

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

5 Denmark

by Søren Baatrup²

¹ The European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/experts) was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 (http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm). The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account. The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

² Mr. S.V. Baatrup (svu@topdanmark.dk) works as head of the underwriting department in Topdanmark Insurance company, Industrial Division.

5.1 General legal situation

5.1.1 Constitutional protection against discrimination

The Danish Constitution³ does not contain any prohibition of discrimination. The ban on sexual orientation discrimination is found in three Acts of Parliament⁴, none of which has constitutional status.

Nevertheless, the Constitution (*Grundloven*) provides some rules that, in a broad sense, refer to equality. Art. 70 reads that no one on the ground of belief or descent can be deprived of his or her political or civil rights, and that no one relying on his or her belief or descent can refuse to complete his or her duties as a citizen in Denmark. Further, art. 71 of the *Grundloven* reads that personal freedom is inviolable, a sentence that has been read more as a political statement than a legal rule⁵. Furthermore, art. 71 states that no one can be imprisoned in any way because of his or her political or religious belief or due to his or her ethnic origin / ancestry.

Art. 75(1) of the *Grundloven* completes the constitutional framework by stating that 'to promote the public good [the State] shall try to ensure that every able-bodied citizen has a possibility to work in a way that secures his existence'. Even though it is read as aspirational in nature, originating in the 1948 UN Declaration on Human Rights⁶, it still plays a certain role in Danish political debate.

Administrative action is governed by the unwritten principle of equality, the respect of which is guaranteed quite efficiently by the Danish Ombudsman, established in 1955 but directly mentioned by the 1953 Constitution.

The European Convention on Human Rights forms an integral part of the Danish legal order since 1992 and has had a remarkable impact on every field of law, including issues of discrimination.

5.1.2 General principles and concepts of equality

As seen in 5.1.1, sexual orientation is not mentioned expressly by the Constitution, written in 1953, a time when sexual orientation was not a matter of concern and thus discussed in public debate. The ban on discrimination by the

³ *Danmarks Rige Grundlov* (The Constitution of the Danish Kingdom – hereafter '*Grundloven*'), lov nr. 169 of 5 June 1953.

⁴ The first is *Lov om forbud mod forskelsbehandling på grund af race m.v.* (Act on ban of race etc. discrimination – hereafter 'Act on race discrimination') *Lovbekendtgørelse* nr. 626 of 29 October 1987, (originally *Lov* nr. 289 of 9 June 1971 and changed by *Lov* nr. 357 of 3 June 1987) the act is in daily life called 'Act on race discrimination' even though it also covers colour of skin, national or ethnic background, belief and sexual orientation. The second is *Straffelovens* (The Danish Penal Code – hereafter 'the Penal Code') Art. 266b, which covers the grounds: race, colour of skin, national or ethnic origin, belief, and sexual orientation. The third is *Lov om forbud mod forskelsbehandling på arbejdsmarkedet* (Act on ban on discrimination on the labour market – hereafter 'Act on discrimination') *Lov* nr. 459 of 12 June 1996 as amended by Act number 253 of 7 April 2004, which covers the following grounds: race, colour of skin, religion, political belief, sexual orientation and national, social or ethnic origin.

⁵ Karnov 2001, 11, note 195.

⁶ Karnov 2001, 14, note 224.

three Acts mentioned in footnote 3 reflects very well the opinion of the Danish population.

The principle of equality established by administrative case law embraced only the formal aspect of it, whilst equality of opportunities and results have a less prominent place, although not an insignificant one.

5.1.3 *Division of legislative powers relating to discrimination in employment*

The public and private labour market is mostly regulated according to the 'Danish model' (see 5.1.4). There is no division of powers between Parliament and regional or local legislative bodies.

5.1.4 *Basic structure of employment law*

The Danish private and public labour market is dominated by the so-called 'Danish model', according to which regulation of the labour market is based on collective agreements entered into by the different actors of the labour market.

The collective agreement is based on the so-called '*Hovedaftale*' ('main agreement') between LO (the employees umbrella organisation) and DA (the employers umbrella organisation) of 31 October 1973, modified on 1 January 1993⁷.

This tradition of collective agreements is supplemented by a number of statutory provisions like, for instance, provisions on safety at the workplace⁸ and the ban on discrimination⁹.

5.1.5 *Provisions on sexual orientation discrimination in employment or occupation.*

In relation to sexual orientation in the field of employment or occupation two acts apply: the Act on Liberty of Association¹⁰, which bans dismissal on grounds of membership or relation to certain organisations, and the Act on Discrimination¹¹, which forbids differential treatment by an employer on grounds of: race, colour of skin, religion, political belief, sexual orientation or national, social or ethnic origin.

5.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

There have been no cases brought to court. However I consider that it is important to note a case which was settled out of court.

A (gay) man was employed by a special institution to take care of a group of young troublemakers, who were placed by the authorities in the above mentioned special institution. After he was employed - but before he actually began to work - he was asked to meet his employer, and on that occasion he

⁷ See *Arbejdsmarkedets regler 2001 af Ole Hasselbalch*.

⁸ *Lovbekendtgørelse* nr. 784 of 11 October 1999.

⁹ *Lov om forbud mod forskelsbehandling på arbejdsmarkedet*, Lov nr. 459 of 12 June 1996.

¹⁰ *Foreningsfrihedsloven*, *Lovbekendtgørelse* nr. 443 of 13 June 1990.

¹¹ *Lov om forbud mod forskelsbehandling på arbejdsmarkedet*, Lov nr. 459 of 12 June 1996.

was informed that his homosexuality had become known. Because the employer considered it to be a problem with this type of job, the contract was annulled. When the worker met again with his employer in a meeting arranged by his trade union, the latter denied that the offended had been fired because he was a gay man. But when the representative from the trade union played a tape, which the offended secretly had recorded with help from a pocket tape-recorder during the above mentioned first meeting with the employer, the employer confessed and accepted to pay compensation to the victim of discrimination¹².

What I consider particularly instructive about this example is the emphasis it puts on the proof of discrimination, a task that presents great challenges in many of the cases I witness in my capacity as legal advisor.

5.1.7 *Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation*

All provisions on discrimination in employment and occupation, which cover race, also cover sexual orientation. Sex is covered in separate acts – but all Danish anti-discrimination acts are using the same term 'differential treatment' and the understanding of the term is also the same in all acts¹³.

5.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*

In 1987 both art. 266b of the Penal Code and the Act on Race discrimination were modified so as to include sexual orientation¹⁴. The former is a prohibition of incitement to hatred on grounds of sexual orientation, whilst the latter is a general ban on discrimination on different grounds outside employment and occupation. The Act on Race Discrimination was based on a report¹⁵ which took the view that collective agreements in the labour market offered proper protection against discrimination (which, as time has shown, they clearly did not).

5.1.9 *Other aspects of the legal background*

In my opinion the most distinct example of discrimination against homosexuals is the ban put on women, other than those who are married to a male or who have established a similar relationship, to receive treatment for childlessness by a medical doctor.

¹² Frank Wolff Hinrichs *ctr. Haderslev Kommune*.

¹³ See *Anti-discriminations Lovgivningen med kommentarer* p. 84.

¹⁴ Art. 266b, 1 *Straffelovens* reads: 'The one, who in public or intentionally in a wider group put forward statement or other announcements, by which a group of people are threatened, insulted or degraded because of their race, colour of skin, national or ethnic origin, belief or sexual orientation, are punished by fine, ..., or imprisonment in up to two years' (my translation).

¹⁵ See *Betænkning 553/1969* p 36.

5.2 The prohibition of discrimination required by the Directive

5.2.1 Instrument(s) used to implement the Directive

On 29 January 2003 the Minister of Labour presented to the *Folketinget* Bill L 152¹⁶, which was rejected on 27 May 2003. The opposition as well as the Government's usual supporting party (*Dansk Folkeparti*) voted against the Bill although with motivations based on different arguments¹⁷.

The Bill was supposed to change the existing Act on Discrimination¹⁸ in order to bring it in line with the Directive.

On 22 October 2003 the Minister of Labour presented a new Bill L 40 to the Parliament, which one word to another was like the rejected Bill L 152. The opposition on their side repeated their arguments for voting against the Bill. But during the Parliament's treatment of the Bill – the Minister of Labour proposed a change in the Bill L 40, which included an enforcement body. This enforcement body – which is the Institute on Human Rights – is limited in its tasks to considering discrimination on the grounds of 'race' and 'ethnic background'. This proposal made it possible for the opposition – with the exception of the *Dansk Folkeparti* – to vote for the presented Bill L 40, which changes the existing Act on Discrimination so it meet the demands of the Directive.

The Bill was passed on 30 March 2004 and come into force the day after it was published in the *Lovtidende*, on 7 April 2004¹⁹

5.2.2 Concept of sexual orientation (art. 1 Directive)

In the existing Danish law the term 'sexual orientation' is used, which means homo- and heterosexual relations and other kinds of lawful sexual inclinations (like transvestitism)²⁰. It is important to note that the implementation of the Directive has not changed the current notion.

5.2.3 Direct discrimination (art. 2(2)(a) Directive)

Direct discrimination is defined in the Act on Discrimination art. 1(2), even though the Act uses the term 'direct differential treatment' rather than 'direct discrimination'²¹.

5.2.4 Indirect discrimination (art. 2(2)(b) Directive)

Indirect discrimination is defined in the Act on Discrimination art. 1(3). In the explanatory comments to the Bill L 40 a definition of indirect discrimination is deemed to be necessary in order to 'insure a correct fulfilment of the

¹⁶ L 152 *Forslag til lov om ændring af lov om forskelsbehandling på arbejdsmarkedet*.

¹⁷ For more details see: www.ft.dk.

¹⁸ *Lov om forbud mod forskelsbehandling på arbejdsmarkedet*, Lov nr. 459 of 12 June 1996.

¹⁹ As Act number 253 of 07 April 2004.

²⁰ See *Anti-diskrimination Lovgivningen med kommentarer* p. 59 and Karnov 2001 p. 4464 note 2.

²¹ The Act on Discrimination Art. 1(2) reads: 'Differential treatment is if a person, because of race, colour of skin, religion or belief, political belief, sexual orientation, or national, social or ethnic origin, is treated inferior to another, has been treated (inferior) or would have been treated (inferior) in a similar situation' (my translation).

Directive'.²² The definition corresponds – as regards contents – to art. 2(2)(b) of the Directive.²³

5.2.5 *Prohibition and concept of harassment (art. 2(3) Directive)*

The prohibition and concept of harassment is dealt with in the Act on Discrimination art. 1(4). The Act defines harassment as unwanted behaviour in respect of any person's sexual orientation with the aim or effect of insulting or hurting a person's dignity *and* creating a threatening, hostile, degrading or unpleasant climate for the person concerned.

5.2.6 *Instruction to discriminate (art. 2(4) Directive)*

Art. 1(5) of the Act on Discrimination states that 'An instruction to differential treatment of a person on the grounds of race, colour of skin, religion or belief, political belief, sexual orientation, national, social, or ethnic origin is differential treatment' and is therefore unlawful.²⁴

5.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

Art. 3(1) of the Directive reads: 'This Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment condition (...)'.
All these demands, with the exception of self-employment, are covered in art. 2(1) of the Act on Discrimination. Self-employment is covered in art. 3(3) of the same Act.

(b) 'access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience'.
All these demands are covered in art. 3(1) of the Act on Discrimination.

(c) 'employment and working conditions, including dismissals and pay'.
These demands are covered in art. 2(2)²⁵ of the Act on Discrimination, although the wording is slightly different.

(d) 'membership of, and involvement in, an organisation of workers or employers, or any organisations whose members carry on a particular profession, including the benefits provided for by such organisations'.
These demands are met in a new art. 3(4) of the Act on Discrimination.

²² See the comments on art. 1, 4 of the Bill.

²³ The Act on Discrimination art. 1(3) reads: 'Indirect differential treatment is if a provision, a criteria or a praxis which apparently is neutral will leave persons of a specific race, colour of skin, religion or belief, political belief, sexual orientation, or national, social or ethnic origin inferior to other persons unless the above mentioned provision, criteria or praxis is objectively justified by a factual purpose, and the means to fulfil are appropriate and necessary' (my translation).

²⁴ *Lov om forbud mod forskelsbehandling på arbejdsmarkedet*, Lov nr. 459 of 12 June 1996 art. 2, 1.

²⁵ Art. 2(2) of the Act on Discrimination states: 'Discrimination in relation to payment conditions is, if equal salary is not offered for the same job or for jobs which are regarded as having the same value'.

5.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

The Act on Discrimination gives the person claiming to be a victim of discrimination the right to take his or her employer to court. It is not the person who actually offended the victim, but it is his or her employer who can be taken to court for not respecting the law²⁶. The passing of Bill L 40 has not changed this. This is in my opinion in contradiction to art. 3 of the Directive, which states that the Directive is applicable to 'all persons'.

The Act on Compensation gives the court the possibility to order the actual person who himself/herself harassed somebody to pay compensation²⁷.

5.3 **What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?**

5.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*

The Act on Discrimination forbids discrimination on grounds of sexual orientation. The understanding of the words 'sexual orientation' is the same as the one used in Act on Race Discrimination and in art. 266b of the Penal Code, that is a person's lawful sexual behaviour and preferences. This is not only covering homo-, bi-, and heterosexuals – but also transvestite and transgendered people.

5.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

As mentioned in 5.3.1, a person's sexual preference (being it secretly or not) as well as sexual behaviour (doing it secretly or not) is covered by the Act on Discrimination.

5.3.3 *Discrimination between same-sex partners and different-sex partners*

Discrimination between married and registered couples:

In my opinion there is no legal discrimination in the field of employment between married and registered couples²⁸, with one exception. There is no right for the 'social mother' to have parental leave when her registered partner becomes a mother. This right is exclusively for the father of the child.

It is true that Danish legislation allows homosexuals to adopt their registered partner's biological child three months after birth, and that once adoption is granted employment benefits concerning parental leave and others of a similar nature. These may be afforded to gay or lesbian employees on an equal

²⁶ See the comments to art. 1, stk.4 of the Bill, Act on Discrimination art. 7 and 8, and *Anti-diskriminations Lovgivningen med kommentarer* p. 140 – 141.

²⁷ See '*Erstatningsansvarsloven*' (Act of compensation) art. 26.

²⁸ It should be remarked that in Denmark registered partnership is only available to same-sex couples, whilst marriage is only available to different-sex couples.

footing with heterosexual employees.

However, because in the case of a child born in a registered partnership the law does not provide for the automatic establishment of a filiation link between the child and the partner of his or her biological parent. The requirement posed by an employer of being the legal parent – albeit neutral in its face – is particularly disadvantageous for same-sex registered couples because one partner must first go through a costly, lengthy and uncertain adoption procedure. This, between the moment of birth and the moment of adoption, would in my view amount to an example of indirect sexual orientation discrimination.

Discrimination between unmarried and unregistered couples:

If an employee were treated differently compared to his/her colleagues because he or she lives together with a person of the same sex it would be a breach of the Act on Discrimination.

But as mentioned above – the father of a child has the right to parental leave if he becomes a father – it does not matter if he is married to the mother or not.

5.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*

Art. 1 of the Act on Liberty of Association²⁹ states that the dismissal (and only dismissals) of an employee caused by a connection with or membership of an association will not be legal. This ban is not limited to membership of trade unions, but to all kinds of religious, cultural, social, etc. associations including gay/lesbian/bisexual organisations. Other kinds of discrimination towards individuals related to their membership of an association etc. will in my opinion be covered by the Act on Discrimination.

5.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays and/or bisexuals*

This topic is not mentioned directly in the Act on Discrimination – but art. 2 reads: 'An employer may not make differential treatment between employees and between applicants to vacant jobs in relation to employment, dismissal, transfer, promoting or in relation to payment or working conditions'. There is no practice in relation to this topic but in my opinion, it would be a breach of the Act if an employer denies homosexual employees the right to inform their colleagues about homosexual parties if the employer allows heterosexual employees to do for theirs.

5.3.6 *Discrimination on grounds of a person's refusal to answer, or answering incorrectly, a question about sexual orientation*

In Denmark it is illegal to ask for information about a candidate's sexual orientation. The Act on Discrimination art. 4 reads: 'An employer is not allowed, in connection with or during the employment of an employee, to request, make inquiries about, or receive and use information about his or her race, colour of skin, religion or belief, political belief, sexual orientation, or national, social or

²⁹ Foreningsfrihedsloven, lovbekendtgørelse nr. 443 of 13 June 1990.

ethnic origin.' Since it is illegal to ask for information about a candidate's sexual orientation, the candidate is not obliged to give a true answer.

5.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent.*

The problem of discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without a heterosexual equivalent is of no relevance in Denmark.

The ban on homosexuality was repealed in 1930³⁰. But the penal code still distinguished between homo- and heterosexual relations in e.g. prostitution, age of consent etc.³¹

In 1976 the same age of consent was introduced for both hetero- and homosexual relations³². In 1981³³ the same penalty was introduced for sex crimes involving persons of the same sex as applicable for sex crimes involving persons of the different sex³⁴ and from then on there was complete equality between homo- and heterosexuals in the Penal Code.

I have not seen cases reported where foreign judgements have led to discrimination in Denmark.

5.3.8 *Harassment*

Until the passing of Bill L 40, harassment in itself was not directly mentioned in the existing anti-discrimination legislation on sexual orientation, but the Act on Discrimination art. 2(1) is interpreted so that it protects against harassment, because an employer may not treat employees differently in relation to working conditions. And working conditions are interpreted to include a harassment free environment.

But a more thorough and explicit prohibition is introduced by the passing of the Bill L 40.³⁵

5.4 **Exceptions to the prohibition of discrimination**

5.4.1 *Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)*

Art. 1(3) of the rejected Bill contained a definition of indirect discrimination which made explicit reference to its justification: '(...) unless the above-mentioned

³⁰ Lov nr. 126 of 15 April 1930.

³¹ See Steffen Jensen, Recognition of sexual orientation: The Scandinavian Model (1998, 2 – 3).

³² Lov nr. 195 of 28 April 1976, *der ophævede Straffelovens* art. 225, stk. 2.

³³ Lov nr. 256 of 27 May 1981.

³⁴ See Steffen Jensen, Recognition of sexual orientation: The Scandinavian Model (1998, 2 – 3).

³⁵ Act on Discrimination art. 1(4) reads: 'Harassment is differential treatment if an undesirable behaviour in relation to a person's race, colour of skin, religion or belief, political belief, sexual orientation, or national, social or ethnic origin is taking place with the aim or the effect to insult or hurt a person's dignity and create a threatening, hostile, degrading, humiliating or unpleasant climate for the person concerned'.

provision, criteria or practice is objectively justified by a factual purpose, and the means to fulfil this are appropriate and necessary’.

5.4.2 *Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)*

None.

5.4.3 *Social security and similar payments (art. 3(3) Directive)*

The Act on Race Discrimination art. 1(1) forbids differential treatment of persons on the ground of colour of skin, national or ethnic background, belief and sexual orientation in relation to e.g. social security etc.

5.4.4 *Occupational requirements (art. 4(1) Directive)*

The matter of occupational requirements is partly included in art. 6(2) of the Act on Discrimination, which reads: ‘If, in certain trade or education, it is of great importance that the agent is of a certain race, sexual orientation, and the demand for that (sexual orientation) is in proper relation to the activity, the relevant resort minister – after asking the Minister of Labour for an opinion – can deviate from arts. 2 to 5.’ The wording of the article and the fact that it constitutes an exemption from the general anti-discrimination principle imply that the Ministries will interpret this article in a narrow way, thus minimising its effect.

5.4.5 *Loyalty to the organisation’s ethos based on religion or belief (art. 4(2) Directive)*

The new art. 6(1)³⁶ of the Act on Discrimination includes three exceptions to the general ban on discrimination. These exceptions are political opinion, religion or belief. This is in contradiction to art. 4 (2) of the Directive, which allows only two exceptions: ‘religion’ and ‘belief’ – but not ‘political opinion’.

Discrimination on these grounds is allowed where the employer or principal has a legitimate interest in doing so (e. g. a Catholic school has a legitimate right in protecting its wish to employ Catholic teachers as when they teach Catholic doctrine (and only then) as opposed to geography where such discrimination is not allowed).

Furthermore it is important to note that this exception does not give the churches the right to discriminate on other grounds like e.g. sexual orientation.

5.4.6 *Positive action (art. 7(1) Directive)*

There is no provision that allows for positive action with respect to sexual orientation. Nowadays it is common that a number of public institutions in their

³⁶ Art. 6(1) of the Act on Discrimination reads: ‘The ban on differential treatment on the ground of political belief, religion or belief is not including employers, whose company/organisation has as its certain goal to promote a certain political or religious point of view or belief, and where the employee’s political view or religious belief (objectively) must be of importance for the company/organisation’.

advertisements write that they recommend people of the list of the Act on Discrimination to apply for jobs.

5.5 Remedies and enforcement

5.5.1 Basic structure of enforcement of employment law

Once again the 'Danish model' plays an important role. According to this model the players on the labour market have set up a special court (*Arbejdsretten*), which rules in matters dealing with the interpretation of collective agreements³⁷.

The above mentioned special court primarily deals with cases concerning:

- interpretation and non-compliance of the *Hovedaftalen*³⁸ and of other collective agreements and deals,
- legality of issuing a strike notice,
- whether the partners actually have made a collective agreement etc.³⁹.

The '*Arbejdsretten*' does not evaluate whether a collective agreement is in conformity with existing law.

But it is also possible to agree on leaving a dispute to arbitration. See the Act on Arbitration.⁴⁰

Finally it is important to note that the *Arbejdsretten* only deals with the interpretation of the collective agreements, and not with e.g. a breach of the Act on Discrimination.

5.5.2 Specific and/or general enforcement bodies

As mentioned in 5.2.1, the Bill L40 does not include an enforcement body covering all or any of the grounds of discrimination, an issue which among others, the Danish National Organisation for Gays and Lesbians has asked the Danish government to consider⁴¹. In fact, the lack of this enforcement body was one of the arguments the opposition used, when rejecting the Bill.

But Parliament has passed a Bill that sets up of a new independent body, the Institute for Human Rights. This institute is an integrated part of the new Danish Centre for International Studies and Human Rights. The task of the institute is to promote the equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (as required by Directive 2000/43/EC, whilst in the absence of a similar requirement in the framework directive the government did not include discrimination on the grounds of sexual orientation). The above mentioned Institute is the enforcement body in relation to the Directive – but only covering the grounds 'race' and 'ethnic background'.

³⁷ For more details see *Lov om Arbejdsretten*, lov nr. 183 of 12 March 1997.

³⁸ See *Arbejdsmarkedets regler* 2001, side 77. See para. 5.1.4 above.

³⁹ *Lov om Arbejdsretten*, Lov nr. 183 of 12 March 1997 art. 9.

⁴⁰ *Voldgiftsloven*, lov nr. 181 of 24 May 1972.

⁴¹ Se www.lbl.dk. Unfortunately the letters and reports are only available in Danish.

5.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

Penal procedures are not available. For other procedures see par. 5.5.1.

5.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

The provisions on sanctions are in arts. 7 and 8 of the Act on Discrimination, which are supplemented by a further art. 7 (2). These articles give the court the possibility to award the victim of discrimination compensatory damages. The same possibility exists for people who have been victimised as a result of the person's challenging a case of unequal treatment. Furthermore discriminatory clauses in contracts and collective agreements are considered null and void, under art. 5a (1 and 2) of the Act on Discrimination.

5.5.5 *Natural and legal persons to whom sanctions may be applied*

In cases of infringement of the Act on Discrimination it is the employer of the offended person, not the offender himself who can be made to pay the above mentioned compensation, which is in line with Danish law, where the employer is liable for his employees acts (as long as the acts cannot be described as being abnormal)⁴². This is to my opinion not in line with the Directive, which applies to everyone. But very much in line with the Danish legal tradition – where an employer is liable for the acts of employees.

See also 5.2.8.

5.5.6 *Awareness among law enforcers of sexual orientation issues*

The awareness among the civil servants, the police, the judges etc. may be expected to be quite low – not because they want to discriminate – but rather because they do not regard it a problem in Denmark any longer. Nowadays the focus is on discrimination of ethnic minorities.

Unfortunately it has not been possible in Denmark to get a specific ombudsman to deal with discrimination of based on sexual orientation, like there is in Sweden.

5.5.7 *Standing for interest groups (art. 9(2) Directive)*

Apart from rules of Danish civil procedure on intervening in a lawsuit (according to which the person or association has to show a *legal* interest in becoming a party to the case), standing for interest groups that have a *legitimate* interest in ensuring the enforcement of the Directive has not been tackled by the Bill.

With all probability the government considers existing rules of civil procedure to be enough. However, the Framework Directive refers not only to the possibility of acting in support, but also 'on behalf' of the victim, without specifying whether the choice between the two options belongs to the government or to the interest groups.

⁴² *Danske Lov* (The Danish Law) af 1683 3-19-2.

If the latter interpretation is to be preferred, then the lack of action of the government must be seen as failing to properly implement the Directive.

5.5.8 *Burden of proof of discrimination (art. 10 Directive)*

The passing of Bill L 40 introduces the principle of dividing the burden of proof⁴³. This means that the person who feels that he or she has been discriminated against has to show evidence of possible discrimination, whereafter the employer has to prove that no discrimination has taken place. This divided (and not a total shift) burden of proof is in line with the (Danish version) of recital number 31 and art. 10 of the Directive.

5.5.9 *Burden of proof of sexual orientation*

There is no demand for the person claiming that they have been subject to discrimination to prove his or her sexual orientation.

5.5.10 *Victimisation (art. 11 Directive)*

The Act on Discrimination in its old text said nothing about protection against victimisation on account of a complaint about discrimination, but a new art. 7(2) reads that the person who has been met with disparaging treatment or unfavourable consequences because he or she has asked for equal treatment, as mentioned in arts. 2 to 4, can be given compensation [by the court].

When the protection applies, the comments of the Bill read: 'Protection against victimisation applies in cases where a formal letter of complaint has been filed with a court of justice or another public authority, as well as in cases where a certain incident is criticised verbally at the place of work, or where the employee has contacted his or her trade union and relate the circumstances to the union.' It is of course a prior condition, that a causal link can be established between the victimisation and the employee's request for equal treatment.

5.6 **Reform of existing discriminatory laws and provisions**

5.6.1 *Abolition of discriminatory laws (art. 16(a) Directive)*

See 5.6.2.

5.6.2 *Abolition of discriminatory administrative provisions (art. 16(a) Directive)*

Since there is a general ban on discrimination in Denmark on the ground of sexual orientation inside as well as outside the field of employment and occupation, the existing discriminatory laws and administrative provisions had already been abolished. But there is still one example of indirect discrimination, which I have described in para. 5.3.3.

⁴³ It is not covering victimisation, because victimisation – according to the comments to the Bill is not discrimination.

5.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)*

There is no constitutional court in Denmark. It is up to the courts to decide whether a law or a provision is in contradiction to the Constitution (*Grundloven*), other acts, or directives from the EU – but it is important to note, that the courts cannot do it on their own initiative. The only way is if a citizen raises a claim against the State.

If a collective agreement were in contradiction with existing acts it would be regarded as null and void. Since Denmark has no Ombudsman to deal with discrimination against homosexuals (like in Sweden), any claim or report would most likely be addressed to the National Organisation for Gays and Lesbians (LBL), which would be informed by employees if they found any discriminating rules in the above mentioned agreements or other internal rules. Except for the example given in para. 5.1.6 no such information has been given to the LBL over the last eight to ten years.

5.6.4 *Discriminatory laws and provisions still in force*

There are no laws, provisions or written internal rules of public or private employers containing direct sexual orientation discrimination in employment or occupation. When it comes to non-written internal rules of individual employers, that is of course impossible to know with certainty, but at least the National Organisation for Gays and Lesbians has had no such indications in the form of complaints or requests for advice and support from individual victims of discrimination (apart from the case mentioned in para. 5.1.6).

5.7 Concluding remarks

Almost four months later than supposed to, the Parliament passed the Bill L 40 which was to implement (most) of the Directive.

In my opinion the implementation meets the demands of the Directive with a few minor exceptions:

- the lack of applicability to everyone;
- the addition of 'political opinion' as a further exception to the general ban on discrimination;
- the lack of standing for interest groups that have a legitimate interest in ensuring the enforcement of the Directive.

List of literature used in footnotes

Dorthe la Cour, *Ligestillingslove*, København, Dansk Arbejdsgiverforening, 1994.

Henrik Karl Nielsen, Lars Adam Rehof og Christian Harlang, *Anti diskriminations lovgivningen med kommentarer*, København, GadJura, 1997.

Karnov 2001, *Forlaget Thompson A/S*, 2001.

Ole Hasselbalch, *Arbejdsmarkedets regler 2001*, GreensJura, 2001.

Steffen Jensen, *Recognition of sexual orientation: The Scandinavian Model*, København, 1998 (available on www.steffenjensen.dk).

