

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*

13 The Netherlands

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The full text of the updated version of legislation in force in the Netherlands can be found, in Dutch, at <http://wetten.overheid.nl>. An unofficial translation in English of the General Equal Treatment Act (hereinafter GET Act) as amended in 2004 and of some other legislation can be found at www.cgb.nl/english. All opinions of the *Commissie gelijke behandeling* (Equal Treatment Commission, hereinafter ET Commission) can be found at www.cgb.nl ('oordelen'). Recent judicial decisions can be found at www.rechtspraak.nl.

13.1 General legal situation

13.1.1 Constitutional protection against discrimination

Since 1983 the Constitution [*Grondwet*] of the Kingdom of the Netherlands contains a non-discrimination clause (second sentence of art. 1): *Discrimination on grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.*³

The words ‘or any other grounds whatsoever’ were inserted during the parliamentary debates leading to the enactment of this clause; the original Government proposal only contained an exhaustive list of the five explicitly mentioned grounds. The main reason for inserting the words ‘or any other grounds whatsoever’ was the wish in Parliament to also cover anti-homosexual discrimination.⁴ It has been confirmed in case-law that the ‘other grounds’ do indeed include sexual orientation.⁵

Although the non-discrimination clause is the first in a chapter of 23 articles guaranteeing various civil, political and social human rights (including a right for all Dutch citizens to be eligible for appointment to the public service ‘on an equal footing’; art. 3), it is not generally seen as more important than other rights. However, it has been argued that the prohibition of discrimination has more horizontal effect than most other constitutional rights; this has hardly been tested in courts, because there is now extensive and detailed ordinary legislation prohibiting discrimination on many grounds in the private sphere, including employment (see para. 13.1.5 below).⁶ It is undisputed that the Constitution binds the administration, also in its capacity as public employer.

One reason for the enactment of various pieces of ordinary legislation specifying the meaning of the prohibition of discrimination for specific social fields, lies in the vagueness of the constitutional concept of discrimination. The term is not defined in the Constitution. In legal doctrine it is generally understood that not all types of different treatment based on the grounds covered by the constitutional clause are to be considered as prohibited discrimination. Differential treatment only amounts to *discrimination*, if it disadvantages someone on the basis of a criterion that is irrelevant,⁷ or, in other words, if the disadvantaging differential treatment cannot be justified by specific reasons.⁸

The main importance of the non-discrimination provision of art. 1 lies in its use in political and legislative debate. On the one hand it is invoked as a principle against legislative discrimination, on the other hand it inspires and legitimises the legislature in enacting numerous anti-discrimination provisions (see below). Although art. 1 is not phrased as an obligation for the legislature to enact anti-

³ Art. 1 sentence 2 *Grondwet*: ‘*Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan.*’ In force since 17 February 1983 (*Staatsblad* 1983, nr. 70).

⁴ See Waaldijk, 1986/1987, 59-60.

⁵ *Gerechtshof* [Court of Appeal] Amsterdam, 10 December 1987, *NJCM-Bulletin* 1989, 305 at 315 (NJCM is the Dutch section of the International Commission of Jurists).

⁶ Akkermans, 1992, 57-58; Bijsterveld, 2000, 69.

⁷ Akkermans, 1992, 46.

⁸ Hirsch Ballin, 1988, 140.

discrimination legislation, it has functioned in that way (together of course with the EC equal treatment directives, and the Conventions on the Elimination of Racial Discrimination and on the Elimination of Discrimination Against Women).

Although the Constitution is binding on the legislature, Dutch courts do not have the power to strike down parliamentary legislation that violates the Constitution,⁹ and court cases in which secondary legislation or administrative action is alleged to be unconstitutional are rare. The Equal Treatment Commission is not empowered to look into questions of constitutionality.

However, Dutch courts do have the power to strike down parliamentary legislation that violates any directly applicable provision of international law.¹⁰ With respect to discrimination, the Dutch courts quite frequently have to consider whether some piece of legislation violates art. 14 of the European Convention on Human Rights, art. 26 of the International Covenant on Civil and Political Rights, or any other international or European equality provision.

13.1.2 General principles and concepts of equality

Even before it found its place in the Constitution, a general principle of equality was recognised in Dutch law, especially in Dutch administrative law. In 1983 this principle was codified as the first sentence of art. 1 of the Constitution: *All persons in the Netherlands shall be treated equally in equal circumstances.*¹¹ The prohibition of discrimination discussed above, which forms the second sentence of art. 1 of the Constitution, is generally seen as a specification of this general principle: for any different treatment of similar cases there should be a (reasonable and objective) justification.¹²

In spite of the Dutch tradition of accommodating different minorities with specific legislative or administrative 'space', there is little explicit recognition in Dutch case law and doctrine of the *reverse principle of equality*: the requirement that persons in different circumstances shall be treated differently.¹³ Nevertheless, the Equal Treatment Commission has used this formulation, both with respect to pregnancy cases and in other contexts.¹⁴ In two other ways some material (as opposed to formal) aspects of the equality principle have been more generally recognised. Firstly, *positive 'discrimination'* is not seen as a (constitutionally or otherwise) prohibited form of discrimination, but as a form of differentiation that can be justified under certain circumstances. As far as art. 1 of the Constitution (see above) is concerned, or art. 429quater of the Penal Code (see para. 13.1.5 below), this is part of the interpretation of the concept of discrimination. In the General Equal Treatment Act (hereinafter GET Act), on the other hand, there is an explicit exception for positive action, but only with

⁹ This is provided by art. 120 of the Constitution. Control of constitutionality of legislation is entrusted to Parliament and Government themselves.

¹⁰ Art. 93 and 94 of the Constitution.

¹¹ Art. 1 sentence 1 Grondwet: *'Allen die zich in Nederland bevinden, worden in gelijke gevallen gelijk behandeld.'* In force since 17 February 1983.

¹² Akkermans, 1992, p. 45; Bijsterveld, 2000, 65.

¹³ As recognised by the EC Court of Justice in a long series of judgements, starting on 17 July 1963, case 13/63 (*Italy v. Commission*), and also by the European Court of Human Rights, 6 April 2000 (*Thlimmenos v. Greece*).

¹⁴ See for example *Commissie gelijke behandeling* [Equal Treatment Commission, hereinafter ET Commission], 8 December 1998, opinion 98-131; 20 November 2002, opinion 02-188; and 31 March 2003, opinion 03-47.

respect to women and ethnic or cultural minorities.¹⁵ There is no statutory obligation for employers or others to operate a policy of positive action. Secondly, *indirect discrimination* is also covered by the constitutional and legislative prohibitions.¹⁶

Apart from these material aspects, it seems there now are roughly four legal concepts of equality in force in the Netherlands:

- a. The general principle against *unjustified different treatment* in equal circumstances (first sentence of art. 1 of the Constitution, see above).
- b. The prohibition of discrimination (on any ground whatsoever) as *unjustified disadvantaging different treatment* (second sentence of art. 1 of the Constitution, see above).
- c. The prohibition of *any distinction* (based on the ground of religion, belief, political opinion, race, sex, nationality, civil status, heterosexual or homosexual orientation, handicap or chronic disease,¹⁷ or age¹⁸) that does not fall under an explicit statutory exception (GET Act and some related statutes, see below).
- d. The prohibition of discrimination (on the ground of race, religion, belief, sex or heterosexual or homosexual orientation) as '*any form of distinction or any act of exclusion, restriction or preference that intends or may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms in the political, economic, social or cultural field or in any other area of society*' (art. 90quarter of the Penal Code, see below).

Sexual orientation discrimination is covered by all four concepts. With the advent of new grounds of discrimination that now are covered by Dutch anti-discrimination legislation (such as age, handicap, chronic disease, and whether or not someone works full-time or part-time), there is some unease about this confusing proliferation of equality concepts, as there is with the growing number of statutes that deal with anti-discrimination.¹⁹ The Dutch Government has indicated to look into these problems with a view to legislating on it *after* the implementation of Framework Directive 2000/78/EC and Race Directive 2000/43/EG.²⁰

¹⁵ Art. 2(3) of the *Algemene wet gelijke behandeling* of 2 March 1994 (*Staatsblad* 1994, nr. 230). A similar provision can be found in art. 3(b) of the *Wet gelijke behandeling op grond van handicap of chronische ziekte* [Act on Equal Treatment on Grounds of Disability and Chronic Disease] of 3 April 2003 (*Staatsblad* 2003, nr. 206; in force since 1 December 2003).

¹⁶ See for example art. 1(c) of the GET Act.

¹⁷ *Wet gelijke behandeling op grond van handicap of chronische ziekte* [Act on Equal Treatment on Grounds of Disability and Chronic Disease] of 3 April 2003 (*Staatsblad* 2003, nr. 206; in force 1 December 2003, *Staatsblad* 2003, nr. 329).

¹⁸ *Wet gelijke behandeling op grond van leeftijd bij de arbeid* [Act on Equal Treatment on Grounds of Age in Employment] of 17 December 2003 (*Staatsblad* 2004, nr. 30; in force 1 May 2004, *Staatsblad* 2003, nr. 90).

¹⁹ See Holtmaat 2000.

²⁰ See *Kamerstukken II* [Parliamentary Papers of Lower Chamber, hereinafter *Parliamentary Papers II*], 2002/2003, 28770, nr. A, p. 4-5.

13.1.3 Division of legislative powers relating to discrimination in employment

The power to legislate against discrimination in employment and occupation lies with the national parliamentary legislature, which may delegate the regulation of certain details to the Government. In addition, the regulating bodies of certain professions are competent to enact anti-discrimination rules.

13.1.4 Basic structure of employment law

Private employment contracts are regulated by book 7 of the Civil Code [*Burgerlijk Wetboek*], some specific additional statutes (including the GET Act) and Collective Employment Agreements (per sector or employer). Some public employees have a private employment contract with their Governmental employer, but the employment of most public employees is regulated in the Public Servants Act [*Ambtenarenwet*] and in some specific additional statutes (including the GET Act). Also for each sector of public employment there normally is a Collective Employment Agreement.

13.1.5 Provisions on sexual orientation discrimination in employment or occupation

Discrimination on the ground of ‘heterosexual or homosexual orientation’ in the field of employment and occupation is explicitly prohibited in two different statutes: the Penal Code since 1992,²¹ and the General Equal Treatment Act of 1994 (hereinafter GET Act).²² The latter has been amended by the *EG-implementationwet Awgb* of 21 February 2004 (hereinafter Implementation Act).²³

Article 429quater of the Penal Code makes it a criminal offence to ‘discriminate against persons on the ground of their race, religion, beliefs, sex or heterosexual or homosexual orientation’, but only if a person does this in the performance of a ‘profession, business, or official capacity’.²⁴ Most employers fall under one of these three categories. For the purposes of this provision, art. 90quater of the Code defines *discrimination* as ‘any form of distinction or any act of exclusion, restriction or preference that intends or may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms in the political, economic, social or cultural field, or in any other area of society’.²⁵

The GET Act outlaws any (direct or indirect) ‘distinction between people on the ground of religion, belief, political opinion, race, sex, nationality, heterosexual or

²¹ Art. 90quater and 429quater of the *Wetboek van Strafrecht* (Penal Code), as amended as of 1 February 1992 by the law of 14 November 1991 (*Staatsblad* 1991, nr. 623).

²² The *Algemene wet gelijke behandeling* of 2 March 1994 (*Staatsblad* 1994, nr. 230) came into force on 1 September 1994, and has been amended several times since.

²³ The Implementation Act was published in *Staatsblad* 2004, nr. 119, and entered into force on 1 April 2004 (as provided for in *Staatsblad* 2004, nr. 120). ‘EG’ is the Dutch abbreviation of European Communities, and ‘Awgb’ is the abbreviation of *Algemene wet gelijke behandeling*.

²⁴ The full text of art. 429quater of the Penal Code is: ‘Hij die in de uitoefening van een ambt, beroep of bedrijf personen discrimineert wegens hun ras, hun godsdienst, hun levensovertuiging, hun geslacht of hun hetero- of homoseksuele gerichtheid wordt gestraft met hechtenis van ten hoogste twee maanden of geldboete van de derde categorie’.

²⁵ The full text of art. 90quater of the Penal Code is: ‘Onder discriminatie of discrimineren wordt verstaan elke vorm van onderscheid, elke uitsluiting, beperking of voorkeur, die ten doel heeft of ten gevolge kan hebben dat de erkenning, het genot of de uitoefening op voet van gelijkheid van de rechten van de mens en de fundamentele vrijheden op politiek, economisch, sociaal of cultureel terrein of op andere terreinen van het maatschappelijk leven, wordt teniet gedaan of aangetast’.

homosexual orientation, or civil status' (art. 1), in the field of employment (art. 5), in the field of the liberal professions (art. 6), by organisations of employees, employers or professionals (art. 6a), and with respect to educational, vocational and career guidance (art. 7).²⁶ In art. 2, 3, 4, 5, 6a and 7 the Act provides for various exceptions to this general prohibition of *distinction*. The Act also establishes the Equal Treatment Commission (hereinafter ET Commission) and its non-binding, quasi-judicial tasks (art. 11 to 21). More details on the ET Commission will be given below in para. 13.5.1 and 13.5.2.

In addition to these basic prohibitions, several statutes provide that certain bodies must guard against employment discrimination on any ground (including sexual orientation). This applies to:

- the Centres for Work & Income (whose permission an employer often needs for terminating an employment contract);²⁷
- the works council or employee participation body in companies, schools, universities and other organisations;²⁸
- the complaints commission in any primary or secondary school;²⁹
- the Central Organisation of Work & Income, and its Clients Council;³⁰
- the Executive Institute of Social Insurance for Employees.³¹

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

The first reported Dutch case law on dismissals because of sexual orientation (in the sense of individual characteristic, or of having a same-sex relationship) dates from the 1950s and the early 1970s.³² In each of these cases the court did not consider the dismissal to be contrary to any unwritten rule.

In two cases that were decided in the 1980s (so before the anti-discrimination legislation came into force) the courts avoided having to say something about

²⁶ Art. 7 also covers the provision of any goods and services that are *not* related to employment (see below).

²⁷ Art. 7:1 of the *Ontslagbesluit* (Dismissals regulation of the Minister of Employment of 7 December 1998, *Staatscourant* 1998, nr. 238).

²⁸ Art. 28 of the *Wet op de ondernemingsraden* (Act on Works Councils, *Staatsblad* 1971, nr. 54), as inserted by the Act of 5 July 1979, *Staatsblad* 1979, nr. 448); art. 5 of the *Wet medezeggenschap onderwijs 1992* (Act on Employee Participation in Education 1992, *Staatsblad* 1992, nr. 663); and art. 9.32 of the *Wet op het hoger onderwijs en wetenschappelijk onderzoek* (Act on Higher Education and Academic Research, *Staatsblad* 1992, nr. 593).

²⁹ Art. 14 of the *Wet op het primair onderwijs* (Primary Education Act, *Staatsblad* 1994, nr. 620) and art. 143 of the *Wet op het voortgezet onderwijs* (Secondary Education Act, *Staatsblad* 1993, nr. 666), both as amended by the Act of 18 June 1998 (*Staatsblad* 1998, nr. 398).

³⁰ Art. 22 and 12 of the *Wet structuur uitvoeringsorganisatie werk en inkomen* (Act on the Administration of Work & Income, *Staatsblad* 2001, nr. 624). The Central Organisation has several tasks in the field of employment and social security.

³¹ *Idem*, art. 31.

³² *Kantonrechter* [Subdistrict Court] Rotterdam, 14 November 1950 (*Nederlandse Jurisprudentie* 1951, 355); *Kantonrechter* Utrecht, 29 July 1955 (*Nederlandse Jurisprudentie* 1971, nr. 137); *Kantonrechter* Haarlem, 12 April 1957 (*Nederlandse Jurisprudentie* 1957, nr. 458); *President Rechtbank* [President of District Court] Arnhem, 28 May 1970 (*Nederlandse Jurisprudentie* 1970, nr. 424); *Kantonrechter* Leeuwarden, 29 February 1972 (*Nederlandse Jurisprudentie* 1972, nr. 356). The 1955 decision of the *Kantonrechter* Utrecht was later challenged before the *Hoge Raad* [Supreme Court] as amounting to a judicial tort for which the State would have to pay compensation; however on 3 December 1971 the *Hoge Raad* dismissed that action (*Nederlandse Jurisprudentie* 1971, nr. 137).

the acceptability of the alleged sexual orientation discrimination. Both cases dealt with the non-renewal of a temporary employment contract of teachers in Catholic education who were very open about their lesbian or gay orientation. In the first case the court did not consider the school bound to give reasons for the non-renewal; in the second case the court did not consider it relevant that the church based its non-renewal decision on the fact that the teacher openly lived in a homosexual relationship.³³

The first positive decision from a Dutch court about a claim of sexual orientation discrimination in employment, was given in 1982 (so even before the constitutional prohibition of discrimination came into force).³⁴ The case was brought by a gay man who had been discharged from the military on the ground of 'unsuitability because of illness'. In fact, the military authorities had relied heavily on the man's homosexuality in concluding that he was 'ill'. The court ruled that 'unsuitability because of illness' may not be derived from the sole fact of homosexual orientation.³⁵

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

From 1995 the ET Commission has given 29 (non-binding) opinions about alleged sexual orientation discrimination in employment (see below), as well as 18 opinions about sexual orientation discrimination with respect to goods or services.³⁶ In total four opinions were about heterosexual orientation,³⁷ and the other 43 about homosexual orientation.

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

Almost all aspects of employment discrimination are covered by the GET Act, without differentiation between sexual orientation on the one hand, and race, sex, religion or belief on the other. However, the Act contains several exceptions with respect to the grounds of race and sex (for example on positive action and on genuine occupational requirements),³⁸ that do not apply to sexual orientation.

Furthermore, the prohibition of sex discrimination is repeated in a greater number of other statutes than the prohibition of sexual orientation discrimination. For example, the prohibition to distinguish between men and women in the field of employment can also be found in the Civil Code,³⁹ and in the Act on Equal Treatment of Men and Women.⁴⁰ However, apart from specific provisions with respect to pregnancy, maternity, and equal pay, these other statutes do not give a greater protection against sex discrimination than the

³³ *President Rechtbank Den Bosch*, 16 July 1982 (*NJCM-Bulletin* 1982, 334); *Rechtbank Maastricht*, 21 May 1987 (case 2401/1985, unpublished).

³⁴ *Centrale Raad van Beroep* [Central Appeals Court, the highest court for cases about public employment], 17 June 1982 (*Militair Rechterlijk Tijdschrift*, 1982, 300).

³⁵ See Mattijssen, 1992, 21.

³⁶ All opinions can be found at the Equal Treatment Commission's website: www.cgb.nl; and an overview in Dutch of all opinions relating to sexual orientation at www.emmeijers.nl/waaldijk.

³⁷ ET Commission 3 February 1999, opinion 99-13; 18 December 2000, opinion 00-90; and 8 May 2003, opinion 03-57; and 27 January 2004, opinion 04-07.

³⁸ See art. 2 of the GET Act.

³⁹ Art. 646 and 647 of Book 7 of the Civil Code.

⁴⁰ *Wet gelijke behandeling van mannen en vrouwen* (*Staatsblad* 1980, nr. 86).

protection that the GET Act gives against sexual orientation discrimination. The protection offered by the laws against employment discrimination on grounds of handicap, chronic disease and age,⁴¹ is also comparable.

The Implementation Act of 2004 has extended the GET Act to the field of social protection, social security and social advantages, but the new prohibition (art. 7a) is limited to distinctions on the ground of race in that field. For other grounds, this field will remain to be subject only to the constitutional and international prohibitions of discrimination.

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

Sexual orientation discrimination is prohibited in several other enactments, notably in art. 7 of the GET Act, with respect to the provision of goods and services, including education, health services, housing, etc.

Being able to have an ‘unprejudiced, understanding and reliable attitude towards patients whatever their sex, race, age, wealth, education, culture, sexual orientation or belief’ is one of the statutory requirements in the training of medical doctors.⁴²

Several general and specific acts on data protection severely limit the possibility to register data about someone’s ‘sexual life’ (sometimes called ‘sexuality’).⁴³

The ‘Act on Benefits for Victims of Persecution 1940-1945’ specifies that persecution on the ground of homosexuality is covered.⁴⁴

Finally, the Penal Code makes it a criminal offence ‘to publicly, either orally or in writing or by image, and intentionally make a defamatory statement about a group of persons’ on the basis of their ‘heterosexual or homosexual orientation’.⁴⁵ Similarly it is a criminal offence to ‘publicly incite hatred, discrimination or violence’ against persons because of their sexual orientation,⁴⁶ or to ‘take part in, or to extend financial or other material support to, activities aimed at discrimination against persons because of their heterosexual or homosexual orientation’.⁴⁷

⁴¹ See para. 13.1.2 above.

⁴² Art. 3 of the *Besluit opleidingseisen arts* (Royal Decree on the training of medical doctors, *Staatsblad* 1997, nr. 379).

⁴³ See for example art. 16 of the *Wet bescherming persoonsgegevens* (Data Protection Act, *Staatsblad* 2000, nr. 302), which was preceded by the *Wet persoonsregistraties* (Data Registration Act, *Staatsblad* 1988, nr. 665) that contained a similar provision in art. 7.

⁴⁴ Art. 2 of the *Wet uitkeringen vervolgingsslachtoffers 1940-1945* (*Staatsblad* 1972, nr. 669), as amended by the Act of 11 June 1986 (*Staatsblad* 1986, nr. 355; in force since 4 July 1986).

⁴⁵ Art. 137c and 137e of the *Wetboek van Strafrecht*, as amended as of 1 February 1992 by the Act of 14 November 1991 (*Staatsblad* 1991, nr. 623).

⁴⁶ Art. 137d and 137e, *idem* (see also art. 90quater, cited above).

⁴⁷ Art. 137f, *idem*.

13.2 The prohibition of discrimination required by the Directive

13.2.1 Instrument(s) used to implement the Directive

The Dutch Government considered that the Directive was already largely implemented by the existence of the GET Act, and other existing anti-discrimination legislation (see above).⁴⁸ However, for a full implementation of both the Framework Directive and the Race Directive it was considered necessary to amend the GET Act. To this end the Government on 28 January 2003 presented a Bill to Parliament,⁴⁹ which became the *EG-implematiewet Awgb* of 21 February 2004 (hereinafter Implementation Act).⁵⁰ This act added several new articles in the GET Act (1a on harassment, 6a on membership of organisations, 7a on social protection and social advantages, 8a on victimisation, and 10 on burden of proof), and contained amendments to art. 1, 2, 4, 5, 7 and 8.

The Government did not consider it necessary to also propose amendments to art. 1 of the Constitution or to art. 429quater of the Penal Code. This can be criticised, because these two anti-discrimination provisions also cover employment discrimination. Therefore it would make sense to see the Directive (and indeed art. 13 EC) as a good reason to make the grounds age, disability and sexual orientation explicit in the list of forbidden grounds in art. 1 of the Constitution. As regards the criminal prohibition of discrimination, it would make sense to amend the text of art. 429quater so as to make sure that every employer is covered, rather than just those who can be said to carry out a 'profession, business or official capacity' (which seems to exclude most non-profit employers). This would bring the criminal provision more in line with the GET Act, and would make the law a little more transparent.

13.2.2 Concept of sexual orientation (art. 1 Directive)

Most Dutch legislation (see para. 3.1.5 above) uses the phrase '*hetero- of homoseksuele gerichtheid*' to refer to what the Directive in English calls 'sexual orientation'. There is no legislative definition of this phrase. The Penal Code uses a possessive pronoun ('their'), but in accordance with the Directive the GET Act does not: it simply refers to any 'distinction between persons on the ground of (...) heterosexual or homosexual orientation' (art. 1(b)).

During the passage of the GET Act the Government said that the phrase refers to a person's orientation in sexual and loving feelings, in sexual and loving expressions, and in sexual and loving relationships.⁵¹ (That 'person' does not need to be the discriminated person.) The Government also specified that it had

⁴⁸ *Parliamentary Papers II*, 2002/2003, 28770, nr. 3, p. 1.

⁴⁹ The Bill (also aimed at implementing the Race Directive) was published in *Parliamentary Papers II*, 2002/2003, 28770, nr. 2 (text of the Bill) and nr. 3 (explanatory memorandum). Without any relevant amendment it was approved by the Lower House on 9 October 2003, and by the Upper House on 10 February 2004, and then signed into law on 21 February 2004. Separate legislation was enacted in 2003 to cover the grounds of age, handicap and chronic disease, which until then were not yet covered by Dutch anti-discrimination legislation (see para. 13.1.2).

⁵⁰ The Implementation Act was published in *Staatsblad* 2004, nr. 119, and entered into force on 1 April 2004 (as provided for in *Staatsblad* 2004, nr. 120). 'EG' is the Dutch abbreviation of European Communities, and 'Awgb' is the abbreviation of *Algemene wet gelijke behandeling*.

⁵¹ '*Seksuele gerichtheid ziet op de gerichtheid van een persoon in seksuele en liefdesgevoelens, -uitingen en -relaties.*' (*Parliamentary Papers II*, 1990/1991, 22014, nr. 3, p. 13).

opted for the term *gerichtheid* [orientation] rather than *voorkeur* [preference], because the former not only covers feelings, but also verbal and non-verbal expressions that arise from someone's (heterosexual or homosexual) preference.⁵² According to the Government the term 'heterosexual or homosexual orientation' also covers bisexual orientation, because bisexuality consists of homosexual and heterosexual feelings, expressions and relationships.⁵³ The main reason not to simply use 'sexual orientation' seems to have been to exclude paedophile orientation.⁵⁴ The chosen terminology also excludes transsexuality and transvestism.⁵⁵ Discrimination against transsexuals or transvestites is considered to be sex discrimination.⁵⁶

Some confusion is now emerging, because the Dutch language versions of art. 13 EC and the Directive both use the term '*seksuele geaardheid*' rather than '*seksuele gerichtheid*'. In my opinion this is an unfortunately bad translation of the term 'sexual orientation'. In English the meaning of the Dutch term '*geaardheid*' is nearer to 'nature', 'inclination' or 'proclivity', whereas both the English term 'orientation' and the Dutch term '*gerichtheid*' convey the sense of 'relative position', and thus more easily accommodate the notions of loving someone (of the same or opposite sex) and of being in a (same-sex or different-sex) relationship. The Court of Justice of the EC, in *Grant*, therefore was able to consider discrimination based on someone's partner being of the same sex, to be an example of 'sexual orientation discrimination'.⁵⁷

When implementing the Directive the Dutch legislature faced two questions:

Firstly, should it replace the word '*gerichtheid*' in existing legislation with the Directive's word '*geaardheid*'? The Government did not propose to do so, because it considers '*gerichtheid*' to be the wider term of the two, one that also covers 'concrete expressions'.⁵⁸ This seems the right choice, although I would argue that the term '*geaardheid*' in the Directive should be given an equally wide meaning because of the other language versions of the Directive (and the *Grant* judgement, see above).

Secondly, should the Dutch legislature replace the words '*hetero- of homoseksuele*' in existing legislation with the Directive's simple word '*seksuele*'? The Government did not propose to do so, but gave no reason. This may be acceptable, because in the context of the Directive, the phrase 'sexual orientation' only seems to refer to heterosexual, homosexual and bisexual orientations (that is orientations that are defined in terms of the sex of a person's partner). All three are covered by the current Dutch terminology (see above). Furthermore although it has been suggested that the words 'sexual orientation' in the Directive are capable of being interpreted as also including

⁵² *Parliamentary Papers II*, 1991/1992, 22014 nr. 5, p. 21.

⁵³ *Idem*, nr. 10, p. 13.

⁵⁴ For a rare case of alleged discrimination on the basis of paedophile orientation, with respect to access to an ice skating rink, see *Hoge Raad* [Supreme Court], 10 January 1992 (case 14.453, unpublished).

⁵⁵ Asscher-Vonk & Monster, 2002, 47.

⁵⁶ *Gerechthof* [Court of Appeal] Leeuwarden, 13 January 1995, *Nederlandse Jurisprudentie* 1995, nr. 243; and (for example) ET Commission, 17 February 1998, opinion 98-12; and 7 November 2000, opinion 00-73.

⁵⁷ Court of Justice EC, 17 February 1998, C-249/96 (*Grant vs South West Trains*), especially para. 24, 42 and 48.

⁵⁸ *Parliamentary Papers II*, 2002/2003, 28770, nr. 3, p. 3.

other erotic preferences,⁵⁹ such an unintended interpretation is not to be expected from the Court of Justice of the EC.

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

The GET Act uses ‘distinction’ [*onderscheid*] as the central concept. The term is defined as ‘direct and indirect distinction, plus the instruction thereof’ (art. 1(a)). The Council of State has advocated that the ‘neutral’ concept of ‘distinction’ is abandoned, and to start using the more normative term ‘discrimination’.⁶⁰ The Government however, saw no reason to do so. It pointed out that no problems have arisen in case law, and that the European Commission has not indicated that there is a problem with the Dutch concept used to implement the various equal treatment directives.⁶¹ It also emphasised that the use of the neutral concept of ‘distinction’ provides more legal certainty, and therefore more legal protection.⁶² Nevertheless, it has promised that it would look into the issue of terminology again.⁶³ Furthermore, art. 2 of the Directive defines the concept of ‘direct discrimination’ in fairly neutral terms (‘less favourably’, ‘comparable situation’). Anyhow, the Dutch concept of ‘distinction’ is wider than the Directive’s concept of ‘discrimination’; therefore the Dutch implementation seems to be acceptable.

Art. 1(b) of the GET Act defines ‘direct distinction’ as ‘distinction between persons on the ground of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation, or civil status’.⁶⁴ This is a much shorter definition than that in art. 2(a) of the Directive. The Dutch definition is not limited to *less favourable* treatment. Nevertheless, the ET Commission considers a real and personal disadvantage to be a requirement for a successful case under the GET Act.⁶⁵ This also follows from procedural law.⁶⁶ For reasons of clarity it would be desirable to incorporate the requirement of ‘less favourable treatment’ in the Dutch definition of ‘direct distinction’.

The other elements in the Directive’s definition (‘one person’, ‘treated’, ‘than another is, has been or would be treated’, ‘in a comparable situation’) all seem to be implied by the words ‘distinction between persons’ in the Dutch definition. Nevertheless, the Directive’s definition is much clearer to the unaccustomed reader, and would be my preferred option for future Dutch legislation.

To establish whether a distinction is actually *based on* a particular ground, the ET Commission has always considered it enough that sexual orientation, for example, has ‘played a role’ in the disadvantageous treatment. It is not

⁵⁹ According to one author, at least paedophile and transvestite orientations are covered by the Directive (Asscher-Vonk, 2001, 194).

⁶⁰ *Parliamentary Papers II*, 2002/2003, 28770, nr. A, p. 3.

⁶¹ *Idem*, nr. A, p. 5.

⁶² *Idem*, nr. 3, p. 4.

⁶³ *Idem*.

⁶⁴ Art. 1(b) of the GET Act reads as follows: *‘In deze wet en de daarop berustende bepalingen wordt verstaan onder: (...) (b) onderscheid: onderscheid tussen personen op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat’.*

⁶⁵ See Gerards & Heringa, 2003, 43-44.

⁶⁶ See for example art. 12(2) of the GET Act, that restricts the right of individuals to request an investigation by the ET Commission to those persons who have been disadvantaged by a distinction that is prohibited.

necessary to establish that sexual orientation was the only or decisive reason for that treatment.⁶⁷

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

Article 1(c) of the GET Act defines an ‘indirect distinction’ as any ‘distinction on the ground of other characteristics or behaviours than those referred to in art. 1(b), that results in a direct distinction’.⁶⁸ This definition does not seem to be fully in accordance with the Directive’s definition of indirect discrimination: ‘an apparently neutral provision, criterion or practice’ putting persons of a protected group ‘at a particular disadvantage compared with other persons’ (art. 2(b)).

As is the case with respect to direct distinction, the Dutch definition of indirect distinction does not require that persons of a protected group are disadvantaged, let alone *particularly* disadvantaged. But again, the Dutch legislation uses a wider concept of indirect distinction than the Directive, which is permitted. More problematic is that the Directive’s wide enumeration of ‘apparently neutral provision, criterion or practice’ is narrowed down in the Dutch text to a ‘distinction on the ground of other characteristics or behaviours’ than those listed. In other words, in Dutch law a prohibited indirect distinction can only arise out of a provision or practice that already makes a certain distinction on the basis of a non-prohibited ground, whereas under the Directive indirect discrimination can also arise out of a general (non-distinguishing) provision or practice.⁶⁹ This limiting departure from the text of the Directive, does not appear to be permitted. Therefore, more strongly than with respect to direct distinction, I would recommend that the Dutch legislature adopts the Directive’s definition of indirect discrimination.

For the justification of indirect discrimination, see para. 13.4.1 below.

Indirect discrimination is also already covered by the criminal provisions on discrimination, albeit implicitly. Art. 90quater of the Penal Code also recognises as ‘discrimination’ any distinction that ‘may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms’ (see para. 3.1.5 above).

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

Until April 2004, the Dutch legislature had not treated harassment as a form of discrimination.⁷⁰ Harassment, defined as ‘sexual intimidation’, had only found its way into two pieces of legislation: the Working Conditions Act 1998⁷¹ and the Schools Inspectorate Act.⁷² In both, the notion of intimidation is not linked to any

⁶⁷ See Gerards & Heringa, 2003, 44-45.

⁶⁸ Art. 1(c) of the GET Act reads as follows: *‘In deze wet en de daarop berustende bepalingen wordt verstaan onder: (...) (c) indirect onderscheid: onderscheid op grond van andere hoedanigheden of gedragingen dan die bedoeld in onderdeel b, dat direct onderscheid tot gevolg heeft’*. Art. 2(1) contains an exception for indirection distinctions that are objectively justified (see para. 13.4.1 below).

⁶⁹ You could also say that the Directive’s definition allows for *equal* treatment (of different situations) to be considered as discrimination. As indicated above (para. 13.1.2), this reverse formulation of the principle of equality has been recognised in European law.

⁷⁰ Holtmaat, 1999, 25; Asscher-Vonk & Monster, 2002, 164.

⁷¹ *Arbeidsomstandighedenwet 1998* (*Staatsblad* 1999, nr. 184), which was preceded by the *Arbeidsomstandighedenwet* (*Staatsblad* 1980, nr. 664), which since 1 September 1994 (*Staatsblad* 1994, nr. 536) contained similar provisions.

⁷² *Wet op het onderwijstoezicht* of 20 June 2002 (*Staatsblad* 2002, nr. 387).

particular ground. The word 'sexual' is used in its erotic sense, rather than its gender sense. So this does not exclude the sexual forms of anti-homosexual harassment. In fact the definition is not even limited to *sexual* forms of harassment, because art. 1(3) of the Working Conditions Act 1998 defines as 'sexual intimidation': unwanted sexual advances, requests for sexual favours, or other verbal, non-verbal or physical behaviour, when one of six conditions applies:

- subjection to such behaviour is explicitly or implicitly being used as a condition for employing someone;
- subjection to, or refusal of such behaviour by a person is being used as a basis for decisions with respect to that person's work;
- such behaviour is aimed at harming someone's work performance
- such behaviour results in harm to someone's work performance;
- such behaviour is aimed at creating an intimidating, hostile or unpleasant working environment;
- such behaviour results in the creation of an intimidating, hostile or unpleasant working environment.⁷³

In spite of this limited amount of legislation, the ET Commission has already recognised that harassment (on the basis of sex, race, sexual orientation, etc.) is a form of discrimination, and as such covered by the prohibitions of the GET Act.⁷⁴ According to the ET Commission, this entails a duty of care for employers to combat harassment,⁷⁵ among other things by protecting employees from it, and by providing a proper complaints procedure.⁷⁶ The ET Commission concluded that an employer's failure to investigate the complaints from a lesbian employee about harassment against her, did amount to a prohibited direct distinction on the ground of homosexual orientation.⁷⁷ The duty of care extends to harassment by clients.⁷⁸

As a result of the Implementation Act, a new art. 1a in the GET Act now explicitly provides that '*intimidatie*' [harassment] on any of the grounds covered is a form of prohibited distinction. Art. 1a(2) gives a definition which is almost identical to that in art. 2(3) of the Directive: 'conduct related to any of the

⁷³ Art. 1(3)(e) of the *Arbeidsomstandighedenwet 1998* reads as follows:

'In deze wet en de daarop berustende bepalingen wordt verstaan onder: (...)

(e) seksuele intimidatie: ongewenste seksuele toenadering, verzoeken om seksuele gunsten of ander verbaal, non-verbaal of fysiek gedrag waarbij tevens sprake is van een van de volgende punten:

1°. onderwerping aan dergelijk gedrag wordt hetzij expliciet hetzij impliciet gehanteerd als voorwaarde voor de tewerkstelling van een persoon;

2°. onderwerping aan of afwijzing van dergelijk gedrag door een persoon wordt gebruikt als basis voor beslissingen die het werk van deze persoon raken;

3°. dergelijk gedrag heeft het doel de werkprestaties van een persoon aan te tasten en/of een intimiderende, vijandige of onaangename werkomgeving te creëren, dan wel heeft tot gevolg dat de werkprestaties van een persoon worden aangetast en/of een intimiderende, vijandige of onaangename werkomgeving wordt gecreëerd (...)'.

⁷⁴ See for example ET Commission 21 October 1996, opinion 96-88 (race); ET 21 January 1997, opinion 97-07 (sex); and 12 April 2001, opinion 01-35 (sexual orientation).

⁷⁵ A similar duty follows from art. 4(2) of the Working Conditions Act 1998.

⁷⁶ Asscher-Vonk & Monster, 2002, 164-165.

⁷⁷ ET Commission 12 April 2001, opinion 01-35.

⁷⁸ ET Commission 28 May 1997, opinion 97-82.

grounds (...) with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'. The only word of the Directive's definition omitted here is 'unwanted' (in front of 'conduct'). This departure from the Directive's text is acceptable for two reasons: the Directive in art. 2(3) explicitly allows national definitions of harassment, and the omission of the word only broadens the definition. The Government has chosen to omit the word, so as to lighten the burden of proof for any victim.⁷⁹ By leaving the word out, the Government also avoided having to choose between its objective and subjective meaning (as in 'undesirable' and 'undesired'). It is unclear why the definition of harassment in the GET Act, does not incorporate the first four alternatives laid down in the definition in the Working Conditions Act 1998 (quoted above), although the Directive leaves room for a national definition.⁸⁰

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

Instructing someone to discriminate was already implicitly covered by the GET Act.⁸¹ In response to the Directive this has been made explicit in the definition of the central concept of 'distinction', which now is defined as 'direct and indirect distinction, plus the instruction thereof' (art. 1(a)).⁸²

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

Article 5 of the GET Act covers:

- offering a job,
- filling a vacancy,
- employment-finding (added by the Implementation Act),
- beginning an employment relationship,
- ending an employment relationship,
- appointing a civil servant,
- ending the appointment of a civil servant,
- terms and conditions of employment (which includes pay),
- education or training during or prior to an employment relationship,
- promotion,
- working conditions (added by the Implementation Act).

Art. 6 of the GET Act covers the liberal professions [*het vrije beroep*], and in particular conditions for these professions, access to them, opportunities to pursue them, and opportunities of development within them. Art. 6a (added by the Implementation Act) covers membership and involvement in organisations of employees, employers or professionals and benefits attached to these. Art. 7 covers the supply of goods and services (including all education), the giving of

⁷⁹ *Parliamentary Papers II*, 2002/2003, 28770, nr. A, p. 14-15.

⁸⁰ See Holtmaat, 2001, 118.

⁸¹ *Parliamentary Papers II*, 2002/2003, 28770, nr. 3, p. 7.

⁸² Art. 1(a) GET Act: '*direct en indirect onderscheid, alsmede de opdracht daartoe*'.

information or advice about choice of school or choice of occupation, and the giving of career guidance.⁸³

It seems the material scope of the Directive is adequately covered. There might be a question whether all ‘self-employment’ (art. 3(1)(a) of the Directive) is properly covered by the use of the Dutch words for liberal professions: ‘*het vrije beroep*’ (which literally means ‘free occupation’). However, this problem can be solved by giving a wide interpretation to the latter term, so as to include any freelancer or entrepreneur (and not just doctors, advocates, architects, etc.).⁸⁴

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

Like the Directive itself, the GET Act does not specify to whom the prohibitions apply. Therefore, they do not only apply to all private and public employers, but also to organisations of employers, organisations of workers, employment offices, job agencies, pension funds, some external advisers, (‘liberal’) professionals, bodies of liberal professionals, training institutions, schools, universities, etc.⁸⁵

Whether the Act also applies to colleagues and/or clients, remains unclear. Although the Directive ‘shall apply to all persons in relation to’ (among other things) ‘employment and working conditions’ (art. 3(1)(c)), the Dutch Government has taken the position (in the *travaux préparatoires*) that the GET Act does not need to apply between colleagues (because there is no contract or relationship of authority between them).⁸⁶ This is particularly problematic with respect to harassment. Only rarely it will be the formal employer who harasses an employee. In most instances of harassment, it is carried out by a boss or colleague, or even by a client, or by a group of colleagues or clients. Because of the employer’s duty of care to prevent harassment, this may then involve the responsibility of the employer (see above). But in light of the text of art. 3(1) of the Directive, it seems wrong to deny the responsibility of each employee for the working conditions of their colleagues. Therefore, I think the courts and the ET Commission should not follow the limiting interpretation given in the *travaux préparatoires*. The same could be argued with respect to clients who harass workers.

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

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

There is no doubt in Dutch law that discrimination on the ground of a person’s heterosexual, homosexual or bisexual preference/inclination (‘being it’) is prohibited. Among the 47 cases of alleged sexual orientation discrimination that

⁸³ ‘Career guidance’ was added, somewhat superfluously, by the Implementation Act.

⁸⁴ See Asscher-Vonk & Monster, 2002, 26.

⁸⁵ Idem, 23-24 and 27; Gerards & Heringa, 2003, 60.

⁸⁶ *Parliamentary Papers II*, 2002/2003, 28770, nr. 5, p. 28.

have so far been decided by the ET Commission, there is, however, no case where the mere preference or inclination of the complainant clearly was the issue.

The definition of (hetero- or homo-) sexual orientation, given in the *travaux préparatoires* of the General Equal Treatment Bill (*a person's orientation in sexual and loving feelings, in sexual and loving expressions, and in sexual and loving relationships*⁸⁷), also clearly covers intimate contact with someone of the same sex. According to two recent opinions of the ET Commission, 'concrete behaviour' is protected by the prohibition of sexual orientation discrimination, if that behaviour is 'generally considered as a result of somebody's homosexual orientation'.⁸⁸ Nevertheless, in some older cases the ET Commission has treated as (justified) *indirect* distinctions, some rules that directly distinguish between men who did, and men who did not, have sex with other men. In each of these (controversial) cases the reason for the distinction was a medical one: men who had sex with other men were refused as donors of blood⁸⁹ or sperm,⁹⁰ and men who did not have sex with other men were not included in a free experimental programme for hepatitis B vaccination.⁹¹ One might suspect that the ET Commission has chosen to treat these cases as instances of *indirect* distinction, *pour les besoins de la cause*, because the GET Act does not allow for a (medical or otherwise objective) justification of *direct* distinction on the ground of sexual orientation. Therefore, it is difficult to assess whether outside the medical context the Commission would also consider such distinctions to be only indirect. I would imagine that, for example, a rule that prohibits same-sex kissing at work, while allowing different-sex kissing, must be considered as making a prohibited *direct* distinction on ground of sexual orientation.⁹²

According to the Government the term 'heterosexual or homosexual orientation' also covers bisexual orientation, because in their view bisexuality consists of homosexual and heterosexual feelings, expressions and relationships.⁹³

The wording of art. 1(b) of the GET Act does not require that a distinction on the ground of heterosexual or homosexual orientation is in fact based on the sexual orientation of *the person affected by the distinction*. Therefore discrimination on the basis of a mistakenly assumed sexual orientation is also prohibited by the Act.⁹⁴ To consider such discrimination *not* covered, would create unacceptable problems of privacy, because then each complainant would have to declare (or even prove) his or her sexual orientation. Art. 10(1) of the Constitution guarantees everyone's right to respect for his or her privacy, and this also binds private actors.⁹⁵ In a case about alleged discrimination on grounds of political opinion, the ET Commission has ruled that such discrimination is prohibited even if the political opinion has been wrongly ascribed to the victim.⁹⁶ The

⁸⁷ 'Seksuele gerichtheid ziet op de gerichtheid van een persoon in seksuele en liefdesgevoelens, -uitingen en -relaties.' (*Parliamentary Papers II*, 1990/1991, 22014, nr. 3, p. 13).

⁸⁸ ET Commission 12 August 2002, opinion 03-113, and 15 December 2003, opinion 03-150.

⁸⁹ ET Commission 15 December 1998, opinion 98-137.

⁹⁰ *Idem*, opinion 98-139.

⁹¹ ET Commission 18 December 2000, opinion 00-90.

⁹² See Hendriks & Waaldijk, 2001, 58-59.

⁹³ *Parliamentary Papers II*, 1991/1992, 22014, nr. 10, p. 13.

⁹⁴ See also Waaldijk, 1997, 117; Wentholt, 1999, 13.

⁹⁵ *Hoge Raad* [Supreme Court] 9 January 1987, *Nederlandse Jurisprudentie*, 1987, nr. 928.

⁹⁶ ET Commission, 9 July 2002, opinion 02-84.

Commission based that interpretation on a judgement by the Supreme Court giving a similar interpretation to the words 'for reasons of political opinion' in art. 1 the Convention on the Status of Refugees.⁹⁷

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

Given the broad definition of homosexual orientation (see para. 13.2.2 above) any discrimination because of someone's coming out as gay, lesbian or bisexual (to co-workers, to clients, in the media, etc.) would most probably be covered by the prohibition of direct distinction in the GET Act. However, according to the opinions of the ET Commission, this does not mean that an employee can talk without any limit about his or her (homosexual or heterosexual) intimate life.⁹⁸

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

Distinctions based on the sex of someone's partner are considered to be distinctions on the ground of sexual orientation. This follows from the definition of sexual orientation given during the Parliamentary debates leading to the GET Act (which talks about '*sexual and loving relationships*'⁹⁹), and has been confirmed by the ET Commission.¹⁰⁰ Therefore it is unlawful to distinguish between same-sex and different-sex partners with the same civil status.

However, in two cases (about goods and services), dating from before the EC Court of Justice judgement in *Grant*,¹⁰¹ the ET Commission has declined to label a distinction between same-sex and different-sex partners as direct discrimination on the ground of sexual orientation. The first case was started by an organiser of ballroom dancing competitions who wanted to know whether he could continue to exclude same-sex couples from his competitions. The Commission found the exclusion to amount to a prohibited direct distinction on the ground of sex, and to an unjustified indirect distinction on the ground of sexual orientation.¹⁰² The second case was about the exclusion of same-sex partners from a block of service-apartments for the elderly. Here the Commission considered the exclusion to amount to prohibited direct sex discrimination, and did not go into the question of sexual orientation, perhaps because the complainant had not revealed whether he and his male partner were in a homosexual relationship.¹⁰³ These two cases highlight an interesting dilemma: Should the anti-discrimination law distinguish between same-sex relationships that are perceived as being of a sexual nature and same-sex relationships that are not, by combating discrimination against the former category as *sexual orientation* discrimination, and discrimination against the latter category as sex discrimination? Or should both categories be protected

⁹⁷ *Hoge Raad* [Supreme Court], 26 January 1993, *Nederlandse Jurisprudentie*, 1993, nr. 507.

⁹⁸ See for example: ET Commission 22 November 1996, opinion 97-108; 12 April 2001, opinion 01-35.

⁹⁹ See para. 13.2.2 above.

¹⁰⁰ ET Commission 23 April 1997, opinions 97-47 and 97-48; 2 February 1999, opinion 99-08; and 3 February 1999, 99-13.

¹⁰¹ Court of Justice EC, 17 February 1998, C-249/96 (*Grant v. South West Trains*).

¹⁰² ET Commission 1 April 1997, opinion 97-29.

¹⁰³ ET Commission 12 February 1998, opinion 98-10.

under the heading of sexual orientation? Both solutions raise privacy issues. Therefore it is difficult to predict which solution will be chosen in the future.

Discrimination between married and unmarried partners is direct civil status [*burgerlijke staat*] discrimination. In the field of employment this is prohibited by the GET Act of 1994. However, with respect to survivor's pensions, there is an exception in that act for distinctions based on civil status (art. 5(6)). For that reason, and for symbolic reasons, some (unmarried) same-sex partners have tried to challenge instances of *direct civil status* discrimination, as *indirect sexual orientation* discrimination. This made sense, because until 1 April 2001, same-sex couples could not enter into a civil marriage in the Netherlands. Therefore, until that date, any discrimination against unmarried employees resulted in a particular disadvantage for any employee in a homosexual relationship. That such direct civil status discrimination could also be challenged as indirect sexual orientation discrimination, has been recognised by the courts¹⁰⁴ and by the ET Commission,¹⁰⁵ also with respect to pensions.¹⁰⁶

Since the opening up of marriage to same-sex couples in 2001,¹⁰⁷ direct discrimination against unmarried employees can only very rarely be challenged as being indirectly discriminatory against homosexuals.

Registered partnership was introduced on 1 January 1998, both for same-sex and different-sex couples. In its consequences it is almost identical to marriage.¹⁰⁸ During the passage of the registered partnership legislation, it became clear that being in a registered partnership would count as a new civil status.¹⁰⁹ Therefore any distinction between married and registered partners (or between registered and non-registered partners) now amounts to direct civil status discrimination, as prohibited by the GET Act. This was confirmed by the ET Commission.¹¹⁰ The Commission has held that the exception for civil status discrimination with respect to survivor's pensions (see above), should be narrowly interpreted: distinctions between married and registered survivors are not excepted from the prohibition.¹¹¹

During the period between the introduction of registered partnership (1998) and the opening up of marriage to same-sex couples (2001) it was possible to argue that to distinguish between married and registered employees also amounted to

¹⁰⁴ *Hoge Raad* [Supreme Court], 19 October 1990 (*Nederlandse Jurisprudentie*, 1992, nr. 119; *obiter dictum* with respect to a claim of two women who wanted to marry each other; *Gerechtshof* [Court of Appeal] Amsterdam, 6 May 1993 (*Nederlandse Jurisprudentie*, 1994, nr. 681; with respect to family property law); *Rechtbank* [District Court] Den Haag, 23 October 1997 (*Migrantenrecht*, 1997, nr. 130-131; with respect to immigration law).

¹⁰⁵ ET Commission 20 June 1996, opinion 96-52 (confirmed by *Gerechtshof* [Court of Appeal] Amsterdam, 2 October 1997, *Rechtspraak Nemesis*, 1998, nr. 822); this case was about free international train travel for unmarried partners of Dutch Rail employees.

¹⁰⁶ ET Commission 7 October 1998, opinion 98-110; and 19 October 1998, opinion 98-115.

¹⁰⁷ Art. 30 of Book 1 of the *Burgerlijk Wetboek* [Civil Code], as amended by the *Wet openstelling huwelijk* (Act on the Opening Up of Marriage) of 21 December 2000 (*Staatsblad* 2001, nr. 9; translation at www.emmeijers.nl/waaldijk).

¹⁰⁸ Art. 80a - 80e of Book 1 of the *Burgerlijk Wetboek* [Civil Code], as amended by the Act of 5 July 1997 (*Staatsblad* 1997, nr. 324); and hundreds of provisions in other acts, as amended by the *Aanpassingswet geregistreerd partnerschap* (Registered Partnership Adjustment Act) of 17 December 1997 (*Staatsblad* 1997, nr. 660). Both laws came into operation on 1 January 1998

¹⁰⁹ *Parliamentary Papers II*, 1996/1997, 23761, nr. 11, p. 3.

¹¹⁰ ET Commission 3 February 1999, opinion 99-13 (requiring the same number of days off for an employee's partnership registration, as for his or her wedding).

¹¹¹ ET Commission 13 August 2002, opinions 02-111 and 02-113 (see Waaldijk, 2003, 61-64).

(indirect or even direct) sexual orientation discrimination. As far as I know, this has not been tried. This can be explained by the existence of the prohibition on civil status discrimination (see above), but also by the working of a transitory provision in the registered partnership law: all contracts (including collective employment agreements) and other private law documents from before 1 January 1998 that referred to marriage, were from that date on to be deemed to refer in exactly the same way to registered partnership.¹¹²

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

The wording of art. 1(b) of the GET Act does not require that a distinction on the ground of heterosexual or homosexual orientation is in fact based on the sexual orientation of *the person affected*. Therefore discrimination on the basis of someone's ties to persons of a particular sexual orientation is also prohibited by the Act.

For the same reason discrimination on the basis of someone's involvement in the homosexual or bisexual movement is most probably also prohibited by the Act. The ET Commission's case about student debating societies confirms this (see para. 13.3.5 below).¹¹³

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

The same reason as described in the previous paragraph also makes it unsurprising that the ET Commission ruled in favour of a lesbian and a gay student debating society. The complaint was that their university had refused to give study-credits to students participating in their activities, whereas students could get such credits for their activities in any other debating society at their university.¹¹⁴

Gay and lesbian employees of several employers have organised themselves into social and/or political groups (with or without legal personality), or as subgroups of trade unions. The law forbids their employers and, because of the Implementation Act, also their trade unions, to discriminate against such groups, for example with respect to facilities (meeting rooms, time off, money) offered to other groups of employees.

For the same reason, it would seem that an employer (or trade union etc.) cannot lawfully discriminate with respect to information (for example about how to prevent harassment, or about how to meet the needs of certain groups of clients). The ET Commission's case about student debating societies confirms this.¹¹⁵

¹¹² Art. V of the Act of 5 July 1997 (*Staatsblad* 1997, nr. 324).

¹¹³ ET Commission 19 December 1997, opinion 97-135.

¹¹⁴ *Idem*.

¹¹⁵ *Idem*.

13.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about his or her sexual orientation*

In Dutch law it is considered unlawful to ask a job applicant whether she is pregnant, because it is discriminatory to reject an applicant on the ground of pregnancy.¹¹⁶ It may therefore be argued that it is similarly forbidden to ask a job applicant about his or her sexual orientation.¹¹⁷ This makes sense because there are very few situations in which someone's sexual orientation may be considered relevant for any employment decision (see the exceptions to the prohibition of sexual orientation discrimination discussed in para. 13.4 below).

The ET Commission has so far only recommended that employers exercise great restraint in asking questions about grounds which may lead to conscious or unconscious discrimination. It did so in a case where the employer used a form in which each job applicant had to fill in his or her religion, nationality, civil status and name of partner. Controversially, the Commission considered this form to be acceptable, after having underlined that it does not contain a question about sexual orientation, and that an applicant is not required to indicate the sex or full first name of the partner.¹¹⁸ It is unclear why the Commission accepted the direct question about religion. Asking a direct question about sexual orientation or religion could be seen as a violation of art. 10(1) of the Constitution guaranteeing the right to respect for privacy that also binds private actors.¹¹⁹ Both religion and 'sexual life' are covered by the Data Protection Act (see para. 13.1.8 above).

Job applicants do not have to give an answer to questions that cannot be considered relevant.¹²⁰ That is almost always the case with questions about sexual orientation. To discriminate against someone on the basis of not having answered such a question, would most probably be prohibited by the GET Act, also because discrimination on the basis of an assumption about someone's sexual orientation is unlawful (see para. 13.3.1 above).

It is lawful for a job applicant to lie about her pregnancy.¹²¹ Therefore it would seem that it is also lawful to lie about your sexual orientation, when an irrelevant question is being asked about it by an employer.¹²² Giving an accurate answer might lead the employer (consciously or unconsciously) to take a discriminatory decision,¹²³ refusing to answer the question might lead the employer to assume that you are not heterosexual. For these two reasons, giving an inaccurate answer may be the only reasonable option for gay, lesbian or bisexual job applicants (or employees) to protect themselves from unlawful discrimination. As the ET Commission has pointed out, the fact that a question about sexual orientation is being asked, gives the impression that the answer will be taken into account.¹²⁴

¹¹⁶ Hübner & Lenssen, 1996, 35; Asscher-Vonk & Monster, 2002, 156.

¹¹⁷ De Wit, 1992, 167; Mattijssen, 1992, 16-17.

¹¹⁸ ET Commission 13 November 1998, opinion 98-123.

¹¹⁹ *Hoge Raad* [Supreme Court] 9 January 1987, *Nederlandse Jurisprudentie*, 1987, nr. 928.

¹²⁰ Hübner & Lenssen, 1996, 35.

¹²¹ Hübner & Lenssen, 1996, 35; Asscher-Vonk & Monster, 2002, 156-157 (with reference to statements to that effect from the Government in the *travaux préparatoires* of the 1989 amendment of the Act on Equal Treatment of Men and Women).

¹²² De Wit, 1992, 167; Mattijssen, 1992, 16-17.

¹²³ ET Commission 13 November 1998, opinion 98-123.

¹²⁴ *Idem*.

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

The question of a previous criminal record with respect to a homosexual offence has not arisen in Dutch law, mainly because the last specifically homosexual offence was abolished in 1971.¹²⁵ The issue could still arise with respect to a foreign conviction. If such a conviction were used, for example, by a Dutch employer as a reason to deny employment, then to all probability the employer would be considered guilty of a prohibited unjustified indirect distinction based on sexual orientation.

13.3.8 *Harassment*

Depending on the exact circumstances, unwanted homosexual or heterosexual advances can be considered as (sexual) harassment under the definition in the Working Conditions Act 1998 (see para. 13.2.5 above). Under the definition inserted into the GET Act by the Implementation Act (see para. 13.2.5 above) such behaviour could be harassment if it was based on sexual orientation or on any of the other prohibited grounds.

Serious verbal abuse may amount to (sexual orientation) harassment, both under the definition introduced by the Implementation Act, and under the definition in the Working Conditions Act 1998. Before intimidation on grounds of sexual orientation became explicitly prohibited in April 2004, it could already be challenged under the general prohibition of discrimination in the GET Act. Several times the ET Commission had to deal with complaints about (verbal) anti-homosexual intimidation. In the case of a gay employee the Commission observed that the employer had established a proper complaints procedure for such intimidation, and that the employee had never invoked it; therefore the employer was not in breach of the GET Act.¹²⁶ In the case of a lesbian employee of another employer, however, the Commission found that she had formally complained, and that the employer had not started an investigation into her complaints; therefore this employer was in breach of the Act.¹²⁷

Depending on the exact circumstances, the expression of very negative anti-homosexual opinions in the employment context may also be considered as harassment, under the definition introduced by the Implementation Act, and under the definition in the Working Conditions Act 1998. However, the prohibition of harassment would need to be interpreted in light of the freedom of expression and the freedom of religion (as guaranteed by the Constitution and by international human rights treaties). This follows from case law about religiously inspired anti-homosexual statements in the media.¹²⁸

The unwanted *outing* of someone's sexual orientation would be a violation of art. 10(1) of the Constitution, the right to respect for privacy that also binds private actors.¹²⁹ Such behaviour may also be considered as harassment, under

¹²⁵ Repeal of art. 248bis of the Penal Code, which set a higher age of consent for same-sex sexual contact.

¹²⁶ ET Commission 20 December 2001, opinion 01-144.

¹²⁷ ET Commission 12 April 2001, opinion 01-35.

¹²⁸ *Hoge Raad* [Supreme Court], 9 January 2001, *Nederlandse Jurisprudentie*, 2001, nr. 203 and 204.

¹²⁹ *Hoge Raad* [Supreme Court], 9 January 1987, *Nederlandse Jurisprudentie*, 1987, nr. 928.

the definition introduced by the Implementation Act, and under the definition in the Working Conditions Act 1998. To have such a very intimate aspect of your private life revealed to your colleagues, or to your clients, may well have the effect or even purpose of violating your dignity and of creating an intimidating or hostile environment. The latter would be most certainly the case, if the anti-homosexual attitudes of the colleagues were the very reason for the lesbian, gay or bisexual employee not to *come out* at work.

13.4 Exceptions to the prohibition of discrimination

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

Article 2(1) of the GET Act of 1994, as amended in 2004 by the Implementation Act, provides that an indirect distinction is not prohibited, if ‘the distinction is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’,¹³⁰ (exactly the same words as in the Directive). For many years already, the ET Commission has been using a similar test.¹³¹ With respect to sexual orientation, the Commission has found an indirect distinction in eight cases. In three cases it considered the distinction justified, each time for medical reasons.¹³² In five other cases it did *not* consider the distinction justified.¹³³

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

So far, the Dutch Government has only invoked art. 2(5) of the Directive in support of art. 5(2)(b) of the GET Act, which contains an exception for political organisations. Its wording is similar to the exception for religious organisations (see para. 13.4.8 below), but cannot be based on art. 4(2) of the Directive, which only applies to organisations based on religion or belief. Art. 5(2)(b) allows political organisations to set requirements, which, ‘having regard to the organisation’s aim, are necessary for the performance of a job’, but ‘these requirements may not lead to a distinction based on *the sole fact of* race, sex, nationality, heterosexual or homosexual orientation, or civil status’. Whether this provision is really necessary for the protection of the freedom of association, as the Government contends,¹³⁴ is debatable. According to the Government the exception is necessary because there are political organisations that need to

¹³⁰ Art. 2(1) GET Act reads as follows: ‘*Het in deze wet neergelegde verbod van onderscheid geldt niet ten aanzien van indirect onderscheid indien dat onderscheid objectief gerechtvaardigd wordt door een legitiem doel en de middelen voor het bereiken van dat doel passend en noodzakelijk zijn.*’

¹³¹ See for example ET Commission 7 February 2000, opinion 00-04, para. 4.7.

¹³² ET Commission 15 December 1998, opinions 98-137 and 98-139 (refusal of blood and sperm donors who had male/male sexual contacts); and 18 December 2000, opinion 00-95 (exclusion of man without male/male sexual contacts from hepatitis B vaccination experiment).

¹³³ ET Commission 1 April 1997, opinion 97-29 (exclusion of same-sex couples from dancing competitions); 7 October 1998, opinion 98-110 (pension fund requiring unmarried partners to live together while allowing married partners to live apart); 19 October 1998, opinion 98-115 (employer introducing a new additional pension scheme for married employees only); 7 February 2000, opinion 00-04 (hospital refusing to use donor sperm in IVF treatment); and 15 December 2003, opinion 03-150 (research institute refusing to admit lesbian woman as test-person in a pharmaceutical test because she does not use condoms or an IUD).

¹³⁴ *Parliamentary Papers II*, 2002/2003, 28770, nr. 5, p. 26.

make distinctions on grounds of religion or belief.¹³⁵ To me it would seem that such political organisations are simultaneously based on religion or belief, and therefore covered by the exceptions for such organisations.

Art. 6a(2)(b) of the GET Act (introduced by the Implementation Act) contains a similar exception for political organisations of employers, employees or professionals. Similar criticisms can be made of that exception.

The GET Act contains two other exceptions that arguably fall within the scope of art. 2(5) of the Directive:

- Art. 5(3) provides that the prohibition of employment discrimination does not cover 'requirements which, in view of the private character of the employment relationship, may reasonably be imposed on the employment relationship'.¹³⁶
- Art. 3 of the Act exempts the internal affairs of churches and other spiritual congregations, and especially the profession of priests, rabbis, imams, etc.¹³⁷

The Implementation Act did not repeal or change these exceptions. Can the two exceptions be seen as 'measures (...) which, in a democratic society, are necessary for (...) the protection of the rights and freedoms of others'? The Government did not explicitly relate them to art. 2(5) of the Directive.

The exemption for employment in the private sphere already has a limited wording ('requirements (...) which may reasonably be imposed'). The Government has justified this exemption in terms of art. 8 of the European Convention on Human Rights,¹³⁸ to which art. 2(5) of the Directive of course implicitly refers. This seems acceptable.

The Government had first chosen to justify the exemption for churches etc. in terms of art. 4 of the Directive.¹³⁹ That was problematic, because art. 4(2) explicitly states that any exception for churches and other religion/belief based organisations 'should not justify discrimination on another ground' (than religion or belief). The Council of State also criticised the Government on this point.¹⁴⁰ Later the Government chose to justify the exemption as being 'necessary for the protection of the freedom of religion', while referring both to art. 9 of the European Convention on Human Rights and to art. 6(1) EU.¹⁴¹ This sounds more like a justification in terms of art. 2(5) of the Directive. However, the exemption for the internal affairs of churches etc. (unlike the one for the private sphere) is unconditional and, in my opinion, therefore too wide, because not all forms of sexual orientation discrimination in this context can be considered to be 'necessary' for the freedom of religion.

¹³⁵ Idem.

¹³⁶ Art. 5(3) GET Act reads as follows: '*Het eerste lid is niet van toepassing op eisen, die, gelet op het privé-karakter van de werkverhouding in redelijkheid aan een werkverhouding kunnen worden gesteld*'.

¹³⁷ Art. 3 GET Act reads as follows: '*Deze wet is niet van toepassing op:*

a. rechtsverhoudingen binnen kerkgenootschappen alsmede hun zelfstandige onderdelen en lichamen waarin zij zijn verenigd, alsmede binnen andere genootschappen op geestelijke grondslag;

b. het geestelijk ambt'.

¹³⁸ *Parliamentary Papers II*, 2002/2003, 28770, nr. 3, p. 5.

¹³⁹ Idem, p. 11.

¹⁴⁰ Idem, p. 9.

¹⁴¹ Idem, nr. 5, p. 11.

This is especially true for harassment. The various exceptions to the prohibition of direct or indirect distinction should not apply to the prohibition of harassment. In the explanatory memorandum to the bill that became the Implementation Act, the Government agreed with this.¹⁴² However, in the text of the Implementation Act the exception for churches and other spiritual congregations also applies to harassment, with no specific reasons being given for this applicability. It is difficult to see, how an exception for harassment in the internal affairs of churches etc. could be considered as ‘necessary’ in the sense of art. 2(5) of the Directive (or as involving a ‘genuine, legitimate and justified occupational requirement’ in the sense of art. 4(2) of the Directive; see para. 13.4.5 below).

13.4.3 Social security and similar payments (art. 3(3) Directive)

Sexual orientation discrimination with respect to social security payments (which does not seem to happen often) is not prohibited by the GET Act, although it is clearly unlawful given art. 1 of the Constitution and art. 26 of the International Covenant on Civil and Political Rights. A new art. 7a, inserted into the GET Act by the Implementation Act, only covers racial discrimination with respect to social security (and other forms of social protection or social advantages).

13.4.4 Occupational requirements (art. 4(1) Directive)

The GET Act only contains a general exception for occupational requirements with respect to sex and race (art. 2), not with respect to sexual orientation.

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

Both the Directive and the GET Act (art. 5(2)(a))¹⁴³ contain complex exceptions allowing organisations based on religion or belief to continue to treat people differently on the basis of their religion or belief. There are several differences between the wording of the European provision and that of the Dutch provisions, which the Implementation Act does not amend.

The key criterion in the Directive is whether (having regard to the organisation’s ethos) *a person’s religion or belief* constitutes a *genuine, legitimate and justified occupational requirement*, by reason of the nature of the occupational activities or of the context in which they are carried out. This contrasts with the Dutch criterion whether (having regard to the organisation’s aim) *the organisation’s requirements are necessary for the performance of a job*. It is difficult to say whether (in conjunction with the other words used) ‘genuine, legitimate and justified’ is a stricter test than ‘necessary’, or vice versa. This difference in terminology may be acceptable.

However, the Dutch text suggests that requirements other than a particular religion or belief may be established. That suggestion is not in conformity with

¹⁴² Idem, nr. 3, p. 8.

¹⁴³ Art. 5(2)(a) GET Act reads as follows: ‘Het eerste lid laat onverlet:

a. de vrijheid van een instelling op godsdienstige of levensbeschouwelijke grondslag om eisen te stellen, die gelet op het doel van de instelling, nodig zijn voor de vervulling van een functie, waarbij deze eisen niet mogen leiden tot onderscheid op grond van het enkele feit van politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat’.

the Directive. This also follows from the stipulation in art. 4(2) of the Directive, that the difference in treatment based on religion or belief 'should not justify discrimination on another ground'. The Dutch provision also contains such a stipulation, but that reads as follows: 'these requirements may not lead to a distinction based on *the sole fact of* political opinion, race, sex, nationality, heterosexual or homosexual orientation, or civil status'. The combination of the absence of the words 'a person's religion or belief' (in the first part of the provision) and the presence of the words 'the sole fact of' (in the final part), in my opinion means that the Dutch exception is wider than the Directive allows. The Dutch exception allows for 'additional circumstances' to play a role. That is exactly what was intended by the legislature when adopting the GET Act of 1994,¹⁴⁴ but under the Directive 'additional circumstances' are only acceptable if they are part of a person's religion or belief, and not of that person's sexual orientation.

So far only two cases have come before the ET Commission, but neither has given much insight into what requirements are exempted. The requirement that an employee does not live together with a same-sex partner, has been classified as being prohibited as a distinction based on 'the sole fact of homosexual orientation'.¹⁴⁵ The requirement to sign a declaration that unmarried cohabitation and a homosexual lifestyle are against the word of God, would probably be accepted by the Commission as a permissible 'additional circumstance'.¹⁴⁶ The latter requirement (or at least the requirement to promise to advocate only such a view of homosexuality) could also be said to be permissible under the Directive, especially in light of the last words of its art. 4(2), allowing religion or belief based organisations to require their employees 'to act in good faith and with loyalty to the organisation's ethos'.

Given these two examples, the material difference between the Directive and the Dutch legislation on this point may well be small.¹⁴⁷ Nevertheless, it would be better, and certainly clearer, if the Dutch text was brought in line with the European text. The same applies to the exception with respect to religious organisations of employers, employees or professionals, in art. 6a(2)(a) of the GET Act (introduced by the Implementation Act). The Government, however, takes the view that the words 'the sole fact of' should be kept in the law, because they are the result of a long and intensive political, social and legal debate about balancing the principle of non-discrimination and certain fundamental freedoms.¹⁴⁸

Art. 5(2)(c) of the GET Act contains a similar exception for non-state schools. Its wording is slightly different, but in light of the Directive, the same criticism can be made as that given above for art. 5(2)(a). In addition, it should be noted that not all non-state schools are based on religion or belief. The exception for non-religious non-state schools is clearly in breach of the Directive. Therefore art. 5(2)(c) needs to be narrowed down. The Government has proposed to do this

¹⁴⁴ For an overview of the *travaux préparatoires* with respect to 'the sole fact of' and 'additional circumstances' [*bijkomende omstandigheden*], see ET Commission 29 april 1999, opinion 99-38. See also Gerards & Heringa, 2003, 103-113.

¹⁴⁵ ET Commission 29 April 1999, opinion 99-38.

¹⁴⁶ ET Commission 10 June 1996, opinion 96-39.

¹⁴⁷ See Holtmaat, 2001, 119.

¹⁴⁸ *Parliamentary Papers II*, 2002/2003, 28770, nr. 5, p. 26.

by way of interpretation, without changing the text of art. 5(2)(c).¹⁴⁹ In support of keeping the words ‘the sole fact of’ in this provision, the Government also invoked art. 149(1) and 150(1) EC, which provide that the European Community shall respect the responsibility of the Member States for the ‘content’ and ‘organisation’ of education.¹⁵⁰

The prohibition of discrimination with respect to goods and services, including education, is also subject to an exception for non-state schools (art. 7(2) of the GET Act). As far as vocational training is concerned (art. 3(1)(c) of the Directive), this exception is too wide, for the same reasons as the similar exception in art. 5(2)(c). Furthermore, art. 4(2) of the Directive only seems to allow certain exceptions with respect to certain ‘occupational activities’ (of employees), not with respect to the educational activities of students.

As indicated above, the GET Act also contains an exception for the internal affairs of churches and other spiritual congregations and for the professions of priests, rabbis, imams, etc. Since that exception is unconditional and because it covers all distinctions on any ground, it cannot be based on art. 4(2) of the Directive, but in a slimmed down version perhaps on art. 2(5) of the Directive (see para. 13.4.2 above).

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

The GET Act only contains an exception for positive action with respect to women and ethnic and cultural minorities (art. 2), not with respect to homosexuals.

13.4.7 *Exceptions beyond the Directive*

The Implementation Act has repealed art. 4(c) of the GET Act, that exempted distinctions made in, or pursuant to, another act, predating the GET Act of 1994. This exemption was not justifiable under the Directive. The repeal of art. 4(c) may have been an important change with respect to civil status, but I am not aware of any old act that still provides for sexual orientation discrimination with respect to employment.

A recent case brought to light that there is another exception to the GET Act, one that cannot be traced back to the Directive. A gay man found his job application for the position as translator at the International Yugoslavia Tribunal in The Hague rejected, and felt that this was because of his sexual orientation. He put his case before the ET Commission. The Yugoslavia Tribunal invoked immunity, on the basis of the Seat Treaty between the Netherlands and the United Nations. The Commission accepted the Tribunal’s immunity claim, citing a letter of the Office of Legal Affairs of the Secretariat of the UN of 3 March 1987, in which it was claimed that the immunity of the UN and other international organisations extends to the ‘jurisdiction of quasi-judicial bodies’.¹⁵¹ Therefore it is unclear to what degree Dutch anti-discrimination legislation is binding on the various international and European organisations on its territory. At the very least, it seems that these laws cannot be applied to them

¹⁴⁹ Idem, nr. 5, p. 25.

¹⁵⁰ Idem, nr. 5, p. 26.

¹⁵¹ ET Commission 9 July 2002, opinion 02-85, quoting from the *UN Juridical Yearbook 1987*, p. 206-208.

by the Courts or the ET Commission. But that brings us to the topic of remedies and enforcement, the subject matter of the next paragraph of this chapter.

13.5 Remedies and enforcement

13.5.1 Basic structure of enforcement of employment law

Jurisdiction in conflicts arising out of private law employment contracts, lies with the subdistrict courts [*Kantongerechten*], mostly without any higher appeal. Jurisdiction over conflicts of public employment lies with the administrative chambers of the district courts [*Rechtbanken*], with an appeal to the Central Appeals Court [*Centrale Raad van Beroep*]. Conflicts about access to public or private employment can be brought before the district courts.

An employment contract may be terminated by court, or by the employer with permission of the Centre for Work & Income. This Centre specifically pays attention to possible discriminatory applications for dismissal.¹⁵²

13.5.2 Specific and/or general enforcement bodies

Supervision over the observance of the GET Act, both in the field of employment and with respect to the provision of goods and services, is not only the task of the courts, but also of the ET Commission (art. 16 of the GET Act). A person who feels discriminated against can normally choose whether to take the case to court, to the Commission, or to both. The Commission consists of nine members (some of whom are working full-time for it) and a number of deputy-members, all appointed by the Government. The chair and deputy-chairs of the Commission must be fully qualified lawyers. For its powers, see para. 13.5.3 below.

For the enforcement of the Working Conditions Act 1998 there is the Labour Inspectorate [*Arbeidsinspectie*], which can order an employer to comply with a provision of the Act (for example when an employer is not doing enough to prevent or combat sexual harassment). It may also impose an administrative fine.¹⁵³ The Labour Inspectorate in each of its six regions has an inspector specialised in sexual harassment issues, to which employees can confidentially report cases of sexual harassment.¹⁵⁴

The enforcement of the anti-discrimination provisions in the Penal Code (see para. 13.1.5 above) is the task of the police, the public prosecution service, which has its own expertise bureau for discrimination issues,¹⁵⁵ and the criminal courts.

¹⁵² Asscher-Vonk & Monster, 2002, 112, referring to art. 7:1 of the *Ontslagbesluit* [Dismissals regulation] of the Minister of Employment of 7 December 1998, *Staatscourant* 1998, nr. 238.

¹⁵³ Holtmaat, 1999, 35-36.

¹⁵⁴ Holtmaat, 1999, 35-36.

¹⁵⁵ 'Landelijk Expertisecentrum Discriminatie Openbaar Ministerie'; see Loof, 2003, 69-70.

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

The GET Act does not provide for specific judicial procedures: if discrimination takes place in the context of a private employment contract, the ordinary civil procedures apply. With respect to public employment the ordinary procedures of administrative law apply.

In addition to these judicial procedures, the GET Act empowers the ET Commission to give non-binding opinions based on an investigation whether any distinction prohibited by the Act is or has been made. The Commission can do so at the written request from:

- someone who thinks that a prohibited distinction is or has been made to his or her disadvantage;
- natural or legal persons that want to know whether they themselves are making a prohibited distinction;
- a court or other adjudicator who has to decide on an allegation of prohibited distinction;
- a works council or employee participation body which thinks that a prohibited distinction is being made in the relevant company or organisation;
- an association or foundation promoting the interests of persons protected by the Act.

On its own initiative, the Commission can investigate whether prohibited distinctions are *structurally* being made in a particular sector of society,¹⁵⁶ and publish its non-binding opinion on that question (art. 12). With respect to sexual orientation and civil status the Commission has done this once, to look into access to IVF treatment for single, unmarried and/or lesbian women.¹⁵⁷

The Commission can requisition any information or document that is reasonably necessary for its investigations, and (in general) everyone has to provide these informations and documents (art. 19).

Finally, the Commission may petition a court to declare a distinction unlawful, to prohibit it, or to order to undo its negative consequences, unless the victim objects (art. 15). It seems that the Commission has so far not used this power.¹⁵⁸

Many recommendations have been made to strengthen the legal position of the Commission, including an extension of its power to start investigations at its own initiative, a statutory power to give advice about legislation, and a rule prohibiting courts to ignore a Commission's opinion without giving specific reasons.¹⁵⁹ It has also been recommended that the Commission make more use of its pro-active powers, especially its power to ask for a court ruling.¹⁶⁰

¹⁵⁶ On 21 November 2003 the Government has sent a proposal to Parliament for a law that would change the GET Act on various minor points (*Parliamentary Papers II*, 2003/2004, 29311, nr. 2). When this bill becomes law, the ET Commission will also have the power to start an investigation on its own initiative with respect to structural discrimination by *one particular employer*.

¹⁵⁷ ET Commission 7 February 2000, opinion 00-04.

¹⁵⁸ Asscher-Vonk & Monster, 2002, 119.

¹⁵⁹ Asscher-Vonk, 1999, 316.

¹⁶⁰ *Idem*, 319.

In most companies, schools, universities and other organisations there has to be a works council or employee participation body, one of the tasks of which it is to guard against discrimination on any ground.¹⁶¹

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

The only sanctions provided by the GET Act are the voidability of the termination of employment by an employer in violation of art. 5 of the Act (art. 8(1)), and the nullity of any contractual provision that violates the Act (art. 9). The latter applies both to individual contracts and to collective employment agreements.¹⁶² Internal rules of employers that violate the GET Act (or any other legislation) are also null and void; in private employment, this follows from the general rule on nullity in art. 40(2) of Book 3 of the Civil Code; and in public employment it follows from the general principle that higher rules override lower rules. Decisions by organs of legal persons that violate the GET Act (or any other legislation) are also null and void, according to art. 14 of Book 2 of the Civil Code.

In addition to these specific and general nullity provisions, the general sanctions of administrative law (in the case of public employment), of contract law (in the case of private employment), and of tort law (in the case of discriminatory denial of access to employment) apply. These include payment of damages, and court orders under an *astreinte* [*dwangsom*]. In academic writings serious doubt has been expressed by legal scholars whether the range of (mostly general) sanctions available with respect to the GET Act satisfies the Directive's requirement that sanctions must be 'effective, proportionate and dissuasive'.¹⁶³ It has been suggested that more specific sanctions should be provided for, such as an order to halt a recruitment procedure and start a new, non-discriminatory procedure.¹⁶⁴

Art. 429quater of the Penal Code threatens with imprisonment of up to two months or a fine of up to 4500 euro, anyone who (in an official capacity, in a profession or in a business) discriminates on the ground of sexual orientation (see para. 13.1.5 above).

Some penal sanctions are attached to breach of the Working Conditions Act 1998, which also allows the imposition of an administrative fine (art. 33).

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

For most of the sanctions described in the previous paragraph, the law does not limit their application to the formal employer (whether a natural or legal person). This is of course different for the sanctions of contract law, which only apply to the parties to the contract. Therefore, depending on the circumstances of the case, most sanctions can also be applied to the employer, a pension fund, a trade union, an organisation of professionals, a job agency, etc., and perhaps even to an individual boss, colleague or client (see para. 13.2.8 above).

¹⁶¹ See para. 13.1.5 above.

¹⁶² Asscher-Vonk & Monster, 2002, 137.

¹⁶³ Holtmaat, 2001, 121; see also Asscher-Vonk, 1999, 233.

¹⁶⁴ Jaspers, 1994, 232-233.

13.5.6 Awareness among law enforcers of sexual orientation issues

There is no statutory requirement that (members of) the ET Commission should have a specific knowledge of issues of sexual orientation discrimination. Nevertheless, the Commission has always had at least one openly homosexual member. Several members of the Commission have published about lesbian and gay rights and/or have been active in political activities around such issues.

13.5.7 Standing for interest groups (art. 9(2) Directive)

Interest groups are not only entitled to ask the ET Commission to start an investigation,¹⁶⁵ but also to take legal action in court.¹⁶⁶ Several gay and lesbian interests groups have been recognised as having standing,¹⁶⁷ and from time to time they offer support to individuals starting their own procedure.

13.5.8 Burden of proof of discrimination (art. 10 Directive)

A new art. 10 of the GET Act (inserted by the Implementation Act) shifts the burden of proof once facts have been advanced from which it may be presumed that there has been a prohibited distinction. This is only provided for civil and administrative *judicial* procedures, and not for procedures at the ET Commission, because the latter are not governed by strict rules of evidence (and therefore the exception of art. 10(5) of the Directive applies).¹⁶⁸ However, the ET Commission already voluntarily applies the shift of the burden of proof described in art. 10 of the Directive.¹⁶⁹ Nevertheless, quite often a complainant fails to convince the ET Commission that a prohibited distinction based on sexual orientation did in fact take place. Worryingly, this is so in all but one of the seven cases about the termination of an employment relationship.¹⁷⁰

13.5.9 Burden of proof of sexual orientation

In the Netherlands it has never been thought that it might ever be necessary for either party in a discrimination case to prove the sexual orientation of the complainant. One of the most common arguments against a provision allowing positive action with respect to homosexuals, is that such action would require evidence of the sexual orientation of the persons involved, which would be undesirable (or even impossible).

As is the case with refugee law,¹⁷¹ the ET Commission does not require proof that the victim does indeed have the political opinions because of which it

¹⁶⁵ Art. 12(2)(e) of the GET Act (see para. 13.5.3 above).

¹⁶⁶ Art. 305a and 305b of Book 3 of the *Burgerlijk Wetboek* [Civil Code], and art. 1:2(3) of the *Algemene wet bestuursrecht* [General Administrative Law Act].

¹⁶⁷ ET Commission 19 December 1997, opinion 97-135; 15 December 1998, opinion 98-137; and 15 March 2002, opinion 02-24.

¹⁶⁸ *Parliamentary Papers II*, 2002/2003, 28770, nr. 5, p. 34.

¹⁶⁹ See for example: ET Commission, 15 May 1997, opinion 1997-50.

¹⁷⁰ ET Commission, 7 May 1996, opinion 96-30; 22 November 1996, opinion 96-108; 30 September 1997, opinion 97-103; 19 January 1999, opinion 99-01; 12 April 2001, opinion 01-35; and 20 December 2001, opinion 01-144. The one exception was decided by the ET Commission on 12 August 2003, opinion 03-113.

¹⁷¹ *Hoge Raad* [Supreme Court] 9 January 1987, *Nederlandse Jurisprudentie*, 1987, nr. 928 (see para. 13.3.7 above).

claims to be discriminated.¹⁷² The same would apply with respect to sexual orientation.

13.5.10 *Victimisation (art. 11 Directive)*

Before the implementation of the Directive, the GET Act only contained a limited victimisation clause, stating that the termination of employment by an employer because the employee has invoked art. 5 of the Act, is voidable (art. 8). The Directive requires a more general prohibition of victimisation. The Implementation Act therefore introduced a new art. 8a, prohibiting the 'disadvantaging of persons because they have invoked the Act in court or elsewhere, or because they have supported someone else in doing so'.¹⁷³ The latter phrase has now also been added to the voidability provision of art. 8. It may be doubted whether this is enough to comply with the Directive, which requires an even more general provision, irrespective of who has invoked the principle of equal treatment and of who has supported someone else.

Also it is to be regretted that the provision on the shift of the burden of proof (see para. 13.5.8 above), does not apply to cases of alleged victimisation, although the burden of proof may be as big a problem for a victim of victimisation as for a victim of discrimination. The Government sees this differently.¹⁷⁴

13.6 Reform of existing discriminatory laws and provisions

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

Due to the fact that by 2001 no legislation in the field of employment discriminated on grounds of sexual orientation (see para. 13.6.4 below), the Directive did not make it necessary to repeal or amend such legislation.

Furthermore, according to art. 94 of the Constitution any legislative provision that violates a directly applicable written rule of international law, is non-binding and must not be applied. This gives the Dutch courts the power to set aside such legislative provisions. With respect to legislation containing sexual orientation discrimination, the courts could rely on the general prohibition of discrimination in art. 26 of the International Covenant on Civil and Political Rights, and also on those provisions of the Directive that are considered to have direct effect.

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

By the time the Directive had to be implemented, there were no longer any administrative provisions in the field of employment that discriminated on grounds of sexual orientation.

¹⁷² ET Commission, 9 July 2002, opinion 02-84 (see para. 13.3.7 above).

¹⁷³ Art. 8a GET Act: '*Het is verboden personen te benadelen wegens het feit dat zij in of buiten rechte een beroep hebben gedaan op deze wet of ter zake bijstand hebben verleend.*'

¹⁷⁴ *Parliamentary Papers II*, 2002/2003, 28770, nr. 5, p. 35.

13.6.3 *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)*

Art. 9 of the GET Act stipulates that any contractual provision that violates the GET Act is null and void. This applies both to individual contracts and to collective agreements.¹⁷⁵ Internal rules of an employer and decisions of a body of a legal person that violate the GET Act are also null and void.¹⁷⁶

The Minister for Social Affairs and Employment, has the power to declare provisions of a collective agreement void (*onverbindend*), if the general interest so requires.¹⁷⁷ With respect to certain professionals, the Crown has the power to void decisions of their organisations.¹⁷⁸ These powers can be used to ensure compliance with the GET Act.

As internal rules and collective agreements which discriminate on grounds of sexual orientation have been so rare in the Netherlands in recent years, there have hardly been any specific activities undertaken by employers and trade unions to repeal or amend the provisions concerned.

13.6.4 *Discriminatory laws and provisions still in force*

In the field of employment (and in almost all other fields), Dutch legislation does not directly discriminate on grounds of sexual orientation. Hardly any of the various legislative arrangements for informally cohabiting partners that have emerged since the late 1970s, ever made such a distinction.¹⁷⁹ Nowadays the same can be said about legislation with respect to registered partnership and civil marriage. Only outside the field of employment there are still a few legislative provisions that explicitly distinguish between same-sex and different-sex partners.¹⁸⁰

In all probability, such direct distinctions are also almost completely absent in collective agreements, in internal rules of employers and in rules governing the independent occupations and professions and workers' and employers' organisations.

The only example that I know of where employment rules explicitly distinguish on the basis of sexual orientation can be found in the regulations of the pension scheme for priests and pastoral workers of the Dutch province of the Roman Catholic Church. Until 2002, these regulations only contained distinctions based on civil status.¹⁸¹ Since 2002 these regulations also distinguish between

¹⁷⁵ Asscher-Vonk & Monster, 2002, 137.

¹⁷⁶ See para. 13.5.4 above.

¹⁷⁷ Art. 8 of the *Act on declaring provisions of collective employment agreements generally binding or void of 1937*.

¹⁷⁸ See for example art. 30 of the *Advocatenwet* [Advocates Act] of 1952, and art. 92 of the *Wet op het notarisambt* [Act on the office of public notary] of 1999.

¹⁷⁹ See for example art. 629b (short paid leave in case someone who lives in the same house as the employee dies) and 674 (payment of one more month's wages, after the death of the employee, to his or her spouse, registered partner or informal cohabitant) of Book 7 of the Civil Code.

¹⁸⁰ I know of only two examples: the rules about paternity, and the rules about intercountry adoption.

¹⁸¹ Some of which were found to be unlawful by: ET Commission, 13 August 2002, opinion 02-113. See notes by Breaker (in *Pensioen Jurisprudentie*, 2002, 136) and by Vermeulen (in: De Wolff et al. (eds.), 2003, 235-237), and also Waaldijk, 2003, 61-64.

different-sex marriages and same-sex marriages of pastoral workers, by denying a survivor's pension to same-sex widows/widowers. This does not seem to be justifiable under art. 5(1) of the GET Act, nor under art. 4(2) of the Directive. It is quite possible that some other religion based employers also have discriminatory internal rules.

There used to be many rules that (through the use of marital status as a criterion) discriminated indirectly against homosexual partners. However, with the introduction of registered partnership in 1998 and the opening up of marriage to same-sex partners in 2001, that legislation ceased to be discriminatory on grounds of sexual orientation.

13.7 Concluding remarks

Even before the implementation of the Directive, Dutch law already prohibited most forms of sexual orientation discrimination, both in the field of employment and beyond. The Implementation Act of 21 February 2004 entered into force on 1 April 2004. With the amendments and additions of that act, the General Equal Treatment Act of 1994 meets most of the requirements of the Directive. In my opinion, however, the implementation in this GET Act is not fully in accordance with the Directive on certain points:

- The definition of indirect discrimination is limited to apparently neutral provisions and practices that make some distinction on other grounds than those prohibited; provisions and practices that make no distinction at all fall outside this definition, which therefore is incompatible with art. 2(2)(b) of the Directive (see para. 13.2.4).
- The internal affairs of churches and other spiritual congregations, and the profession of priests, rabbis, imams etc. are completely exempted from the provisions of the GET Act; this *unconditional* exemption of harassment and other forms of discrimination is incompatible with art. 2(5), 4(1) and 4(2) of the Directive (see para. 13.4.2 and 13.4.5).
- There are conditional exceptions for organisations based on religion or belief; these exceptions leave some scope for discrimination on other grounds than religion or belief; this is incompatible with art. 4(2) of the Directive (see para. 13.4.5).
- There are not only conditional exceptions for organisations based on religion or belief, but also for political organisations; it has not been demonstrated that these exceptions are necessary for the protection of the freedom of association as meant in art. 2(5) of the Directive (see para. 13.4.2).
- The wording of the conditional exceptions for non-state schools includes non-state schools that are not based on religion or belief; this is not justified under art. 4(2) of the Directive. Furthermore, the exception for non-state schools extends to the treatment of students (in vocational training), while art. 4(2) only refers to 'occupational activities' (see para. 13.4.5).

On several other points the choice of words in old or new provisions of the GET Act is bound to lead to some confusion in light of the Directive, and perhaps to incompatibility of the GET Act with the Directive. Examples of this are the words

used for sexual orientation (see para. 13.2.2), the definition of direct discrimination (see para. 13.2.3), the words used for self-employment (see para. 13.2.7), and the provision on victimisation (see para. 13.5.10).

List of literature used in footnotes

- Akkermans, P.W.C., 'Artikel 1', in: Akkermans, P.W.C., & Koekkoek, A.K., (eds.), *De Grondwet. Een artikelsgewijs commentaar* [The Constitution. A commentary per article], Zwolle, W.E.J. Tjeenk Willink, 1992, 38-61.
- Asscher-Vonk, I.P., 'Sancties' [Sanctions] & 'Conclusie juridische analyse' [Conclusions from the legal analysis], in: Asscher-Vonk, I.P., & Groenendijk, C.A., (eds.), *Gelijke behandeling: regels en realiteit* [Equal treatment: rules and reality], Den Haag, Sdu, 1999, 202-234 & 301-319.
- Asscher-Vonk, I.P., 'Gelijke behandeling, richtlijnen, de bomen en het bos' [Equal treatment, directives, no wood for the trees], in: *Sociaal Maandblad Arbeid*, 2001, 191-195.
- Asscher-Vonk, I.P., & Monster, W.C., *Gelijke behandeling bij de arbeid* [Equal treatment in employment], Deventer, Kluwer, 2002.
- Bijsterveld, S.C., 'Artikel 1', in: Koekkoek, A.K., (ed.), *De Grondwet. Een systematisch en artikelsgewijs commentaar* [The Constitution. A systematic commentary per article], Deventer, W.E.J. Tjeenk Willink, 2000, 63-74.
- Hendriks, A.C., & Waaldijk, C., 'Hetero- of homoseksuele gerichtheid en burgerlijke staat' [Heterosexual or homosexual orientation and civil status], in: Loenen, T., et al. (eds.), *Gelijke behandeling: oordelen en commentaar 2000* [Equal treatment: opinions and commentary 2000], Deventer, Kluwer, 2001, 55-68.
- Gerards, J.H., & Heringa, A.W., *Wetgeving gelijke behandeling* [Equal Treatment Legislation], Deventer, Kluwer, 2003.
- Hirsch Ballin, E.M.H., 'Staatsrecht en bestuursrecht: Artikel 1 van de Grondwet als fundamentele constitutionele norm' [Constitutional and administrative law: Article 1 of the Constitution as fundamental constitutional norm], in: Maris, C.W., (ed.), *Gelijkheid en recht* [Equality and law], Deventer/Zwolle, Van Loghum Slaterus/W.E.J. Tjeenk Willink, 1988, 127-156.
- Holtmaat, R., *Seksuele intimidatie op de werkplek* [Sexual harassment at the workplace], Nijmegen, Ars Aequi Libri, 1999.
- Holtmaat, R., 'De toekomst van gelijkheid' [The future of equality], in Holtmaat, R., (ed.), *De toekomst van gelijkheid*, Deventer, Kluwer, 2000, 253-267.
- Holtmaat, R., 'Uit de keuken van de Europese Unie: De gelijkebehandelingsrichtlijnen op grond van artikel 13 EG-Verdrag' [From the EU kitchen: The equal treatment directives based on art. 13 EC Treaty], in: Loenen, T., et al. (eds.), *Gelijke behandeling: oordelen en commentaar 2000* [Equal treatment: opinions and commentary 2000], Deventer, Kluwer, 2001, 105-124.
- Hübner, M.M., & Lenssen, G.L.M., *Ondernemen en gelijke behandeling* [Enterprise and equal treatment], Deventer, Kluwer, 1996.
- Jaspers, T., 'Sanctionering een vergeten terrein' [Sanctioning – a forgotten area], in: Vleuten, T. van, (ed.), *In concreto. Bijdragen over rechtsvorming gelijke behandeling*, Den Haag, Ministerie van Sociale Zaken, 1994, 229-234.
- Loof, J.-P., 'Discriminatieverboden in Nederland: achtergronden en discussie' [Prohibitions of discrimination in the Netherlands: background and discussion], in: Loof, J.-P. (ed.), *Het discriminatieverbod van artikel 1 Grondwet: nationale en internationale perspectieven* [The prohibition of discrimination of article 1 of the Constitution: national and international perspectives], Leiden, NJCM-Boekerij, 2003, p. 36-81.
- Mattijssen, Astrid, 'Wie niet waagt, die niet wint. Homodiscriminatie en civielrecht' [Nothing ventured, nothing gained. Anti-homosexual discrimination and private law], in: Moerings, M., & Mattijssen, A., (eds.), *Homoseksualiteit en recht* [Homosexuality and law], Arnhem, Gouda Quint, 1992, 11-37.
- Waaldijk, C., 'Constitutional Protection Against Discrimination of Homosexuals', in: *Journal of Homosexuality*, 1986/1987, Vol. 13-2/3, 57-68.
- Waaldijk, C., 'Onderscheid wegens geslachtsgelijkheid: burgerlijke staat, sexuele gerichtheid of geslacht als grond?' [Distinction based on samesexness: civil status, sexual orientation or sex as ground], in: *Nemesis*, 1997, 117-120.

Waaldijk, C., 'Hetero- of homoseksuele gerichtheid en burgerlijke staat' [Heterosexual or homosexual orientation and civil status], in: Wolff, D.J.B. de, et al. (eds.), *Gelijke behandeling: oordelen en commentaar 2001* [Equal treatment: opinions and commentary 2001], Deventer, Kluwer, 2002, 59-68.

Waaldijk, C., 'Burgerlijke staat en seksuele gerichtheid' [Civil status and sexual orientation], in: Wolff, D.J.B. de, et al. (eds.), *Gelijke behandeling: oordelen en commentaar 2002* [Equal treatment: opinions and commentary 2002], Deventer, Kluwer, 2003, 59-70.

Wentholt, K., 'Het verbod om onderscheid te maken' [The prohibition to distinguish], in: Asscher-Vonk, I.P., & Groenendijk, C.A., (eds.), *Gelijke behandeling: regels en realiteit* [Equal treatment: rules and reality], Den Haag, Sdu, 1999, 89-130.

Wit, R. de, 'Discriminatie op grond van seksuele gerichtheid en burgerlijke staat' [Discriminatie on the ground of sexual orientation and civil status], in: Jacobs, A.T.J.M., et al. (eds.), *Arbeid en discriminatie* [Employment and discrimination], Deventer, Kluwer, 1992, 148-180.

Wolff, D.J.B. de, et al. (eds.), *Gelijke behandeling: oordelen en commentaar 2002* [Equal treatment: opinions and commentary 2002], Deventer: Kluwer, 2003.

