynaecologists or urologists." The most common reasons for this unwillingness are:

- Delaying a visit to a medical provider or not visiting at all because of the fear of one's sexual orientation being revealed
- Less than full trust in doctor's ability to keep information confidential
- Inability to talk about sexual orientation, even when understood to be crucial to proper treatment

Hence, a first problem faced by LGB people in accessing health care is linked to the way in which health care professionals treat people following **disclosure of one's sexual orientation** (e.g. when visiting a gynaecologist or a psychologist, when being tested for HIV, when donating blood). Indeed, recent studies, including an ILGA-Europe study on accessing health in Central and Eastern Europe, show that many physicians, clinicians, and therapists view LGB people and their lifestyles as strange or irrelevant.⁷ Many providers claim that they do not feel comfortable treating LGB people, and others see them as problematic, confusing, and dismissible.

Several research led by LGBT organizations in recent years have documented the discrimination that LGB people experience in health care. Experiences range from degrading treatment of patients within health care systems – such as commenting on a person's lifestyle in a reproving manner and using of additional hygienic protection where they wouldn't for other patients (**harassment**) – or to refusal to provide help or access to medical services (**direct discrimination**).

Another factor affecting their access to health services, often in a limitative way, is the **recognition and acceptance of same-sex couples** as well as of the marital status of LGBT people. Same-sex couples – whether they are married, registered or de facto partners – often experience **indirect discrimination** within health services. For instance, health practitioners may favour birth family over LGBT partners when it comes to seeking authorization for a patient's treatment or may not agree to share medical information with a patient's same-sex partner, even with this patient's approval.⁸ Lack of legal recognition of same-sex partnership and marriage can also limit health insurance coverage for couples. In addition, same-sex couples face discrimination in accessing fertility treatment and assisted reproduction in many European countries.

It should be noted that access to health services is also a problem for transgender people who often encounter a general lack of knowledge about transgender issues among health providers. Social stigma around transgender issues persists and leads

⁷ The 2005 ILGA-Europe study was conducted in five countries, including Romania and Hungary, and looked at the context and challenges faced by LGBT people in accessing health care systems. See S.Quinn, Accessing Health: the Context and the Challenges for LGBT People in Central and Eastern Europe, ILGA-Europe, 2006.

⁸ Stonewall's Website, section on mental health: www.stonewall.org.uk/information_bank/health/1287.asp

sometimes to the lack of inclusion of transgender health concerns within national health policies. A lot of transgender people who seek help on issues of gender identity get counter productive advices – such as to learn to live with their birth gender role – or are not redirected to people who could provide adequate services. There are also problems linked to the availability of specific surgeries to allow transgender people to embark upon the transitional process in different countries. Furthermore, the legislation often allows a person to undergo hormone treatment and gender reassignment surgery only if a ‘gender dysphoria’ is diagnosed by a mental health practitioner.⁹

2) Social security (including pensions)

Access to a range of social security schemes - such as survivor pensions, equal treatment for tax purposes, inheritance tax, and financial assistance for carers – is often limited to married couples or couples whose partnership is legally registered. Where same-sex couples are not allowed to marry or to register their partnership, or where such registered partnerships do not provide access to such legal rights, lesbian and gay couples are de facto prevented from enjoying social protection which they would be granted if they were in a relationship with someone of the opposite sex.

Jurisprudence on the impact of non-recognition of same-sex couples on access to social security is slowly emerging. The recent opinion of Advocate General of the European Court of Justice Damaso, in the case *Maruko v. Versorgungsanstalt der deutschen Bühnen* related to survivor’s pension, specified that the non recognition of same sex partnerships can constitute an indirect discrimination on the grounds of sexual orientation where no other means than marriage is provided to qualify for a survivor’s pension.¹⁰ Similar opinions have been rendered by equality bodies such as the Equality Authority in Ireland. The Authority issued a comment on a complaint lodged in 2006 by a gay man in relation to the refusal of an adult dependent allowance for his partner under the claimant’s invalidity pension (see in Annex), saying that this case was illustrative of the discrimination that affects same-sex partners and that such cases highlight the need to establish a legal recognition for same-sex relationship.¹¹

B. Education

There is a breath of evidence of the forms of discrimination that LGBT people experience in education. Discrimination in education is one of the most researched areas of the life of LGBT people. The problems faced by LGBT people include: harassment and bullying; lack of representation of LGBT issues in the curriculum; discriminatory content in educational materials; insulting or degrading treatment during classes; refusing access to information about sexuality and sexual health.

In 2006, ILGA-Europe in partnership with the International Gay and Lesbian Youth Organisation (IGLYO) conducted a Europe-wide survey which found that 61.2% of

⁹ Prof. Stephen Whittle is currently conducting on behalf of Press for Change, ILGA-Europe and TransGender Europe, a survey on the inequality and discrimination people experience because they are trans. Among other issues, the survey will pay attention to access of health care and treatment. The findings will be available in 2008.

¹⁰ Affaire C-267/06 Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Advocate general opinion of the 6th September 2007.

¹¹ See 2006 Annual Reports (www.equality.ie/)

young LGBT people in Europe had experienced discrimination at school.¹² More than half of the respondents to the survey (53%) said that they had experienced bullying at school (e.g. verbal attacks, harassment, threats, physical violence), while 43% of youth said to have encountered prejudice in curriculum and teaching content (e.g. lack of representation, expression of prejudice/negative representation of LGBT issues in curriculum; homonegative attitudes or passivity from teachers). Other research data corroborate the findings of the ILGA-Europe & IGLYO survey, including the “*Homophobia in the Educational System*” research project in Spain (2005) and the *Observatório de Educação* in Portugal.¹³

Some EU Member States like Ireland and Sweden have legislation which places an obligation on schools to take necessary measures to prevent harassment in education, and consequently, which give a mandate to equality bodies to investigate instances of discrimination at school.¹⁴ Where no legislation exists to protect against discrimination in schools, students have had very limited support them when they experience verbal and/or physical abuse and harassment be it by fellow students or teachers at school.

C. Access to and supply of goods and services available to public, including housing

Discrimination on grounds of sexual orientation in access to goods and services takes many different forms. Typical cases reported by NGOs, as well as complaints taken up by equality bodies include the following: same-sex couples being denied entry to restaurants and bars, or forced to leave premises; couples being denied services or access to double rooms in hotels; unequal treatment in accessing special offers with airline travel or entrance fees to museums; denied access to insurance policies and bank loans available to married couples; refusal to rent apartments or house, etc. These cases are widely reported although rarely followed by an official complaint. By way of illustration, Hans Ytterberg, Swedish Ombudsman against Sexual Orientation Discrimination, reported that for every ten phone calls made to his office asking about procedures to make a complaint, only one complaint is officially lodged.

With regards to discrimination in access to goods and services, one important element to highlight is the fact that such discrimination often occurs by virtue of being with a partner of the same-sex. LGB people rarely experience discriminatory treatment in a public place or in filing for a bank loan if they are on their own.

b. What areas should any new initiative cover? In what areas other than employment do you find that discrimination is more widespread?

¹² There were 754 respondents to the questionnaires; 93% of the responses came from youth from within the EU. In Takacs, J., Social Exclusion of LGBT youth in Europe, ILGA-Europe and IGLYO publication, 2006. www.ilga-europe.org/europe/publications/non_periodical/

¹³ Research project from Spain available at www.felgt.org/_felgt/archivos/4066_es_Homofobia%20en%20el%20Sistema%20Educativo%202005.pdf?cl=es-ES;
Project of Rede Ex Aequo (Portugal): <http://ex-aequo.web.pt/observatorio.html>.

¹⁴ Complaints lodged with the Ombudsman against Sexual Orientation Discrimination can be found at <http://www.homo.se/o.o.i.s/3356> (discrimination in schools) and <http://www.homo.se/o.o.i.s/3345> (discrimination in higher education). For information about legislation in Ireland, refer to the Equality Authority and its anti-bullying campaign (www.equality.ie/index.asp?docID=593)

As detailed in our Shadow Directive on Equal Treatment of Persons Irrespective of Sexual Orientation which aims at extending protection against discrimination based on sexual orientation, ILGA-Europe considers that the material scope of a **new legislative initiative to protect against discrimination on grounds of sexual orientation** should include the following areas: social protection and social advantages (including access to health care), education, access to goods and services (including housing).¹⁵

This position follows from the fact that the European Union should guarantee enjoyment of the range of economic, social and cultural rights enshrined in European and international human rights instruments for all, without discrimination on any ground. As mentioned in the introduction, non-discrimination is a fundamental right recognised in many human rights instruments, such as the International Covenant on Civil and Political Rights, the Charter of Fundamental Rights and the European Convention on Human Rights.

Secondly, ILGA-Europe considers it necessary to protect against discrimination on grounds of sexual orientation in the areas cited above because of extensive evidence of discrimination and of the lack of equality of LGB people in areas outside employment (see examples of discrimination in areas other than employment presented in the section above). As Hans Ytterberg explained: "Our experience has been that sexual orientation discrimination occurs in virtually all sectors of society, be it in employment, primary, secondary or university education, in the provision of goods and services, private and commercial as well as public, within the law enforcement agencies, correctional facilities, etc. When it comes to formal signed complaints to my office, employment cases are in a minority."

Other areas requiring consideration beyond employment

ILGA-Europe wants to take the opportunity of this consultation to highlight other areas which need to be taken into consideration in relation to initiatives aimed at protecting against discrimination and promoting equality. As mentioned in the response to question 1.a), discrimination in areas like access to goods and services and to social protection often takes place by virtue of being with a partner of the same sex. For example, discrimination often occurs when a partner is not allowed to give authorisation for medical treatment for his/her same-sex partner, when insurance or social benefits available to unmarried opposite sex couples or married couples are refused to same-sex couples, when same-sex couples are refused entry to a restaurant or a hotel. Thus, **lack of recognition of same-sex couples, partnerships and LGBT families** consequently can significantly limit the protection offered by anti-discrimination legislation in areas outside employment. In this context, it is important to tackle the issue of marital status and recognition of LGBT family where non recognition of same-sex partnerships can constitute indirect discrimination on grounds of sexual orientation as recently recognised by the Advocate General of the European Court of Justice.¹⁶

¹⁵ [www.ilga-](http://www.ilga-europe.org/europe/news/ilga_europe_launched_shadow_directive_for_further_protection_against_sexual_orientation_discrimination/shadow_directive_for_further_protection_against_sexual_orientation_discrimination)

[europe.org/europe/news/ilga_europe_launched_shadow_directive_for_further_protection_against_sexual_orientation_discrimination/shadow_directive_for_further_protection_against_sexual_orientation_discrimination](http://www.ilga-europe.org/europe/news/ilga_europe_launched_shadow_directive_for_further_protection_against_sexual_orientation_discrimination/shadow_directive_for_further_protection_against_sexual_orientation_discrimination)

¹⁶ Affaire C-267/06 Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Advocate general opinion of the 6th September 2007.

ILGA-Europe would also like to raise the fact that the legislation protecting LGB people and transgender people is different. Whilst LGB people are usually protected under discrimination on grounds of sexual orientation, gender identity discrimination affecting transgender is part of the sex/gender discrimination. Legislation protecting against **sex/gender discrimination** includes employment, goods and services which is more protective than current EU legislation protecting against sexual orientation discrimination which only addresses discrimination in employment. Moreover, there exists a gap in protection against sex/gender discrimination in access to education and health which is currently not covered by EU legislation. Another issue that ILGA-Europe would like to stress is the need to ensure that the **protection of transgender people** is secured under the gender/sex directives. Transgender people are invisible in the directives and it is only by being aware of ECJ case law that people can know that the protection applies also to transgender people. It is therefore very important that where legislation exists it is made clear that it applies to transgender people and that those legal practitioners are trained on this issue.

In addition, while understanding the debate over the legal basis defining EU competences in this area, ILGA-Europe wants to highlight the fact that violence is a phenomenon that continues to affect the everyday life of LGBT people in Europe. Homophobic bullying and violence at school, on the streets, in public spaces is a reality which will also need to be addressed to achieve the goal of equality in all spheres of life for LGBT people. To this end, the legal framework needs to be clarified.

Other grounds of discrimination

ILGA-Europe wishes to join its voice to other organisations calling for levelling up the protection against discrimination and for extending it to access to social protection and social advantages (including access to health care), education, access to goods and services (including housing). In order to ensure **equal levels of protection against all forms of discrimination** included in Article 13 of TEC, and avoid perpetuating a “hierarchy of rights, we consider that further legislation prohibiting discrimination needs to cover discrimination on other grounds, such as religion or belief, disability and age. ILGA-Europe also believes that it is important to look at areas of activity where discrimination occurs which are not covered under the Race Equality Directive or under the Gender Goods and Services Directive (which has a narrower scope), leaving even more areas in which there is no protection against discrimination.

2. NATURE AND EFFECTIVENESS OF NON-LEGISLATIVE MEASURES AND OF MEASURES TO ACCOMPANY ANY LEGISLATION

- a. Do you believe that non legislative measures, for example, awareness-raising, training for specific groups, exchange of best practice, open method of co-ordination, could effectively deal with the remaining problems?*

Anti-discrimination legislation is essential to deal effectively with discriminatory practices, measures and attitudes which LGB people face in areas such as access to social

protection and health care, education, access to goods and services. According to Hans Ytterberg, Swedish Ombudsman against Sexual Orientation Discrimination, and Mark Bell¹⁷, non-legislative measures can never replace legislation. In comments provided to ILGA-Europe, Mark Bell argued that:

“A recurring experience with anti-discrimination law and policy is that non-legislative measures are rarely effective unless they are underpinned with binding and enforceable rights. For example, this approach was initially tried as a means of combating age discrimination in the UK, but the government ultimately recognised that a non-binding Code of Practice was not sufficient. This is particularly true with discrimination grounds where there remain strong social divisions on the (un)acceptability of such discrimination. It is evident that in some Member States there are sizeable proportions of the population, as well as vocal political movements, which believe that it is legitimate to treat lesbian, gay and bisexual persons less favourably. Non-binding measures are very unlikely to be effective against the backdrop of open social division on the basic norm.”

In other words, law legitimises the claims for equality by LGBT people. This opinion was echoed by Hans Ytterberg who argues that *“Non-legislative measures can be effective in preventing and remedying discrimination and harassment as well as to promote equality of opportunity and treatment. They can, however, never effectively replace legislation. Legislation is not enough to do away with prejudices and discrimination but they are necessary to counteract the effects on individuals of such prejudices and discrimination.”* As Mark Bell further argues, given that non-discrimination is a fundamental principle enshrined in human rights law, *“it is reasonable to expect that such rights are protected by legally binding instruments in order to convey their fundamental status to the general population.”*

This being said, non-legislative measures aimed at raising awareness, training specific groups and exchanging good practices are needed to support and complement implementation of existing and future anti-discrimination legislation, and should be encouraged by the EU as additional means to address discrimination outside employment. Discussing developments in relation to discrimination in the sphere of education in Sweden, Mr Ytterberg explained that *“Until April 2006 when the Discrimination and other Degrading Treatment of Children and Pupils Act entered into force, it was exhaustingly difficult to engage those responsible at national or local level in any concrete action against sexual orientation discrimination. With the act prescribing sanctions in the form of economic damages to be paid to victims of discrimination or harassment in schools, interest has rocketed and we cannot accommodate all request for expert assistance and advice or cooperation in educational projects.”*

With regard to the open method of coordination as another non-legislative measures available in the EU, this has not so far demonstrated itself to be a particularly effective method of combating discrimination. Discrimination linked to sexual orientation remains almost invisible with the European Employment Strategy and the Social Protection and Social Inclusion Process despite active involvement of ILGA-Europe and LGBT organisations at national level. Furthermore, it is interesting to point to a recent empirical

¹⁷ Mark Bell is a Professor of Law at Leicester University and ground coordinator (sexual orientation) on the European network of independent legal experts in the non-discrimination field.

study by the European Roma Rights Centre on the effectiveness of the national action plans on social inclusion which concluded that commitments made in relation to Roma communities were often not implemented in practice.¹⁸

b. If legislation is proposed, what accompanying measures would support effective implementation?

In principle, many of the measures which accompanied the implementation of Directive 2000/78 would continue to be appropriate – such as reversal of burden of proof, positive action, awareness-raising and dissemination of information, judicial and administrative measures to enforce rights, dialogue with stakeholders (social partners and NGOs) – including through Community Action Programmes. As Mark Bell commented, one lesson from the operation of the Anti-Discrimination Action Programme seems to be a need to focus on using the law in practice. An initiative to further developed would thus be to concentrate more on training judges and legal practitioners, as well as training NGOs on litigation. Information dissemination remains a very important element to ensuring effective implementation of legislation; experience has shown that low levels of awareness about existing rights and the avenues of redress constitute very important barriers in LGBT people accessing justice.

One essential lesson learned from the implementation of Directives 2000/43 and 2000/78 is that litigation remains low in many countries, especially in relation to sexual orientation. In this respect, it is essential to put in place and guarantee measures aimed at ensuring effective access to justice. A key measure is the ability of associations, organisations and other legal entities (e.g. an NGO, a trade union, an equality body) to engage in judicial and administrative procedures on behalf of a person or persons who have experience discrimination on grounds of sexual orientation. Given that many people discriminated on grounds of their sexual orientation remain silent for fear of having to be public about their sexual orientation, such a measure is necessary to offer safe access to justice and a mechanism to claim their rights while keeping their privacy. In this context, an important initiative to ensure that victims have access to legal aid would be the proposal by Migration Policy Group to create a European Fund for litigation which would support test cases and litigation strategies, an initiative which ILGA-Europe supports. Another essential measure would be for States to have the obligation to set up equality bodies with a mandate to deal with all grounds of discrimination, including by providing advice to victims, to investigate cases, and to institute court proceedings.

Other accompanying measures would include **equality mainstreaming** which complements anti-discrimination legislation, positive action and a rights-based approach. Equality mainstreaming is important as it is more likely to address institutionalised discrimination, structural discrimination and unmet needs of certain groups which are invisible in society. Equality mainstreaming requires developing a **framework for analysis, training** of policy makers on issues affecting marginalised groups, as well as the existence of **data and research** to demonstrate the lived reality of LGBT people.

¹⁸ European Roma Rights Centre (ERRC) and Númena Centro de Investigação em Ciências Sociais e Humanas, 'Social inclusion through social services: the case of Roma and Travellers. Assessing the impact of National Action Plans for Social Inclusion in the Czech Republic, France and Portugal' (Budapest: ERRC and Númena Centro de Investigação em Ciências Sociais e Humanas, 2007)

Finally, positive duties to promote equality have been used at national level in some member States, for instance in the UK, and should be considered in a new legislation. Positive duty obliges public authorities to develop some equality schemes to include groups which are traditionally marginalized. This is a form of equality mainstreaming with a mandatory base. Therefore public authorities have to be proactive in the promotion and protection of equality between different groups. They also have to show that their actions have been equality proofed and are challenge existing structural unbalances.

3. ADVANTAGES AND DISADVANTAGES OF DEALING IN ONE SINGLE INITIATIVE WITH DISCRIMINATION OUTSIDE THE LABOUR MARKET NOT CURRENTLY COVERED BY EU LEGISLATION

a. What is the best approach to tackle multiple discrimination?

Multiple discrimination is a phenomenon which has been highlighted first by the Black feminist literature who demonstrated the limits of the anti-discrimination framework to tackle discrimination affecting Black women.¹⁹ Crenshaw highlighted that multiple discrimination took place simultaneously on several grounds to the effect that they were inseparable. It was impossible to compare the discrimination faced by Black women with the one experienced by Black men or white women. The literature has now distinguished between compound, additive and intersectional discrimination.²⁰ Whereas in the case of additive discrimination, grounds could be separated and could be brought to court separately (although it would be quite tedious for the complainant), it is very difficult in the case of compound discrimination where one ground intensifies the discrimination based on another ground. In the case of intersectional discrimination, it proves impossible to separate the grounds; several grounds create a new type of discrimination.

The issue of multiple discrimination is more and more taken up by civil society²¹ and equality bodies. It has been introduced in the legislations of some EU Member States (in Spain, Austria, Romania, Bulgaria and Germany).²²

It is unclear whether current EU legislation allows for tackling discrimination on several grounds in the field of employment. It is more than likely that the comparator needed to establish a case of indirect discrimination in a courtroom might be very hard to identify²³; in addition, there is a lack of data on the nature and the effects of multiple discrimination. However, it is clear that the current framework does not allow for tackling multiple

19 Kimberlé Crenshaw, 'Demarginalising the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', University of Chicago Legal Forum, 1989, p150.

20 Makkonen, Timo. (2002) 'Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore'. Institute for Human Rights. Åbo Akademi University. Earlier research on the intersection of grounds is by Shoben, W. Elaine. (1980) 'Compound Discrimination: The interaction of Race and Sex in Employment Discrimination' N.Y.U.L Rev. pp. 793-835.

21 Seminar on Multiple Discrimination as it affects young people co-organized by the European Youth Forum, Age, EDF, ENAR, EWL and ILGA-Europe, Brussels, 20-22 September 2007.

22 Information provided by Gay Moon during the seminar mentioned in previous footnote.

23 S. Hannett, "Equality at the Intersections: the Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) 23 OJLS 68.

discrimination outside of employment since different grounds for discrimination are offered different protection against discrimination.

According to Hans Ytterberg and Mark Bell, a **single framework** appears more appropriate to tackle the issue of multiple discrimination for several reasons. The reasons put forward by Hans Ytterberg are that *“A single directive (or other initiative) underlines the human rights nature of the issue of discrimination regardless of discrimination ground. It also limits the risk of creating or upholding a hierarchy of human rights in this respect.”* Moreover, as Mark Bell argues, *“Integrated legislation (i.e. legislation addressing several grounds of discrimination) is generally better placed to response to multiple discrimination. This helps to avoid inconsistencies in the level of protection accorded to different grounds. It also conveys more clearly to individuals and organisations the range of protected grounds.”*

According to several experts (including Professor Bell and Gay Moon), in order to be able to tackle multiple discrimination, it is important that a **legislation specifically mention** the possibility to invoke discrimination on several grounds simultaneously. As noted by Professor Bell, *“Even within an integrated legislative framework, individuals can be forced to separate their complaint into different strands. One method of doing this could be to include a statement in the legislation to the effect that it aims to combat discrimination on any of the individual protected grounds or any combination of those grounds.”* Such a statement should specify that recognition of multiple discrimination is also applicable in relation to grounds of sex/ gender and race or ethnic origin.

Another issue to consider in order to tackle properly multiple discrimination and to put an end to any hierarchy of rights would be for the Gender Directive to be reconsidered to offer the same level of protection as the Race Directive (levelling up). Although this might appear to be a complex task, one rather simple option would be to include the mention of combination of grounds in the legislation. As Gay Moon explains *“It should also be taken into account that contrary to what is commonly believed, it is not legislating on multiple discrimination that is complicated. The complexity lies in making legislation work. One of the challenges lies in developing true inter-sectional thinking in all dimensions of discrimination, this requires changes in the way that we approach such issues.”*²⁴

Having **separated bodies** dealing with different type of discrimination (for instance Ombudsperson) can make the complaint on multiple grounds more difficult. However, this can be remedied by creating a mechanism allowing for several ombudspersons to be dealing with one complaint. As Hans Ytterberg explains: *“When it comes to individual complaints dealing with multiple discrimination it is important to have at least some kind of mechanism in place to ensure that things do not fall between the cracks. In my case this is solved in the following way. As long as I can submit that there has been a violation of any of the statutes dealing with sexual orientation discrimination, I also have legal standing to alternatively argue the case on any other discrimination ground (race, religion, sex, disability) but also on any other legal ground (e.g. professional misconduct in the line of duty). The same goes for the other Ombudsmen.”* The conclusion of memorandum of understanding amongst the different bodies can be a way forward. In

²⁴ Based on Gay Moon's presentation during the Workshop on making legislation works on multiple discrimination at the above-mentioned Seminar on Multiple Discrimination (Brussels, September 2007).

countries where there is **one equality body**, this body must have the power, resources and the capacity to deal with all grounds (including sexual orientation and gender identity as part of gender) and with multiple discrimination.

Other measures needed

In addition to adopting legislation to tackle multiple discrimination, it is important to take measures to collect data on the occurrence and effects of multiple discrimination. In this respect, the Fundamental Right Agency and the Gender Institute have a crucial role to play at the EU level in disseminating methodologies for collecting data and producing reliable research. As with all type of discrimination, awareness-raising, information and training of judiciary are necessary support to the legislation. Finally, concern for multiple discrimination should be integrated in the equality mainstreaming that the Commission undertakes in relation to its policies.

b. How could a single initiative address the specificities of the different types of discrimination?

A single legal framework covering all grounds of discrimination would mirror international human rights standards such as Article 14 of the ECHR, Protocol 12 of the ECHR or Article 26 of the ICCPR. Furthermore, previous experience with EU legislation has shown that it is possible to address several grounds in a single document. As Professor Bell pointed out, “Directive 2000/78 already demonstrates how legislation can combine general provisions applying to all grounds with specific provisions addressing the different context of certain grounds (e.g. the reasonable accommodation duty and disability). Nevertheless, provisions applying to certain grounds only should be thoroughly justified, especially where these extend additional exceptions.”

4. EXCEPTIONS

a. What exceptions to the general rule of equal treatment should be allowed (genuine and determining occupational requirements, positive action, protection of privileges based on certain characteristics)?

In general, blanket exemptions should be avoided. Exceptions should be very narrowly drawn and need to be objectively justified against very strict, limited criteria.

More specifically, exceptions around marital status should not be added automatically in the document. They should be considered carefully as they impact on the rights of LGBT people to be protected from discrimination in a significant manner. Indeed, it is often by virtue of being with a partner of the same sex that people are discriminated in accessing goods and services. Any exemption related to marital status should be considered in the light of the fact that discrimination is usually encountered when same-sex couples are booking a room together or when a partner is not considered as next of kin in relation to health care. Furthermore, in a recent opinion of Advocate General of the European Court of Justice Damaso, in the case *Maruko v. Versorgungsanstalt der deutschen Bühnen*, he specified that the non recognition of same sex partnerships constituted an indirect discrimination on the grounds of sexual orientation.²⁵ Therefore protection against

²⁵ Affaire C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Advocate general opinion of the 6th September 2007.

discrimination on the grounds of sexual orientation must include recognition of family and marital status.

Moreover, exceptions related to religious organisations and religious belief need to be very narrowly defined. Any such exception should only apply to the ground of religion and belief, and not relate in any way to other grounds of discrimination, including sexual orientation. For instance, religious organisations that provide services in the public domain (e.g. managing schools or residential care facilities) must not have an untrammelled prerogative to deny their services to LGBT people.

This being said, differences in treatment may be accepted where they are justified by a legitimate aim such as the protection of victims of discrimination; for example, counselling services, lesbian and gay switchboards and advice lines, as well as social groups which enable lesbian and gay people to meet in a safe space which they might otherwise struggle to do. Positive action is needed to deal adequately with structural and societal discrimination. The ECJ and the Race Directive have recognised the need for positive action in order to achieve the aim set by anti-discrimination legislation. Positive action sometimes requires that specific measures, such as social and support services targeted towards LGB people, are put in place for the traditionally discriminated groups. Such arrangement applies on other grounds – such as the provision of separate services for men and women – and is widely accepted as an effective mechanism for increasing access to services. These measures should be encouraged by the legislation and not seen as unlawful discrimination. (Please refer to preamble 11 and 12, as well as explanatory text for article 6 of ILGA-Europe’s Shadow Directive).

5. ROLE OF EQUALITY BODIES

a. Should the role of equality bodies be widened to go beyond their current remit of discrimination based only on race

The role of equality bodies needs to be widened in two important ways: the scope of their mandate in relation to grounds of discrimination, as well as in relation to areas of discrimination (outside employment), and the extent of their competences.

First, ILGA-Europe considers that there is a very real need to establish equality bodies in all EU Member States with the remit to work on all grounds of discrimination, including sexual orientation. As Mark Bell explained, “*The relatively low level of litigation on sexual orientation discrimination in employment has indicated the need for complementary strategies to enforce and promote anti-discrimination legislation. Indeed, many Member States have already recognised this by creating equality or human rights institutions with a mandate that covers sexual orientation alongside other grounds.*”²⁶ This explanation is corroborated by Hans Ytterberg, who notes the impact that the institution of an Ombudsman against sexual orientation discrimination has had in terms of awareness-raising. Based on his experience of almost 8,5 years as Sweden’s Ombudsman, he says:

“Working on sexual orientation discrimination was a non-issue for labour unions, employers, government agencies, local and regional government, school boards,

²⁶ Such bodies now exist in states such as Austria, Bulgaria, Cyprus, France, Greece, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Romania, Slovenia and the UK. In addition, there is a specific Sexual Orientation Ombudsman in Sweden.

law enforcement agencies, etc. alike, back in 1999. This has completely changed. It goes without saying that this does not mean that Sweden no longer has a problem with sexual orientation discrimination. But it does mean that in all of these sectors of society and in many others, initiatives are being taken and work is being carried out to prevent and counteract sexual orientation discrimination and harassment and to actively promote equality of opportunity regardless of sexual orientation. These extensive and rapid developments would not have come about without legislation and an Ombudsman's office with a wide mandate."

Therefore, new legislation should only require States to create equal treatment bodies that cover all grounds of discrimination, with the mandate to address discrimination in areas of employment, education, access to social protection and social advantages, health care, and access to goods and services.

In addition, the functions of these equality bodies should extend to include the following competences: providing independent assistance to victims of discrimination in pursuing their complaints, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations, and maintaining regular dialogue with individuals affected by discrimination and relevant NGOs. A strategy based purely on individual litigation is unlikely to be effective, especially in relation to sexual orientation, in part because issues of confidentiality often means that LGBT people reluctant to take legal action. This is why, it is important for equality bodies to have the mandate to be able to be proactive at preventing discrimination, and not just at investigating and taking up complaints. As the experience of the Swedish Ombudsman has shown, much can be accomplished by a body which has the mandate both to assist victims (by investigating complaints and taking up legal cases) as well as to proactively work with different sectors of society to promote equality to prevent discrimination from taking place.

b. How can it be ensured that they can operate effectively?

There are various factors which impact upon the capacity of equality bodies to function effectively.²⁷ These range from their financial and human resources, through to the arrangements for protecting their autonomy from external political interference. In terms of resources, there are many examples of existing equality bodies which are limited in their ability to carry out their work because of lack of human resources. It is clear that allocation of adequate financial resources is an issue which requires attention. Concerning the independence of equality bodies, Mark Bell suggested that one option for enhancing their independence is for equality bodies to be accountable to national parliament. Another important practice would be for senior positions within the equality body not to be appointed on the discretion of the national government.

Given the need to respect diverse national institutional arrangements, EC legislation cannot be overly prescriptive on the internal structures of equality bodies. One option is for the legislation to refer expressly to international standards for assessing the independence of equality bodies, such as the UN Paris Principles on national human

27 R Holtmaat, 'Catalysts for change? Equality bodies according to Directive 2000/43/EC – existence, independence and effectiveness', Brussels, Commission, 2006.

rights institution, or ECRI's recommendation on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance.²⁸

28 13 June 1997, CRI (97) 36.

ANNEX 1 – EVIDENCE OF DISCRIMINATION

Here are examples of the discrimination that lesbian, gay and bisexual people in Europe experience in access to social protection (including social security and healthcare), education, goods and services (including housing), because of their sexual orientation. These examples were submitted by members of ILGA-Europe for the purpose of this consultation. Information was received from Austria, Sweden, Portugal, Poland, Slovenia, Romania, Germany, Ireland, UK, France and Belgium

A. Social protection, including social security and healthcare

1) Access to health care

Poland

A survey carried out by two LGBT organisations, Campaign against Homophobia and Lambda Warsaw, in 2007 is indicative of the link between disclosure of one's sexual orientation and the access to and provision of health care services. Respondents to the survey were asked whether they had experienced a situation where a representative of the health service, having learned about their sexual orientation, treated them differently/less favourably than before. While only 20% of the respondents disclosed their orientation in contacts with health professionals, nearly one fourth of that group of respondents (23.5%) experienced a less favourable treatment by representatives of health services.²⁹

The survey also speaks about cases of health services refusing to provide information about the health of a same-sex partner and of refusal of visitation rights during partners' stay in hospitals or other closed medical institutions.³⁰

Portugal

Examples of discrimination linked to lack of recognition of same-sex couples was given by Associação ILGA Portugal which reported having received several complaints over the years of discrimination regarding the recognition of *de facto* couples as families (and *de facto* partners as family members) by some health professionals. Some of these complaints concerned discriminatory treatment by doctors or hospital employees who did not recognise family ties when a member of the couple visits his/her hospitalised partner.³¹

Sweden

A number of complaints lodged with the Ombudsman against Sexual Orientation Discrimination deal with such discrimination in access to health care (e.g. case of demeaning treatment in medical care at a district health centre (Decision of 2 February 2001, Dossier No. 220/00) and case of harassment in dental care (Huddinge District Court, ruling 25 February 2007, no. T 3663-06)). All the cases taken up by the

29 Report on the Situation of bisexual and homosexual persons in Poland 2005 and 2006, Campaign against Homophobia and Lambda Warsaw Association, Warsaw 2007.

30 Report on the situation of bisexual and homosexual persons in Poland 2005 and 2006 Report (2007).

31 Compiled information submitted by Associação ILGA Portugal is available at ILGA-Europe's office.

Ombudsman related to discrimination in access to health care services are available at www.homo.se/o.o.i.s/2061.

United Kingdom

A research conducted by Stonewall in 2007 found that the problems that LGB people face when trying to access services from doctors include:

- a failure either to examine or to respond to a patient properly (for example doctors that have not been willing to offer a smear test to lesbians);
- doctors refusing to accept someone as a patient because of their sexuality
- doctors that have made offensive or discriminatory comments about LGB people and their sexuality³²

2) Social security (including pensions)

Ireland

A complaint lodged with the Equality Authority in Ireland in 2006 (A claimant v The Department of Social and Family Affairs) by a gay man in relation to the refusal of an adult dependent allowance for his partner under the claimant's invalidity pension. The claimant was permanently unfit for work due to a terminal illness and expected to qualify for adult dependent allowance on the claimant's invalidity pension for his partner who had taken unpaid leave from his job to care for him. While such an adult dependent allowance is payable to unmarried heterosexual couples, the claimant was first refused the invalidity pension from the Department of Social and Family Affairs. The claim was settled in favour of the claimant by the Equality Authority under the Equal Status Acts on the sexual orientation ground. In its report, the Equality Authority noted that this case was illustrative of the discrimination that affects same sex partners and that such cases highlight the need to establish a legal recognition for same sex relationship.³³

Portugal

Portuguese law extended *de facto* unions to same-sex couples in 2001. In principle, these *de facto* unions entail several rights and obligations, including social security – namely, a survival pension in case of death of one of the partners. However, it was brought to the attention of LGBT organisations in Portugal that the Social Security Ministry decided at the time not to include same-sex couples as a possibility in the software they were developing. The argument was that the law that regulates *de facto* unions states that Social Security benefits should be applied to couples whose lives are analogous to those of married couples. Since same-sex marriage still does not exist in Portugal, the claim was that no analogy could be drawn and that therefore social security benefits should not be extended to same-sex couples.³⁴

B. Education

France

A community-led research project on homophobia in schools carried out by the French non-governmental organisation SOS Homophobie found that 89% of the respondents considered that homosexuality is silenced in text books. 79% of the respondents to the

³² See www.stonewall.org.uk/documents/reporting_homophobia_in_the_health_sector.pdf

³³ See 2006 Annual Reports (www.equality.ie/)

³⁴ Compiled information submitted by Associação ILGA Portugal is available at ILGA-Europe's office.

survey said that homosexuality is not mentioned by teachers. SOS Homophobie also found that 58% of students had been victim or had witnessed acts of homophobia. Moreover, the study showed that 44% of these students didn't feel secure enough to turn to administration for support in cases of bullying.³⁵

Ireland

An exploratory survey carried out by the Anti-Bullying Centre in Trinity College Dublin into the experiences of LGBT young people in Ireland, which correlated with earlier research conducted in Northern Ireland, found that 76% of respondents had experienced verbal abuse and 39% had experienced physical abuse. The consequences of this bullying and harassment included attempted suicide (15%), self-harmed (21%), an eating disorder, alcohol abuse or drug misuse (42%). One in ten respondents also said to have left education earlier than they would have wished, with 3.3% dropping out of school early.³⁶

Poland

65.1% of the respondents to the Campaign against Homophobia and Lambda Warsaw survey mentioned above were high school or university students (n=990). They were questioned about whether or not they concealed their sexual orientation in their schools. As many as 79% of the respondents concealed their sexual orientation and consequently, their private life in their schools. Out of this number 27.4% kept it back from everyone, and 51.6% only from some persons, equally as often from teachers and schoolmates (77.85 and 82.7%, respectively). Almost 20% of the respondents declared that they could discuss their private lives as openly as heterosexual persons.³⁷

C. Access to and supply of goods and services available to public, including housing

1) Access to public services

Austria

A few years ago, the organisation HOSI Wien ("Homosexuelle Initiative") wanted to buy the name of a train, i.e. pay for the organisation's name to appear in all timetables and on the train and on the platform screens for a whole year – something that can be done by companies and NGOs in Austria. Their request was refused without adequate explanation.

Romania

In July 2007, District 4 Court of Law of Bucharest decided in favour of a citizen who accused SC Distrigaz Sud SA of discrimination and harassment based on sexual

³⁵ http://www.sos-homophobie.org/documents/analyse_enquete_milieu_scolaire.pdf

³⁶ References to studies carried out in Ireland on discrimination in education can be found on the website of the Gay and Lesbian Equality Network (www.glen.ie/education.html). Includes: ShOUT, Research into the needs of young people in Northern Ireland who identify as lesbian, gay, bisexual and/or transgender (LGBT), Research Document, Dec. 2003, Commissioned by the Department of Education (www.glen.ie/education/docs/SHOUT%20main%20report.doc). See also research funded by the Gender Equality Unit of the Department of Education & Science (Norman, Galvin & McNamara, 2006) which found that a majority of teachers (79%) were aware of instances of verbal homophobic bullying. A significant number (16%) were aware of physical bullying in their school.

³⁷ Report on the Situation of bisexual and homosexual persons in Poland 2005 and 2006, Campaign against Homophobia and Lambda Warsaw Association, Warsaw 2007.

orientation when he required the company services. The Court decided that SC Distringaz Sud SA will have to pay the accused moral prejudice in total of 1000 Euro. The verdict is not final; SC Distringaz Sud SA can challenge it in the Court of Law. This was the first legal case won based on sexual orientation discrimination regarding access to public services.

2) Insurance and bank loans

Portugal

In 2006, a *de facto* same-sex couple was denied access to a travel insurance policy by an important insurance company, although the insurance policy accepted *de facto* couples. In the absence of legislation, a solution was found after Associação ILGA Portugal contacted the insurance company customer service. Associação ILGA Portugal was also informed of problems that same-sex couples had with health insurance policies. The organisation reported that the insurance provided by *Multicare* explicitly refused to recognize the same-sex partner as a family member.

Associação ILGA Portugal conducted a survey of Portuguese banks with respect to non-discriminatory treatment of same-sex which revealed that some banks were questioning whether to consider same-sex couples as families. However, over the last few years, there have been some positive developments. In 2007, a gay couple won a lawsuit against *Banco Espírito Santo* because the bank refused to recognize the couple as a family unit. After a press release from Associação ILGA Portugal and several statements to the media, the bank finally decided not to appeal the decision.

3) Restaurants, bars, cafés, hotels and other public places

Cases of LGB people being refused in restaurants, bars and hotels because of public displays of affection have been reported in many EU member states. In their submission to the consultation, organisations such as HOSI-Wien (Austria) and Associação ILGA Portugal reported having received information from several people who were warned not to kiss or hold hands on the premises of restaurants and bars in recent years, and who were asked to leave a café or restaurant when they started kissing each other. Similar stories can be found other countries. In 2005 and 2006, discrimination in access to goods and services represented 7-8% of the complaints received by SOS Homophobie in France; these included discrimination in hotels (e.g. tourists in Paris refused double room) and in shops (e.g. refusing tattoo of man's name on a man), and where coming mostly from outside bigger urban centres.³⁸ Several complaints of unequal treatment by travel agencies, airlines, hostels, museums, etc. were also filed with the Office of the Ombudsman against Sexual Orientation Discrimination in Sweden in recent years.³⁹

Ireland

In 2006, Myra McGuirk and Eileen Twomey took a claim of discrimination on the sexual orientation ground after the owner of a pub prevented them from playing pool and asked them to leave following they had kissed and hugged in the pub. They were successful in

³⁸ See 2006 and 2007 Annual reports of SOS homophobie at www.sos-homophobie.org/

³⁹ See <http://www.homo.se/o.o.i.s/3372>

their action against Malone's Pub, although the judge did not grant the women any redress since he found them to have been the authors of what happened on that night.⁴⁰

In the Equal Status case *O'Regan v Bridge Hotel* which was brought before the Equality Tribunal in 2004, the Equality Officer found that a gay man had been discriminated against on grounds of his sexual orientation in a hotel bar, when he was singled out for attention by a doorman, refused service and asked to leave. The hotel was directed to pay compensation, to ensure that he was welcomed equally with heterosexual customers in future, and to make their staff aware of their obligations under the Equal Status Act.⁴¹

Slovenia

In October 2007, on my way back I got info from Slovenia that there was a homophobic incident in one bar. A young lesbian couple was thrown out on the street from a bar called "Orto-bar" in Ljubljana by the security guy. The man responsible for security said that this bar was not for "such people", because it is a "heterosexual bar". The security guy watched them over the cameras and when he saw them kissing he asked them to leave at once. Information was submitted to the policy, the ombudsman and other relevant institutions in Slovenia. The case is being followed by local LGBT organisations.

4) Housing

Belgium

In a 2005 Judgment by First Instance Court of Nivelles, the owner of a house was found to have discriminated against a same-sex couple interested in renting his property because of their sexual orientation.⁴²

Poland

The 2007 survey by Campaign against Homophobia and Lambda Warsaw looked at disclosure of one's sexual orientation to neighbours or landlords. The organisations found that among those respondents who openly admitted their sexual orientation, 30% of them experienced problems connected with housing. Asked about their fear of disclosing one's sexual orientation to neighbours or landlords, as many as 62.2% admitted that they sometimes concealed their sexual orientation from such persons, fearing their reaction; 37.3% declared otherwise. Out of the respondents that have lived with a partner over the past two years, 53.6% never concealed this fact from their neighbours, while 46.4% did.⁴³

Portugal

In a recent case reported by Associação ILGA Portugal, Teresa Pires and Helena Paixão tried to get married and the media exposure meant that they were instantly recognized on the streets. They tried to rent an apartment, which became a nearly

40 See 2006 Report of the Equality Authority in Ireland – case of Mc Guirk and Twomey v Malone's Public House

41 http://www.equalitytribunal.ie/uploadedfiles/AboutUs/legal_review_2004.pdf

42 Centre pour l'egalite des chances et la lutte contre le racisme, Rapport annuel 2005 (www.diversiteit.be/NR/rdonlyres/464944F9-E178-4266-B118-1617F11F5A5C/0/05_rapportCentre.doc)

43 Report on the Situation of bisexual and homosexual persons in Poland 2005 and 2006, Campaign against Homophobia and Lambda Warsaw Association, Warsaw 2007.

impossible task – as soon as they were recognized, all of the apartment owners claimed that the apartments had already been taken.