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Thematic study Netherlands - Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

Waldijk, C.; Lawson, R.A.; Koffeman, N.R.

Citation

Waldijk, C., Lawson, R. A., & Koffeman, N. R. (2010). *Thematic study Netherlands - Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity*. Vienna: European Union Agency for Fundamental Rights (FRA). Retrieved from <https://hdl.handle.net/1887/16372>

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

updated version

Kees Waaldijk
Rick Lawson
Nelleke Koffeman

Leiden, the Netherlands
April 2010

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Executive summary

Implementation of Employment Directive 2000/78/EC

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

The GETA outlaws any direct or indirect ‘distinction’ between people on several grounds including ‘heterosexual or homosexual orientation’. The concept of ‘distinction’ also includes harassment, sexual harassment and instruction to make a distinction. The GETA covers employment, liberal professions, organisations of employees, employers or professionals, and the provision of goods or services. In December 2008 the government has introduced a bill to bring the definitions of direct and indirect discrimination more in line with Directive 2000/78/EC.

Excluded from the GETA are ‘requirements which, in view of the private character of the employment relationship, may reasonably be imposed on the employment relationship’ are excluded from the GETA, although the government is preparing legislation to bring this exception more in line with Directive 2000/78/EC.

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

The GETA contains an exception for institutions founded on religious principles. They may impose ‘requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post’, unless these requirements lead to a distinction based ‘on the sole fact’ of (for example) homosexual orientation. The European Commission has criticised the absence of legitimacy and proportionality as conditions for these requirements. The government has announced legislation that would make the wording of this exception slightly more in line with Directive 2000/78/EC.

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

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

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

The GETA has established the Equal Treatment Commission (ETC). The ETC is a semi-judicial independent body, the decisions of which are *non-binding* but nevertheless authoritative. The ETC can hear and investigate cases, may conduct an investigation on its own initiative, conducts surveys and issues reports and recommendations. Victims can choose to take a case either to the ETC or to court or to both.

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

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

Freedom of movement

When it comes to the legal situation regarding partners of EU citizens in the context of the freedom of movement, Dutch law makes no distinction between same-sex partners and different-sex partners. Neither does Dutch law make a distinction between couples of two EU citizens and couples of an EU citizen and a third country national partner. Dutch law provides for registered partnership and civil marriage for both same-sex and different-sex couples, but foreign same-sex partners of Dutch citizens do not always enjoy full freedom of movement in other Member States.

Asylum and subsidiary protection

It is standing policy and standing jurisprudence in the Netherlands that an LGBT asylum seeker is eligible for refugee status and thus for a residence permit. Furthermore, an LGBT asylum seeker can be eligible for a residence permit, if s/he has substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return. In the third place, the situation of LGBT persons in the country of origin can be a reason for so-called protection for humanitarian reasons.

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

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

Family reunification

Non-EU family members of Dutch citizens and of lawfully residing foreigners have a right to a residence permit for the purpose of family reunification. The law makes no distinction between same-sex and different-sex partners.

Freedom of assembly

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

For several decades demonstrations/manifestations in favour of tolerance of LGBT people have been taking place. The authors of this report are not aware of any demonstration against tolerance of LGBT people in the Netherlands in the period 2000-2009.

In 1982 a large-scale demonstration in favour of tolerance of LGBT people was violently disturbed. These disturbances led to various new policy initiatives on LGBT matters, both locally and nationally. After 1982 incidental disturbances have taken place.

Hate speech and criminal law

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

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

Neither the Penal Code nor the Code of Criminal Procedure identify homophobic motivation as an aggravating factor in sentencing. However, the Instruction on Discrimination for the Public Prosecution Service requires the public prosecutor to increase the sentence s/he demands by 25 per cent in the case of an offence with a discriminatory aspect. Furthermore, there are examples of cases in which the court

takes a (anti-homosexual) discriminatory aspect of an offence into account in sentencing.

Transgender issues

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

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

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

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

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

Miscellaneous

In recent years the Dutch media have reported an increase in violence against LGBT people, although there are no precise statistics in this respect. The number of incidents of homophobic discrimination reported to anti-discrimination bureaus increased in the period 2002-2008. Not all victims report their case, and a higher number of reports may be the result from increased publicity.

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

Good practices

One important achievement in tackling discrimination on grounds of sexual orientation in Dutch law is the gender neutrality of marriage, registered partnership and rules on *de facto* cohabitation. More and more parenting rights have or will become gender neutral, too.

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

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

Within the police forces, networks have been set up representing the interests and expertise of LGBT people within and outside the police. In some regions special telephone number and/or website is available for people wanting to report a homophobic offence.

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

Several teaching materials aimed at making homosexuality the subject of discussion in secondary education have been developed. Recently the government has announced that sexual diversity will become part of the primary objectives of primary and secondary education.

A. Implementation of Employment Directive 2000/78/EC¹

A.1. Main features of implementation

In the Netherlands, the principles of equality and non-discrimination are firmly enshrined in various realms of the law. Of particular importance are the *Grondwet* [Constitution], the *Algemene wet gelijke behandeling (Awgb)* [General Equal Treatment Act (GETA)], the *Wetboek van Strafrecht* [Penal Code] and specific additional statutory non-discrimination acts and provisions. Sexual orientation discrimination is covered – explicitly or implicitly – by almost all these prohibitions.² Family law is of obvious significance as well, since Dutch law provides for registered partnership and civil marriage for both same-sex and different-sex couples. Moreover, since the Netherlands’ constitutional system adheres to a ‘monist theory’ of international law (provided in Articles 93 and 94 of the Constitution), international equality guarantees binding upon the Netherlands automatically filter into the national legal system.³ In this connection it may be noted that the Netherlands is one of few EU Member States which ratified Protocol 12 to the European Convention on Human Rights (ECHR).

The Dutch Constitution since 1983 contains a non-discrimination clause (second sentence of Article 1): *Discrimination on grounds of religion, belief, political*

¹ The 2008 version of this report was written by Nelleke Koffeman, together with Rick Lawson, Tom Barkhuysen, Janneke Gerards, Maarten den Heijer, Rikki Holtmaat and Kees Waaldijk, all working at Leiden Law School. In 2010 this report was updated by Kees Waaldijk (www.emmeijers.nl/waaldijk).

Dutch legislation (by Act of Parliament or by Royal Decree) is published in the *Staatsblad* [Law Gazette], and ministerial rules and regulations in the *Staatscourant* [Government’s Gazette]. Both publications are available at: www.officielebekendmakingen.nl. Consolidated legislation is available at: www.wetten.nl.

Dutch judicial decisions, since 1999, have a *Landelijk Jurisprudentie Nummer (LJN)* [National Jurisprudence Number]; under that number they are often available at: www.rechtspraak.nl.

Opinions of the *Commissie Gelijke Behandeling (CGB)* [Equal Treatment Commission (ETC)] are available at: www.cgb.nl.

² See K. Waaldijk (2004) ‘The Netherlands’, in: K. Waaldijk and M. Bonini-Baraldi (eds) *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden, available at: <http://hdl.handle.net/1887/12587> (12.02.2010); hereafter cited as: Waaldijk (2004).

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

*opinion, race or sex or on any other grounds whatsoever shall not be permitted.*⁴ The wish in Parliament also to cover anti-homosexual discrimination was the main reason for inserting the words ‘or any other grounds whatsoever’.⁵ As confirmed in case law the ‘other grounds’ do indeed include sexual orientation.⁶

Article 429*quater*(1) of the Penal Code makes it a criminal offence to ‘discriminate against persons on the grounds of their race, religion, beliefs, sex or heterosexual or homosexual orientation’, but only if a person does this in the execution of a ‘profession, business or official capacity’.⁷ Most employers fall under one of these three categories. Complicity in activities with the aim of discrimination on any of these grounds, or financial or any other material support of such discrimination is punishable under Article 137f of the Penal Code. For the purposes of this provision, Article 90*quater* of the Code defines *discrimination* as ‘any form of distinction or any act of exclusion, restriction or preference that intends or may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms in the political, economic, social or cultural field, or in any other area of society’.⁸

Furthermore, the ground of sexual orientation is covered by the General Equal Treatment Act (GETA) of 1994.⁹ In 2004, the 1994 Act was amended by the *EG-Implementatiewet Awgb* [EC Implementation Act GETA].¹⁰ Currently, the government is preparing a bill to incorporate several author laws into the GETA. At

⁴ Article 1, sentence 2, Constitution: ‘*Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan.*’ In force since 17.02.1983 (*Staatsblad* (1983) 70).

⁵ See K. Waaldijk (1986/1987) ‘Constitutional Protection Against Discrimination of Homosexuals’, in: *Journal of Homosexuality*, Vol. 13-2/3, p. 59-60, available at: <http://hdl.handle.net/1887/3607> (12.02.2010).

⁶ *Gerechtshof Amsterdam* [Amsterdam Court of Appeal], 10.12.1987, *NJCM-Bulletin* 1989, 305 at 315, available at: <http://hdl.handle.net/1887/4078> (NJCM is the Dutch section of the International Commission of Jurists); and Waaldijk (2004), p. 342.

⁷ The full text of Article 429*quater*(1) of the *Wetboek van Strafrecht* [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.*’ As of 1 January 2006, Article 429*quater*(2) gives a slightly more limited prohibition of discrimination on grounds of physical or mental disability.

⁸ The full text of Article 90*quater* 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.*’ See Waaldijk (2004), p. 345.

⁹ *Staatsblad* (1994) 230, in force 01.09.1994. See the English translation of the current version of the GETA at the website of the Equal Treatment Commission, www.cgb.nl (05.02.2010).

¹⁰ *Staatsblad* (2004) 119, amendments in force 01.04.2004.

the same time several changes in content and terminology will be made, including some of those discussed below.¹¹

As of 1 August 2009 discrimination is also covered by the law on health and safety at work. Article 3(2) of that law requires every employer to take measures to prevent (or if prevention is impossible, to reduce) ‘psycho-social work pressure’.¹² Article 1(3) now includes direct and indirect discrimination in the definition of the latter term. Articles 33 and 34 enable the inspectors for health and safety at work to impose a fine of up to €9,000 for any breach of Article 3.

The GETA outlaws any (direct or indirect) ‘distinction between people on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’ (Article 1), in the field of employment (Article 5), in the field of the liberal professions (Article 6), by organisations of employees, employers or professionals (Article 6a) and in providing goods or services, in concluding, implementing or terminating agreements thereon and in providing educational or careers guidance (Article 7).¹³ According to Articles 1 and 1a of the GETA, the concept of ‘distinction’ includes harassment, sexual harassment and instruction to make a distinction.

In contrast to EC law or any other realm of Dutch anti-discrimination law, the GETA is centred around the concept of distinction (*onderscheid*) in lieu of discrimination (*discriminatie*). The difference between the two concepts is that ‘distinction’ is a ‘neutral’ and ‘discrimination’ a ‘pejorative’ notion. The usage of the correct terminology was the subject of discussion during the implementation of Directives 2000/43/EC and 2000/78/EC and remains a subject of discussion.¹⁴ Recently the government has indicated that although legally it is not necessary to change the wording of the GETA in this respect, it will nevertheless prepare amending legislation so that the word ‘discrimination’ will be used in future.¹⁵

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

¹¹ The bill is expected to be presented to Parliament in the autumn of 2010 (see *Parliamentary Documents Lower House* (2009-2010) 27017, nr. 57, pp. 2-3).

¹² *Arbeidsomstandighedenwet* of 25.10.1999, *Staatsblad* (1999) 184, as amended by the law of 18 July 2009, *Staatsblad* (2009) 318 and 319.

¹³ Waaldijk (2004), pp. 345-346. Article 7 also covers the provision of any goods and services that are *not* related to employment.

¹⁴ See R. Holtmaat (2006) ‘Discriminatie of onderscheid’ in: M. L. M. Hertogh and P. J. J. Zoontjens (eds) *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*, Wolf Legal Publishers, Nijmegen, pp. 15-45.

¹⁵ See *Parliamentary Documents Lower House* (2008-2009) 28481, nr. 5, p. 3.

over ‘preference’ or simply ‘sexual orientation’ was that the latter term could possibly include ‘paedophile orientation’.¹⁶ ‘Bisexual orientation’ is covered by the notion ‘hetero- or homosexual orientation’.¹⁷ Discrimination on the ground of ‘transsexuality’ and ‘transvestism’ is regarded as a form of sex discrimination.¹⁸

Article 1(b) of the GETA defines ‘direct distinction’ as ‘distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’.¹⁹ Article 1(c) of the GETA defines ‘indirect distinction’ as any ‘distinction on the grounds of other characteristics or behaviours than those referred to in Article 1(b) that results in a direct distinction’.²⁰ Recently, the government has sent a bill to Parliament that would make the wording more similar to that of Directive 2000/78/EC. There would then be ‘direct distinction’ where a person would be treated differently than another is, has been or would be treated on any of the grounds. And there would be ‘indirect distinction’ where an apparently neutral provision, criterion or practice would affect persons having a particular sexual orientation (etc.) in particular in comparison with other persons.²¹

The GETA does not provide for specific court procedures. Normal procedures of civil or administrative law can be used to enforce the equal treatment standards.²² All of these procedures lead to a legally binding decision. In practice, in most cases the equality norm is interpreted through a procedure before the *Commissie Gelijke Behandeling (CGB)* [Equal Treatment Commission (ETC)], the officially designated equality body.²³ Compared to civil and administrative court procedures, this is a low threshold procedure. This means inter alia that no legal representation is required and

¹⁶ Holtmaat (2007), p. 16.

¹⁷ See *Parliamentary Documents Lower House* (1991-1992) 22014, nr. 10, p. 13.

¹⁸ For transsexualism see *Gerechtshof Leeuwarden* [Leeuwarden Court of Appeal], 13.01.1995, *Nederlandse Jurisprudentie* 1995, 243 and e.g. ETC 17.02.1998, opinions 1998-12, and ETC 07.11.2000, opinion 2000-73. For transvestism, see ETC 15.11.2007, opinion 2007-201.

¹⁹ Article 1(b) of the GETA 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*’.

²⁰ Article 1(c) of the GETA 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*’.

²¹ Bill of 31.12.2008, *Parliamentary Documents Lower House* (2008-2009) 31832, nrs. 1-4.

²² Jurisdiction in conflicts arising from private law employment contracts lies with the *Kantongerechten* [district courts], mostly without any higher appeal. Jurisdiction over conflicts of public employment lies with the administrative chambers of the *Rechtbanken* [regional courts], with an appeal to the *Centrale Raad van Beroep* [Central Appeals Court]. Conflicts about access to public or private employment can be brought before the regional courts. An employment contract may be terminated by court or by the employer with permission of the *Uitvoeringsinstituut werknemers verzekeringen* (Institute for the administration of employees’ insurances). This body specifically pays attention to possible discriminatory applications for authorisation to dismiss an employee.

²³ Its website is at: www.cgb.nl.

that no fees need to be paid. On the other hand, the opinions of the ETC are non-binding.²⁴

A.1.1. Scope of the GETA

Article 5(1) of the GETA prohibits distinctions in the context of employment. No distinctions shall be made with regard to the following areas: (a) public advertising of employment and procedures leading to the filling of vacancies; (b) the services of an employment agency (inserted by the 2004 EC Implementation Act); (c) the commencement or termination of an employment relationship; (d) the appointment and dismissal of civil servants; (e) terms and conditions of employment; (f) permission for staff to receive education or training during or prior to the employment relationship; (g) promotions; and (h) working conditions (inserted in 2004 by the EC Implementation Act). Article 6 of the GETA covers the liberal professions (*het vrije beroep*) and Article 6a (added by the EC Implementation Act) covers membership and involvement in organisations of employees, employers or professionals and benefits attached to these.²⁵

Article 7 of the GETA makes it unlawful to make a distinction (on the ground of sexual orientation etc.) ‘in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or careers guidance’. It specifies that this prohibition only applies if such a distinction is made: ‘(a) in the course of carrying on a business or practising a profession; (b) by the public sector; (c) by institutions which are active in the fields of housing, social services, health care, cultural affairs or education; or (d) by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly’.²⁶ One implication of this is that administrative decisions and most other unilateral governmental acts do not fall under the scope of Article 7.²⁷

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

The GETA does not apply to legal relations within religious communities, independent sections or associations thereof and within other associations run on a spiritual basis and excludes the application of equal treatment norms to ‘ministers of religion’ (priests, rabbis, imams, et cetera). These are considered to be internal affairs

²⁴ Holtmaat (2007) Summary, p. 5. See also Chapter A.2. below.

²⁵ Waaldijk (2004), pp. 354-355.

²⁶ See the English translation of the GETA at the website of the Equal Treatment Commission, www.cgb.nl (05.02.2010).

²⁷ J. H. Gerards and A. W. Heringa (2003) *Wetgeving Gelijke Behandeling*, Deventer: Kluwer, pp. 72-73, with references to ETC opinions.

of these (religious) organisations. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*.²⁸

Article 5(3) provides that the prohibition of employment discrimination does not cover ‘requirements which, in view of the private nature of the employment relationship, may reasonably be imposed on the employment relationship’.²⁹

A.1.2. Justifications

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

In the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious, philosophical or political principles may impose ‘requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post’.³² The text suggests that requirements other than a particular religion or belief may be imposed. That suggestion also follows from the stipulation in Article 5(2) that ‘these requirements may not lead to a distinction based on *the sole fact of* political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’.³³ The requirements that are set on this basis need to be closely linked to the nature and content of the job. This means that only functions that are related to the ‘mission’ of the organisation can be exempted from the equal treatment norm (i.e. the exception is not applicable when it concerns a gardener for a church). It is also a requirement that the organisation applies a consistent policy in this respect.³⁴

In essence, the ‘sole fact’ construction has played an important role with regard to the question of whether a Christian school may lawfully refuse to employ a cohabiting homosexual in a teaching position. It is stated clearly in the Parliamentary

²⁸ See Article 3 GETA. Holtmaat (2007), p. 45.

²⁹ Article 5(3) GETA 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*’.

³⁰ Holtmaat (2007), p. 43.

³¹ See the English translation of the GETA at the website of the Equal Treatment Commission, www.cgb.nl (05.02.2010).

³² Article 5(2c) gives a slightly differently worded exception for denominational schools; it speaks of ‘requirements on the occupancy of a post which, in view of the institution’s purpose, are necessary for it to live up to its founding principles’. A similar exceptions can be found in Article 7(2) with respect to admission of children to denominational schools.

³³ Waaldijk (2004), pp. 364-365.

³⁴ See ETC 23.12.1996, opinion 1996-118, for an explanation of the criteria.

Documents that the ‘sole fact’ that a person is homosexual, may *in se* not lead to the refusal to hire such a person or to dismiss him/her.³⁵ However, this may be different if ‘additional circumstances’³⁶ are taken into account.³⁷ The Directive’s wording in Article 4(2) seems not to allow the sexual orientation of a person to play any role, since only the religion or belief of the person concerned may be taken into account with regard to the ethos of the organisation. Examples given by the government during the parliamentary discussions and by the ETC in its opinions regarding ‘additional circumstances’ are all related to behaviour or circumstances that relate to the religious ethos of the organisation.³⁸

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

A.1.3. Existing gaps in implementation

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

A first possible gap in the implementation of the Employment Directive concerns the definition of indirect discrimination. In the GETA this definition 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 can be regarded as being not fully in accordance with Article 2(2b) of the Directive.⁴² That is also the opinion of the European Commission, which stated that the Directive requires that people who are

³⁵ *Parliamentary Documents Upper House* (1992-1993) 22014, nr. 212c, p. 10-11.

³⁶ In Parliament the example was given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabits with a same-sex partner. According to the example, the teacher may reasonably be expected to elaborate in his classes upon the concept of ‘marriage’ in line with the school’s principles. See Memorandum in Reply, *Parliamentary Documents Lower House* (1990-1991) 22014, nr. 5, p. 41.

³⁷ Explanatory Memorandum to the GETA, *Parliamentary Documents Lower House* (1990-1991) 22014, nr. 3, p. 18-19. See also ETC 10.06.196, opinion 1996-39, ETC 29.04.1999, opinion 1999-38, and J. H. Gerards and A. W. Heringa (2003) *Wetgeving Gelijke Behandeling*, Deventer: Kluwer, p. 105.

³⁸ In a recent opinion the ETC interpreted the term ‘additional circumstances’ restrictively: ETC 15.06.2007, opinion 2007-100.

³⁹ See Article 2(3) of the GETA.

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

⁴¹ Reasoned Opinion of the European Commission (31.01.2008) 2006/2444, C(2008)0115. The text of the opinion, in Dutch, is available at: www.cgb.nl/webfm_send/395.

⁴² Waaldijk (2004), pp. 352 and 373.

being disadvantages by neutral provisions, should be able to challenge those provisions.⁴³ This will be remedied by the amendment proposed by the government in 2008.⁴⁴

Secondly, the internal affairs of churches and other spiritual congregations and the profession of priests, rabbis, imams etc. are completely exempted from the provisions of the GETA, because Article 3 of the GETA says that this Act does not apply to: '(a) legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature; (b) the office of minister of religion'.⁴⁵ This *unconditional* exemption of harassment and other forms of discrimination can be said to be incompatible with Articles 2(5), 4(1) and 4(2) of the Directive.⁴⁶ Other experts conclude that Article 3 of the GETA is in line with the exceptions that are possible under the EC Directives.⁴⁷ The Dutch government disagrees with the European Commission whether or not the exemption of Article 3 of the GETA is compatible with Article 4(2) of the Directive. The Commission calls it a 'general' exception, and stipulates that national legislation should clearly indicate the boundaries required by Article 4(2) of the Directive,⁴⁸ whereas the government stresses that the exception is limited to the internal affairs of churches etc., and that therefore – given the freedom of religion and the separation of church and state – no legislative changes are necessary.⁴⁹

Furthermore, there are the exemptions (see Chapter A.1.2 above) for organisations based on religion or belief (Article 5(2) GETA). Insofar as these exemptions leave some scope for discrimination on grounds other than religion or belief, they can be regarded as incompatible with Article 4 of the Directive.⁵⁰ Furthermore, the European Commission is of the opinion that Article 5(2) of the GETA should specify that a 'double test' needs to be met, i.e. that the aim must be legitimate and that the requirement must be proportionate to that aim. According to the Commission the Netherlands have therefore not complied with Article 4(1) and 4(2) of the Directive. However, it is not certain that the European Commission disapproves strongly, because in the *dictum* of its reasoned opinion it does not explicitly mention its objection to Article 5(2) of the GETA.⁵¹

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

⁴⁴ See the bill of 30.12.2008 (mentioned above in Chapter A.1.), published in *Parliamentary Documents Lower House* (2008-2009) 31832, nrs. 1-4.

⁴⁵ See the English translation of the GETA at the website of the Equal Treatment Commission, www.cgb.nl (05.02.2010).

⁴⁶ Waaldijk (2004), p. 373.

⁴⁷ B. P. Vermeulen (2006) 'Kerkgenootschap en geestelijk ambt', in: M. L. M. Hertogh and P. J. J. Zootjens (eds) *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 247-248.

⁴⁸ Reasoned Opinion of the European Commission (31.01.2008) 2006/2444, C(2008)0115, pp. 5-6.

⁴⁹ *Parliamentary Documents Lower House* (2008-2009) 27017, nr. 6, pp. 3-4.

⁵⁰ Waaldijk (2004), p. 373. See also Holtmaat (2007), p. 47, arguing that the sole fact construction is compatible with the Directive.

⁵¹ Reasoned Opinion of the European Commission (31.01.2008) 2006/2444, C(2008)0115, pp. 6-7.

In any event, the government has indicated in September 2009 that it is preparing a bill to make the wording of the exceptions of Article 5(2) more similar to that of Article 4 of the Directive.⁵² For this it is considering a wording suggested by the Council of State:⁵³ ‘A difference in treatment on grounds of requirements that are related to religion or belief, made by an organisation (or school) based on religion or belief, shall not be discrimination, if – because of the nature of the specific occupational activities or of the context in which they are carried out, and in light of the organisation’s ethos and the good faith and loyalty necessary for its realisation – these requirements constitute a genuine, legitimate and justified occupational requirement.’ To that the government would want to add, that such a difference in treatment should apply the constitutional provisions and should not justify discrimination on an another ground.⁵⁴ Such a wording would indeed be more like that of the Directive, but it would still be wider than permitted by Article 4(2) of the Directive, which only speaks of differences of treatment ‘based on a person’s religion or belief’, whereas the new Dutch exception would cover differences of treatment ‘based on requirements that are related to religion or belief’. The issue remains highly controversial.

Conditional exceptions exist not only for organisations based on religion or belief, but also for political organisations (Article 5(2b) of the GETA). It has been argued that it has not been demonstrated that these exceptions are necessary for the protection of the freedom of association of political organisations as meant in Article 2(5) of the Directive.⁵⁵ In its reasoned opinion the European Commission does not deal with this exemption.⁵⁶

Furthermore, the exception of Article 5(3) of the GETA for ‘requirements which, in view of the private nature of the employment relationship, may reasonably be imposed on the employment relationship’,⁵⁷ can be considered to be too wide compared to Article 4(1) of Directive 2000/78/EC.⁵⁸ The government has indicated in December 2008 that it will prepare legislation to make the text of Article 5(3)

⁵² See *Parliamentary Documents Lower House* (2008-2009) 28481, nr. 6, p. 3.

⁵³ *Idem*, nr. 7, p. 18.

⁵⁴ *Idem*, nr. 6, p. 3.

⁵⁵ Waaldijk (2004), p. 373. See also, however, P. J. J. Zoontjes (2006) ‘Gelijkheid, verenigingsvrijheid en privacy’, in: M.L.M. Hertogh and P.J.J. Zoontjes (eds) *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 175-216. The latter author concludes that Articles 5 and 7 GETA are compatible with European law.

⁵⁶ Reasoned Opinion of the European Commission (31.01.2008) 2006/2444, C(2008)0115.

⁵⁷ See the English translation of the GETA at the website of the Equal Treatment Commission, www.cgb.nl (05.02.2010).

⁵⁸ See Reasoned Opinion of the European Commission (31.01.2008) 2006/2444, C(2008)0115, pp. 4-5. See also P. J. J. Zoontjes (2006) ‘Eenzijdig overheidshandelen’, in: M. L. M. Hertogh and P. J. J. Zoontjes (eds) *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 115-174.

more in line with that of the Directive; the word ‘reasonably’ will be replaced with a criterion including legitimacy and proportionality.⁵⁹

As is pointed out in Chapter A.2.3. Sanctions (below), one may conclude that the Directive’s requirement that sanctions be ‘effective’, ‘dissuasive’ and ‘proportionate’ seems not to be met by the Dutch legislation.

A further possible gap in implementation concerns harassment. Before the implementation of Directives 2000/43 and 2000/78/EC, ‘harassment’ was not defined as a concept in Dutch equal treatment legislation. Post-implementation, ‘harassment’ is explicitly defined as a form of ‘distinction’. The current definition of ‘harassment’ in the GETA requires that an applicant establishes: (1) that the harassment is ‘ground-related’, *and* (2) that it has the purpose or effect of violating the person’s dignity, *and* (3) that it has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In all, this test is stricter than that adopted by the Dutch Equal Treatment Commission in its pre-implementation case law. Hence, the Dutch approach falls short of the *non-regression clause* in Article 8(2) of the Employment Equality Directive.⁶⁰

A.2. The Equal Treatment Commission

A.2.1. Mandate of the ETC

The GETA establishes the Equal Treatment Commission (ETC), a semi-judicial independent body whose case law is *non-binding* but nevertheless authoritative.⁶¹ Neither the parties nor the courts are bound by the opinions of the ETC. If the ETC finds discrimination to have occurred, but the discriminator chooses not to follow the opinion of the ETC, or if the ETC finds that discrimination did not take place, the aggrieved victim may go before a court to ask for a binding remedy (e.g. an order to obtain damages). It is also possible to go to court without first going to the ETC.

The ETC can hear and investigate cases on the basis of a written request from: (a) someone who thinks that a prohibited distinction is being or has been made to his or her disadvantage; (b) natural or legal persons who want to know whether they themselves are making a prohibited distinction; (c) a court or other adjudicator who has to decide on an allegation of prohibited distinction; (d) a works council or employee participation body which thinks that a prohibited distinction is being made

⁵⁹ See *Parliamentary Documents Lower House* (2008-2009) 28481, nr. 5, p. 5.

⁶⁰ Holtmaat (2007) Summary, p. 3.

⁶¹ Holtmaat (2007) Summary, p. 5.

in the relevant company or organisation; or (e) an association or foundation promoting the interests of persons protected by the Act.⁶²

Besides this, the ETC may conduct an investigation on its own initiative. ‘All parties involved in any investigation by the ETC are under the duty to provide the ETC with all requested information. A failure to do so may result in criminal law proceedings.’⁶³ The mandate of the ETC covers conducting surveys and issuing reports and recommendations as well. In short, the ETC (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination.⁶⁴

The mandate of the ETC does *not* cover the task of assisting victims of discrimination. This latter function is seen as contradictory to the main task of the ETC, which is to hear and investigate cases of (alleged) discriminatory practices or behaviour.⁶⁵ Since January 2005 the ETC can refer parties to an external mediator. The ETC is financing mediation in disputes that fall within the scope of the ETC.⁶⁶

In December 2009 the Government published a draft-bill to create a *College voor Mensenrechten en Gelijke Behandeling* [Board for Human Rights and Equal Treatment], which would replace the ETC. The existing tasks of the ETC would transfer unamended to this new Board. Its tasks would also include making studies and recommendations about other human rights.⁶⁷

A.2.2. The procedure before the ETC

No legal representation in cases before the ETC is required. Both under the ordinary civil and administrative law procedures and the ETC procedure, organisations (NGOs and other associations) have legal standing.⁶⁸ (See Chapter A.3. Civil society organisations). Moreover, the procedure before the ETC is free of charge. There are no strict rules of evidence in a ETC procedure; the ETC applies the shift of the burden of proof described in Article 10 of Directive 2000/78/EC.⁶⁹

⁶² Article 12, GETA.

⁶³ Holtmaat (2007) Summary, p. 5.

⁶⁴ Holtmaat (2007) Summary, pp. 5-6.

⁶⁵ Holtmaat (2007) Summary, p. 5.

⁶⁶ See the ETC’s mediation brochure (in English) at: www.cgb.nl/artikel/publications (14.02.2010).

⁶⁷ The text of the draft-bill is available at:

www.internetconsultatie.nl/collegevoormensenrechtenengelijkebehandeling (16.04.2010).

⁶⁸ Holtmaat (2007) Summary, p. 5.

⁶⁹ Waaldijk (2004), p. 370.

A.3. Sanctions

According to Article 8(1) of the GETA, discriminatory dismissals and victimisation dismissals are ‘voidable’ (*vernietigbaar*).⁷⁰ This applies with regard to both public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. S/he can also claim to be reinstated in the job. Contractual provisions which are in conflict with the GETA shall be null and void (Article 9 of the GETA).⁷¹

In addition to these specific and general voiding provisions, the general sanctions of administrative law (in the case of public employment), and of contract and tort law (in the case of private employment or provision of goods and services) apply. These include payment of damages and court orders under a *dwangsom* [*astreinte*].⁷²

One expert maintained that ‘Dutch courts are very restrictive in granting damages that are not strictly material damages (e.g. wages not paid). Immaterial damages (e.g. hurt feelings) will be only minimally compensated for.’⁷³

Article 429*quater*(1) of the Penal Code threatens with imprisonment of up to two months or a fine of up to 7,600 Euro anyone who (in an official capacity, in a profession or in a business) discriminates on the ground of sexual orientation, sex, etc. Complicity in activities with the aim of discrimination on the grounds of sexual orientation, sex, etc., or financial or any other material support of such discrimination is punishable under Article 137f of the Penal Code with imprisonment of up to three months or a fine of up to 3,800 Euro.

Articles 13(2), 13(3) and 15 of the GETA mention some additional sanctions. Sanctions under these articles are initiated by the ETC, not by the courts. Under Article 13(2), the ETC may make recommendations (in an opinion) to the party found to have made an unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an opinion to the Ministers concerned, to organisations of employers, employees, professionals, public servants, or consumers, and to relevant consultative bodies.⁷⁴ Under Article 15(1) the ETC may bring legal action with a view to obtaining a judicial ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.⁷⁵ This power

⁷⁰ The term ‘voidable’ (*vernietigbaar*) means that it is not automatically void but that this may be established during a court procedure.

⁷¹ Holtmaat (2007), p. 61.

⁷² Waaldijk (2004), p. 369.

⁷³ Holtmaat (2007), p. 62.

⁷⁴ Examples of ETC opinions that have been forwarded to the government are: ETC 20.04.2009, opinion 2009-31, and ETC 16.11.2009, opinions 2009-107 and 2009-108, all summarised in Annex 1 of this report.

⁷⁵ Holtmaat (2007), p. 61.

must be regarded in light of the fact that the ETC's opinions are not binding. The ETC, however, has never made use of this possibility.⁷⁶

Doubts have been expressed as to whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement of Directive 2000/78/EC that sanctions be 'effective, proportionate and dissuasive'.⁷⁷ One problem is that the ETC cannot impose sanctions. Most discriminatory acts (such as a discriminatory termination of a contract) are not automatically void, but need to be contested in court. Another problem is that the equal treatment legislation itself hardly mentions any sanctions. Victims have to know which sanctions normal civil law and administrative law contains. Therefore, it has been proposed in legal doctrine to include the sanctions (that are available under civil and administrative law) in the GETA in order to clarify this point for both the victims and perpetrators of discrimination.⁷⁸

A.4. Civil society organisations

Under Article 3:305a and 3:305b of the Dutch *Burgerlijk Wetboek* [Civil Code] and Article 1:2(3) of the *Algemene wet bestuursrecht* [General Act on Administrative Law] interest organisations can take legal action in court, provided that they are an association or foundation with full legal powers according to the law, and provided that their statutory goals cover this particular interest.⁷⁹ From time to time they offer support to individuals starting their own procedure.

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

Organisations also have the right to ask the ETC to start an investigation. The interest group must again have full legal powers (it must be an association or foundation according to the law) and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts (Article 12(2e) of the GETA).⁸⁰ However, the alleged victims need to be informed, and can stop the ETC from starting an investigation (Article 12(3) of the GETA).

⁷⁶ Holtmaat (2007), p. 63. See Chapter A.3. for the role of organisations in the procedure before the ETC.

⁷⁷ Holtmaat (2007), p. 61; Waaldijk (2004), p. 369; R. Holtmaat (2001) 'Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag', in: T. Loenen *et al.* (eds) *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer: Kluwer, pp. 105-124; and I. P. Asscher-Vonk (1999) 'Sancties' & 'Conclusie Juridische Analyse', in: I. P. Asscher-Vonk and C. A. Groenendijk (eds) *Gelijke Behandeling Regels en Realiteit*, Den Haag: SDU, pp. 202-234 and pp. 301-319.

⁷⁸ See e.g. Asscher-Vonk (1999) *idem*, p. 233.

⁷⁹ Holtmaat (2007), pp. 59-60.

⁸⁰ Holtmaat (2007), p. 60.

Several gay and lesbian interest groups, and also several general anti-discrimination foundations, have been recognised as having standing. In the LGBT context they were the following: *Stichting Landelijk Koördinatiepunt Groepen Kerk en Homoseksualiteit* [the national coordinating foundation on church and homosexuality]; *Nederlandse Vereniging tot Integratie van Homoseksualiteit COC* [Dutch Association for the Integration of Homosexuality COC]; *Nederlandse Vereniging tot Integratie van Homoseksualiteit COC Zwolle* [Zwolle branch of the Dutch Association for the Integration of Homosexuality COC]; *Stichting Bureau Discriminatiezaken Den Haag* [The Hague Anti-discrimination Bureau] and *Stichting Meldpunt Discriminatie Amsterdam* [Amsterdam Anti-discrimination Bureau].⁸¹

The local and regional Anti-Discrimination Bureaus are partly subsidised by the government, as is their association and expertise centre (which is called *Art.1* after the non-discrimination provision in Article 1 of the Constitution).⁸² One of their tasks is assisting victims of discrimination. They are not formally designated bodies in the sense of Article 13 of the Racial Equality Directive, but they do have this function in practice.⁸³

According to a new law every local authority must give its citizens – by the end of 2009 – access to a ‘anti-discrimination provision’.⁸⁴ This can be an existing local or regional Anti-Discrimination Bureau. The law stipulates two tasks for each anti-discrimination provision: independent assistance to persons complaining about discrimination in the sense of several other laws, including the GETA and the Penal Code, and registration of all such complaints that they receive. For this registration the Minister for the Interior prescribes a standard form.⁸⁵

A.5. Case law

The first reported Dutch case law on dismissals on grounds of sexual orientation (in the sense of an individual characteristic or having a same-sex relationship) dates from 1950.⁸⁶ In these early cases, however, up to the 1970s, the court did not consider the dismissal to be contrary to any written or unwritten rule.

⁸¹ ETC 19.12.1997, opinion 97-135; ETC 15.12.1998, opinion 98-137; ETC 27.04.1999, opinion 199-36; ETC 15.03.2002, opinion 02-24; ETC 08.03.2007, opinion 2007-36; ETC 15.06.2007, opinion 2007-100.

⁸² See www.art1.nl.

⁸³ Holtmaat (2007) Summary, p. 5.

⁸⁴ *Wet gemeentelijke antidiscriminatievoorzieningen* of 25.06.2009, *Staatsblad* (2009) 313.

⁸⁵ Regulation of 19.01.2010, *Staatscourant* (2010) 959.

⁸⁶ Rotterdam District Court, 14.11.1950 (*Nederlandse Jurisprudentie* 1951, 355); Utrecht District Court, 29.07.1955 (*Nederlandse Jurisprudentie* 1971, 137); Haarlem District Court, 12.04.1957 (*Nederlandse Jurisprudentie* 1957, 458); *President Rechtbank Arnhem* [President of Arnhem Regional Court], 28.05.1970 (*Nederlandse Jurisprudentie* 1970, 424); Leeuwarden District Court, 29.02.1972 (*Nederlandse Jurisprudentie* 1972, 356). The 1955 decision of Utrecht District Court

In two cases that were decided in the 1980s (so before the anti-discrimination legislation of 1994 came into force) the courts avoided saying anything about the acceptability of the alleged sexual orientation discrimination. Both cases dealt with the non-renewal of a temporary employment contract for teachers in Catholic education who were very open about their lesbian and gay orientation. In the first case the court did not consider the school bound to give reasons for the non-renewal; in the second case the court did not consider it relevant that the employer based their decision not to renew the contract on the fact that the teacher openly lived in a homosexual relationship.⁸⁷

The first positive decision from a Dutch court about a claim of sexual orientation discrimination in employment was given in 1982 (so even before the constitutional prohibition of discrimination came into force in 1983).⁸⁸ The case was brought by a gay man who had been discharged from the military on the grounds of 'unsuitability because of illness'. In fact, the military authorities had relied heavily on the man's homosexuality in concluding that he was 'ill'. The court ruled that 'unsuitability because of illness' may not be derived from the sole fact of homosexual orientation.⁸⁹

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).⁹⁰

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

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 03.12.1971 the Supreme Court dismissed the action (*Nederlandse Jurisprudentie* 1971, 137).

⁸⁷ President of 's-Hertogenbosch Regional Court, 16.07.1982 (*NJCM-Bulletin* 1982, p. 334); Regional Court Maastricht, 21 May 1987 (case 2401/1985, unpublished).

⁸⁸ *Centrale Raad van Beroep* [Central Appeals Court, the highest court for cases relating to public employment], 17.06.1982 (*Militair Rechterlijk Tijdschrift*, 1982, 300).

⁸⁹ See A. Mattijssen (1992) 'Wie niet waagt, die niet wint. Homodiscriminatie en civielrecht' in: M. Moerings and A. Mattijssen (eds) *Homoseksualiteit en recht*, Arnhem: Gouda Quint, p. 21.

⁹⁰ Waaldijk (2004), pp. 346-347.

B. Freedom of movement

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

B.1. Same-sex partners of EU citizens in the Netherlands

From 1975, unmarried different-sex and same-sex partners have been recognised for purposes of immigration to the Netherlands (and later for an increasing number of other purposes).⁹¹ In addition, since 1998 Dutch law has provided for registered partnership for both same-sex and different-sex couples.⁹² And in 2001 civil marriage was opened up for same-sex couples.⁹³

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

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

In addition, the unmarried and unregistered partner (same-sex or different-sex) with whom the EU citizen is in a duly attested stable long-term relationship has a right to residence. The same goes for the minor children of this partner (Article 8.7 (4), Aliens Decree). Until 2009 the relationship could be attested by the partners signing

⁹¹ K. Waaldijk (2005) *More or less together: levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries*, Paris: Institut National d'Études Démographiques, p. 147, available at: <http://hdl.handle.net/1887/12585> (12.02.2010).

⁹² Law of 05.07.1997 (*Staatsblad* (1997) 324), in force since 01.01.1998.

⁹³ *Wet openstelling huwelijk* [Act on the Opening Up of Marriage] of 21.12.2000, *Staatsblad* (2001) 9, in force since 01.04.2001.

a *relatieverklaring* [declaration of relationship].⁹⁴ As of 31.01.2009 the partners should normally also produce evidence either that they have or recently had a joint household for at least six months, or that they have a child together.⁹⁵

No detailed figures are available on how many same-sex partners of EU citizens are annually allowed (or refused) to reside in the Netherlands. However, for a recent study a sample of 336 cases were examined involving successful applications of non-EU citizens claiming residence in the Netherlands on the basis of EU law, because their spouse/partner was a EU (or EEA or Swiss) citizen. It was found that 15 of these cases involved a same-sex partner. The sample of 336 represented around 10 per cent of all such cases having been decided in the years 2005-2008. It should be noted however that only for two thirds of all honoured applications of that period the study could establish both the citizenship of the sponsor and the type of (family) relationship between applicant and sponsor. Furthermore, the number of successful applications increased from around 900 in 2005 to around 2,500 in 2008, while the annual number of rejected applications increased similarly from around 100 to around 300 during that period.⁹⁶ Taking all that into account, it could be estimated – very tentatively – that in these four years perhaps over 200 same-sex partners were admitted to the Netherlands under Directive 2004/38/EC.

B.2. Same-sex partners of Dutch citizens in other Member States

The Dutch recognition of same-sex marriage and registered partnership *should* lead to the conclusion that this enables LGBT partners of Dutch citizens to benefit from freedom of movement in other Member States. However, daily practice in several Member States proves that this is not the reality.⁹⁷ The only international treaty in this field, the 2007 Convention on the Recognition of Registered Partnership, has so far only been signed by Portugal and Spain.⁹⁸ The Kingdom of the Netherlands has actively contributed to the realisation of this treaty,⁹⁹ but has not yet signed, let alone ratified it.

⁹⁴ *Vreemdelingencirculaire* [Aliens Circular] B10/5.2.2.

⁹⁵ Aliens Circular A2/6.2.2.2.

⁹⁶ A. Schreijenberg et al. (2009) *Gemeenschapsrecht en gezinsmigratie. Het gebruik van het gemeenschapsrecht door gezinsmigranten uit derde landen*, The Hague: Ministry of Justice, pp. 11, 16, 29, 31 and 83; available at: www.wodc.nl/onderzoeksdatabase/neveneffecten-van-toepassing-van-het-europese-gemeenschaps-recht-bij-gezinsmigratie.aspx?cp=44&cs=6796 (14.02.2010).

⁹⁷ For example, Germany/Verwaltungsgericht Karlsruhe, 09.09.2004, *Aktenzeichen* AZ 2 K 1420/03, available at: www.lsvd.de/bund/lpartg/vgkarlsruhe.pdf (13.02.2010). See Annex 1.

⁹⁸ Convention 32 of the International Commission on Civil Status, adopted 22 March 2007, opened for signature at Munich on 5 September 2007, see www.cieci.org (13.02.2010).

⁹⁹ See the answer of 16 July 2008 of the Minister of Justice to parliamentary questions, *Proceedings of the Lower House, Appendix* (2007-2008) nr. 3078.

Recently, the *Wetenschappelijk Onderzoeks- en Documentatiecentrum (WODC)* [Scientific Research and Documentation Centre] of the Ministry of Justice commissioned an evaluation of the legislation introducing registered partnership and of the *Wet openstelling huwelijk* [Act on the Opening Up of Marriage].¹⁰⁰ The research was carried out by researchers from the University of Utrecht who came to the conclusion that the legal recognition of same-sex marriages and registered partnerships abroad, even within the European Union, is problematic. For example, it was unclear whether the Dutch same-sex marriage and/or same-sex registered partnership would be recognised at all in France and Italy. In other EU Member States, such as Germany and the United Kingdom, and also in Switzerland, Dutch same-sex marriages were not recognised as a marriage, but as a registered or civil partnership.¹⁰¹ The same seems to be the case in the Czech Republic, Denmark, Finland, Luxembourg and Slovenia.¹⁰²

Since in 2009 marriage has been opened up to same-sex couples in Sweden (and also in Norway), Dutch same-sex marriages will now be fully recognised there, as they already were in Belgium and Spain. Recent information received (by email) from a French expert suggests that in France foreign registered partnerships will now be recognised for certain purposes,¹⁰³ and that in France foreign same-sex spouses will be recognised, too, at least if both are citizens of countries that allow same-sex couples to marry. An Irish expert suggests (by email) that in Ireland the same-sex spouse of a Dutch citizen could be admitted under the rules (implementing Directive 2004/38/EC) for the ‘partner with whom the Union citizen has a durable relationship, duly attested’, although their marriage would not be recognised as such, and not for most other purposes.

¹⁰⁰ K. Boele-Woelki et al. (2007) *Huwelijk of geregistreerd partnerschap?, Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap*, Deventer: Kluwer.

¹⁰¹ Boele-Woelki et al. (2007) *idem*, p. 190.

¹⁰² Boele-Woelki et al. (2006) ‘The evaluation of same-sex marriages and registered partnerships in the Netherlands’, in: *Yearbook of Private International Law*, Vol. 8, p. 31, available at: <http://igitur-archive.library.uu.nl/law/2009-0226-200927/UUindex.html> (13.02.2010).

¹⁰³ As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 in the French Civil Code, inserted by law 2009-526 of 12.05.2009.

C. Asylum and subsidiary protection

C.1. Sexual orientation as ground for asylum

It is standing policy and standing case law in the Netherlands that the definition of being persecuted for reasons of membership of a particular social group in the sense of Article 1A of the UN Convention relating to the Status of Refugees includes being persecuted for reasons of sexual orientation (*Vreemdelingencirculaire* [Aliens Circular] C2/2.10.2).¹⁰⁴ An asylum seeker who is granted refugee status, is eligible for a residence permit for a fixed period (Article 29(1a), *Vreemdelingenwet* [Aliens Act]). In order to qualify for refugee status the asylum seeker must have a well-founded fear of persecution due to his/her sexual orientation.¹⁰⁵ Such persecution can also exist in countries that do not criminalise homosexuality. Punishment on the basis of a penal provision that only affects homosexuals is considered an act of persecution.¹⁰⁶ However, the sole criminalisation of homosexual acts or of being an LGB person in a certain country does not automatically lead to the conclusion that an LGB person coming from that country is a refugee. The criminal sanction must attain a certain gravity in order to justify recognition as a refugee.¹⁰⁷ Since November 2008 the Aliens Circular considers homosexuals from Afghanistan and homosexuals from Iraq to constitute a ‘risk group’; consequently a lesser degree of evidence regarding the gravity of their persecution is required from them.¹⁰⁸ The Aliens Circular also specifies that LGB asylum seekers should not be required to hide their sexual orientation in their country of origin. On 27.06.2009 another point was added: whenever homosexual acts are criminalised in the country of origin, the asylum seeker should not be required to have invoked the protection of the authorities there.¹⁰⁹

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

¹⁰⁴ This policy was the result of a decision by the *Afdeling Rechtspraak Raad van State (ARRvS)* [Judicial Division of the Council of State] of 13.08.1981, no. A-2.1113, *Rechtspraak Vreemdelingenrecht* 1981, 5.

¹⁰⁵ For specific information on transgender asylum seekers see Chapter G.3 below.

¹⁰⁶ Aliens Circular C2/2.10.2.

¹⁰⁷ ‘s-Gravenhage Regional Court, location ‘s-Hertogenbosch, 12.10.2004, AWB 02/3863, *LJN AR6786*.

¹⁰⁸ Aliens Circular C24/1.3.7 and C24/11.3.13.

¹⁰⁹ Aliens Circular C2/2.10.2. The 2009 amendment (published in *Staatscourant* (2009) 115) was made in response to a suggestion of the national LGBT organisation *COC Nederland*.

Furthermore, the situation of LGBT people in the country of origin can be a reason for so-called protection for humanitarian reasons. This concerns persons who do not qualify for protection under the UN Convention relating to the Status of Refugees nor qualify for subsidiary protection, but for whom the Minister considers that because of pressing humanitarian reasons it cannot be required of the asylum seeker to return to his or her country of origin (Article 29(1c), Aliens Act). Since 18 October 2006 this protection for humanitarian reasons has been applied to Iranian LGBT people.¹¹⁰ This policy was installed after the Minister had first temporarily suspended all expulsions of Iranian homosexual asylum seekers (*besluit- en vertrekmoratorium*).¹¹¹

Same-sex partners and other family members of a refugee can also qualify for a *verblijfsvergunning asiel* [residence permit on asylum grounds]. This concerns the spouse or minor child of the refugee who is *de facto* part of the refugee's family as well as the partner or the child of age who has the same nationality as the refugee and who is dependent on the refugee to such an extent that s/he belongs to the refugee's family for that reason (Article 29(1e) and (1f), Aliens Act).

No detailed figures are available on how many times claims of asylum seekers are based on persecution because of homosexual orientation. However, for a recent study 712 applications for asylum received in the first quarter of 2007 were examined. This sample covered 13 countries of origin, and represented 7 per cent of all 9,750 applications of that year. The study found that 18 cases in the sample involved (alleged) persecution because of homosexual orientation, i.e. 2.5 per cent. The study suggests that the percentage will be lower for the total of 9,750 applications, because some of the selected countries (such as Iran) were specifically chosen for this study because of the likelihood of homosexual asylum seekers coming from there.¹¹² The study discovered that it would be relatively easy, through a search in the computer files of the immigration authority, to find all applications of homosexual and transsexual asylum seekers, and get a complete picture. However, such an analysis has not been made.¹¹³ Therefore the total number of applications on this ground can only be estimated tentatively: perhaps 100 to 200 per year.

Of the 18 applications in the sample, nine were successful, including two on grounds not related to homosexual orientation, plus five as a result of the special policy with respect to Iranian homosexuals. Seven applications were rejected. Two other cases were still pending.¹¹⁴ It seems that rejected applications quite often end up being

¹¹⁰ Aliens Circular C24/12.3.11.

¹¹¹ *Besluit instelling besluitmoratorium en vertrekmoratorium homoseksuele asielzoekers Iran*, Ministerial order of 28.09.2005, *Staatscourant* (2005) 190, p. 12.

¹¹² IND Informatie- en Analysecentrum (2008) *Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*, The Hague: Ministry of Justice, pp. 15-16; available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010).

¹¹³ *Idem*, p. 19. In the sample of the study no case of a transsexual was found; one of the sexual orientation cases concerned an intersexual person (p. 74).

¹¹⁴ *Idem*, p. 74.

contested in court,¹¹⁵ sometimes successfully. This includes cases where the immigration authority was not convinced that the asylum seeker is indeed homosexual and/or that the story of persecution was truthful. To better enable immigration officers to assess the credibility of what asylum seekers tell them about this, a special instruction has been drafted (*Hoorinstructie homoseksuelen*).¹¹⁶ Consultation with several people in the field confirmed that the Dutch immigration authorities do not use technical contraptions to assess a person's sexual attraction to members of either sex.

¹¹⁵ A search at www.rechtspraak.nl (which publishes many but not all judicial decisions) yielded no less than 16 judgments in such cases in 2008 and 2009.

¹¹⁶ See pp. 33 and 76 of the study *Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland* just mentioned.

D. Family reunification

On the basis of Article 3.13 to 3.15 of the Aliens Decree, (non-EU) family members of Dutch citizens and of lawfully residing foreigners have a right to a residence permit for the purpose of family reunification or family formation. The law makes no distinction between same-sex and different-sex partners or between their family members. Family members in the sense of this article are: (a) the adult person who is, according to Dutch Private International Law, legitimately married to the foreigner or who is, according to Dutch law, the registered partner of the foreigner, (b) the adult person who has a lasting and exclusive relationship with the foreigner, provided that certain requirements are met,¹¹⁷ and (c) the minor natural or legitimate child of the foreigner who, in the Minister's opinion, is actually a family member of that foreigner and already was so in the country of origin and who comes under the legitimate authority of the foreigner.¹¹⁸ Thus, Article 4(3) of the Council Directive 2003/86/EC on the right to family reunification is implemented in Dutch law.

Not many figures are available on the number of same-sex partners that have successfully applied for family reunification/formation. However, a recent study of the period July 2003 to February 2006 yielded some figures. Over that period of 32 months there were 23,407 successful applications for a provisional residence permit for a spouse or partner. The study found that 461 of these cases involved same-sex partners, i.e. 2 per cent. Same-sex partners were much more often involved in the 8,296 cases where the sponsor was a Dutch citizen (3.4 per cent or 282 permits) than in the 15,111 cases where the sponsor was a foreigner (1.2 per cent or 179 permits). It should be noted however that the total number of successful applications between 01.07.2003 and 01.11.2004 was more than 50 per cent higher than that between 01.11.2004 and 01.03.2006.¹¹⁹ This is probably due to the increased income and age requirements for family formation that took effect on 1.11.2004. Since then the sponsor needs to be at least 21 years of age, and needs to have an income equal to at least 120 per cent of the minimum wage.¹²⁰

¹¹⁷ According to Article 3.14 the partners should not be so closely related that they would not be allowed to marry under Dutch law, and in general neither partner should be married or in a registered partnership.

¹¹⁸ For each of the three categories a requirement is that the partners actually live together and have a joint household (Article 3.17, Aliens Decree).

¹¹⁹ H. Muermans and J. Liu (2009) 'Gezinsvorming in cijfers', in: *Internationale gezinsvorming begrensd? Een evaluatie van de verhoging van de inkomens- en leeftijdseis bij migratie van buitenlandse partners naar Nederland*, The Hague: Ministry of Justice, pp. 25, 29, 31 and 175, available at: www.wodc.nl/onderzoeksdatabase/de-gevolgen-van-de-aanscherping-van-het-gezinsvormingsbeleid.aspx?cp=44&cs=6799 (01.02.2010).

¹²⁰ Articles 3.15 and 3.22, Aliens Decree.

E. Freedom of assembly

In the Netherlands the right to freedom of assembly is protected in Article 9 of the Dutch Constitution. Moreover, since the Netherlands' constitutional system adheres to a 'monist theory' of international law, Article 11 of the ECHR may be directly applied by national courts (see para. 31 above). The practical consequences of the constitutional right to assembly are covered by the *Wet Openbare Manifestaties* (WOM) [Public Manifestations Act].¹²¹

E.1. Regulation of public demonstrations

There is no obligation to seek permission for a planned gathering for the public expression of a religion or conviction or any other public assembly or demonstration (hereinafter called *demonstration*). Neither is there a general obligation to give prior notice of a planned demonstration. In more detail, Article 4(3) WOM prohibits the city council from asking for prior information about the content of a demonstration. However, for security reasons, the city council may adopt byelaws specifying in which situation a prior notice of a demonstration is required (Article 4(1), WOM). Furthermore, knowledge of the topic (as opposed to the content) of the demonstration might be necessary in order to estimate the risk of counter-demonstrations and to determine the size of the police presence required.¹²² A preventive ban on a demonstration can only be justified in very exceptional cases of *force majeure*, i.e. cases in which it is expected that maintenance of public order, notwithstanding a substantial police presence and a substantial administrative effort, cannot be guaranteed.¹²³ The mayor has the power to give participants in a demonstration instructions (Article 6, WOM). S/he also has the power to give orders to end a demonstration immediately (Article 7, WOM).

E.2. Demonstrations in favour of tolerance of LGBT people

For some decades several demonstrations/manifestations in favour of tolerance of LGBT people have taken place every year in the Netherlands. The most prominent are the We Are Amsterdam Gay Pride (formerly known as Gay Pride Amsterdam) and Pink Saturday (*Roze Zaterdag*). The latter has taken place in a different city each year since 1978. Over the years, the protest character of this demonstration has been

¹²¹ *Staatsblad* (1988) 157.

¹²² J. P. Loof (2007) 'De burgemeester en de demonstratievrijheid. Over beginselen van behoorlijke besluitvorming inzake betogingen', in: *De Gemeentestem*, nr. 7280, pp. 467-481.

¹²³ For example, Maastricht Regional Court, 22.03.2001, *LJN* AB0754, *Jurisprudentie Bestuursrecht* 2001/104.

transformed into a parade with the aim of increasing LGBT tolerance. The number of participants grew from 2,000 in 1978 to 45,000 in 2008.¹²⁴ Pink Saturday has now even been openly supported by the Dutch Queen.¹²⁵ Other large-scale manifestations which aim to increase the tolerance of homosexuality include the Midsummer Canal cultural festival (*MidZomerGracht festival*) in Utrecht,¹²⁶ and the Pink May Party (*RozeMeifeest*) in Nijmegen.¹²⁷

Apart from these demonstrations with a festive atmosphere, each year on 4 May (National Remembrance Day for War Victims), special attention is paid to LGBT people. In the cities of Amsterdam and The Hague special LGBT remembrance meetings take place at the so-called *homomonumenten*.¹²⁸ Furthermore, at different locations in the country a wreath remembering LGBT victims is often laid at a Second World War memorial.¹²⁹

From time to time demonstrations of a more occasional character took place. In April 2007, for example, COC Nederland, the main NGO active in the field of gay and lesbian rights, organised a demonstration against the so-called '*weigerambtenaren*', civil servants who refuse to marry same-sex couples.¹³⁰ In addition, during the week of the International Day against Homophobia, COC Nederland organised a 'Poland Week', to protest against the increasing homophobia in Poland and in support of the Warsaw Pride that was to take place on 19 May 2007. Protest demonstrations were held on 15 May in The Hague in front of the Polish Embassy and on 17 May in Amsterdam in the central square, the Dam.

The overview presented in the table in Annex 2 of demonstrations in favour of tolerance of LGBT people does not claim to be exhaustive. See also Chapter G.4. Transgender and freedom of assembly.

¹²⁴ See www.ihlia.nl/dutch/algemeen/collectie/dossier_roze_zaterdag (22.01.2010).

¹²⁵ 'Pro-homo brief van Beatrix', in: *Trouw* (15.09.2007), p. 2-3.

¹²⁶ See www.midzomergracht.nl.

¹²⁷ See www.rozemeifeest.nl.

¹²⁸ See www.homomonument.nl.

¹²⁹ For the purposes of the table in Annex 2, all these remembrance meetings together will be counted as two meetings per year.

¹³⁰ 'Homomanifestatie tegen weigerambtenaren', available at: www.katholiek nederland.nl (07.02.2010). In the covenant between the coalition partners (CDA, PvdA and CU) it has been agreed that civil servants will be permitted to refuse to conduct a marriage between two people of the same sex should they have conscientious/religious objections, on the condition that same-sex marriage will still be possible in every village or town hall. The local governments of a number of the major cities (among them Amsterdam and Rotterdam) immediately announced that civil servants who are employed by them will not have the right to refuse to marry same-sex couples (see Holtmaat (2007), p. 78). The ETC considers it indirect discrimination on grounds of religion, when a local authority refuses to appoint to such a job someone with religious objections to marrying same-sex couples. In two opinions of 15.03.2002 it considered such indirect discrimination not objectively justified and therefore unlawful (opinions 2002-25 and 2002-26). However, in a more recent opinion the ETC changed its mind; it now considers it objectively justified, and therefore permissible to only appoint registrars who are willing to conduct marriages of two people of the same sex (opinion 2008-40 of 15.04.2008). See Annex 1 of this report.

E.3. Demonstrations against tolerance of LGBT people

The authors of this report are not aware of any demonstration against tolerance of LGBT people in the Netherlands in the period 2000-2009.

E.4. Refusals or bans of demonstrations

Although in the 1970s and 1980s there were private parties claiming in court that a demonstration in favour of tolerance of LGBT people should be banned,¹³¹ no authorisation for such a demonstration has been refused in recent decades, apart from one minor recent case. In 2007 the city council of Amsterdam refused a licence for the original plans for five festivities, mainly street parties, forming part of We Are Amsterdam Gay Pride. Since not *all* activities of the Gay Pride are regarded as demonstrations within the meaning of the Public Manifestations Act, but rather as a public event, a so-called event licence was required on the basis of Article 2.11 of the general municipal byelaws of the municipality of Amsterdam. The refusal was due to the fact that the Amsterdam Soccer Tournament was due to take place the same week. The police and the city council feared that the city centre of Amsterdam would become overcrowded, which could lead to disturbances.¹³²

E.5. Disturbances at demonstrations

During Pink Saturday in 1982, which took place in Amersfoort, onlookers called the demonstrating LGBT people names and pelted them with stones. The pictures of this violence caused a stir in the country. The disturbances gave cause for various new policy initiatives on LGBT matters, both at national and at local level. Since that date, for example, the police have a positive obligation to protect LGBT people from 'queer bashers', instead of banishing LGBT people from gay 'cruising' areas in public places (*homo-ontmoetingsplekken*).¹³³

¹³¹ Vz. ARRvS [President of the Judicial Division of the Council of State], 11.04.1979, *Weekoverzicht Raad van State* 1979, R.737; and ARRvS, 08.01.1981, *Weekoverzicht Raad van State* 1981, 3.314. In this case Roman Catholic pastors unsuccessfully appealed against a planned demonstration with the aim of protesting against anti-gay statements made by the Bishop of Roermond. See also Vz. ARRvS 27.05.1982, *Administratiefrechtelijke Beslissingen* 1983, 62. In this case the court ruled that the refusal by the Mayor of Amersfoort to grant a permit for a third gay demonstration in a row and accompanying encampment was disproportionate.

¹³² 'Politiek kiest voor voetbal-hooligans boven homo-feesten', at: www.progay.nl/nieuws.html?id=14 (14.02.2010).

¹³³ See www.coc.nl/dopage.pl?thema=any&pagina=algemeen&algemeen_id=171 (22.01.2010).

Since 1982 some isolated disturbances have taken place. Recently, during the We Are Amsterdam Gay Pride of 2007, on two occasions a total of four gay men were violently attacked.¹³⁴ Furthermore, a wreath at the *homo-monument* was destroyed and thrown into the canal. The police arrested two young men for this act.¹³⁵ Otherwise, the LGBT network *Roze in Blauw* [Pink in Blue] of the Amsterdam police did not receive any reports of LGBT-related violence during the 2007 Gay Pride.¹³⁶ During the 2008 events, no incidents were reported according to the Pride organisers, and the only incident that was reported during the 2009 events was that 'homos go to hell' had been chalked on a bridge.¹³⁷ See Chapter H. Miscellaneous for more information about violence against LGBT people.

¹³⁴ 'Homo's mishandeld tijdens Gay-Pride' (06.08.2007), available at:

www.coc.nl/dopage.pl?thema=any&pagina=viewartikel&artikel_id=1805 (13.02.2010).

¹³⁵ 'Homohaar leidt tot agressie bij Gay Pride in Amsterdam', in: *Algemeen Dagblad* (07.08.2007), p. 9.

¹³⁶ See www.politie-amsterdam-amstelland.nl (25.01.2008). For more information about this police gay network, see Chapter I. Good practices.

¹³⁷ See www.weareproud.nl/nieuws.html (22.01.2010).

F. Hate speech and criminal law

F.1. Hate speech in criminal law

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

The sanction provided by Article 137c is imprisonment of up to one year or a fine of up to 7,600 Euro. If the offence is committed in pursuance of an individual's profession, as habitual practice, or by two or more persons together, the sanction may amount to two years' imprisonment or a fine of 19,000 Euro. The maximum sanction of Article 266 is three months' imprisonment or a fine of 3,800 Euro.

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

On the basis of Article 137e of the Penal Code a person who – for any reason other than that of giving factual information – publishes a statement which s/he knows or should reasonably suspect to be insulting to a group of people on the grounds of their heterosexual or homosexual orientation (or race, religion, belief or disability), or which s/he knows or should reasonably suspect to incite hatred of or discrimination against people or violence against their person or property on the grounds of their heterosexual or homosexual orientation (or race, religion, belief, disability or sex), is liable to a term of imprisonment of not more than six months or a fine of 7,600 Euro maximum.¹³⁸ If the offence is committed in pursuance of an individual's profession, as habitual practice, or by two or more persons together, the sanction may amount to two years' imprisonment or a fine of 19,000 Euro. If the offence is committed in pursuance of an individual's profession, the offender may be disqualified from the practice of his or her profession.

¹³⁸ Article 137e provides the same punishment for a person who – for any reason other than that of giving factual information – disseminates an object which s/he knows or should reasonably suspect to contain such a statement, or sends such an object to someone who has not asked for it, or has such an object in stock for public disclosure or for dissemination.

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

In 2007, in response to questions from the Parliamentary Standing Committee on Justice, the Minister of Justice commissioned research on criminal discrimination (*strafbare discriminatie*).¹³⁹ The study found that over the years 2000-2005 a total of 682 discrimination cases reached a criminal court, resulting in convictions in 89 per cent of the cases. In addition to that, a fine was agreed in some 200 cases that did not go to court.¹⁴⁰ The numbers of cases and convictions per year have not changed much over 2000-2005,¹⁴¹ and are also fairly stable over the period 1995-2008.¹⁴² Over that longer period the average annual number of instances of criminal discrimination (on any ground) that were registered by the police has been almost 500.¹⁴³

The study on criminal discrimination further analysed the files of 229 cases (i.e. all cases that went to court in the years 2000-2004 in five regional courts, including those in the three largest cities of the Netherlands). This showed that all but 6 of these 229 cases were about hate speech (i.e. the crimes of Articles 137c, 137d and 137e of the Penal Code). In 215 of these cases the ground of discrimination could be established: sex was the ground in 3 cases, homosexuality in 7, race/colour/religion/nationality in 175, other grounds in 13, and multiple grounds in 17 cases.¹⁴⁴ Assuming that the latter will have included some cases also affecting sexual orientation, it could be tentatively concluded that around 5 per cent of all adjudicated hate speech crimes were homophobic in nature.

A recent inventory of all instances of discrimination reported to the police, concludes that in 2008 somewhere between 12 and 17 per cent of these 2240 instances

¹³⁹ C. Brants, R. Kool and R. Ringnalda (2007) *Strafbare discriminatie*, The Hague: Ministry of Justice / WODC; available at: www.wodc.nl/onderzoeksdatabase/strafmaat-discriminatiezaken.aspx (14.02.2010). The study covers not only the discriminatory speech crimes of Articles 137c to 137e, but also actual discrimination crimes in the sense of Articles 137f, 137g and 429*quater* of the Penal Code. It does not cover other crimes with a discriminatory background.

¹⁴⁰ Brants, Kool and Ringnalda (2007) *idem*, pp. 95 and 100.

¹⁴¹ Brants, Kool and Ringnalda (2007) *idem*, p. 100.

¹⁴² S. N. Kalidien and A. Th. J Eggen (eds) (2009) *Criminaliteit en rechtshandhaving 2008 – Ontwikkelingen en samenhangen*, The Hague: Ministry of Justice/WODC and CBS [Statistics Netherlands], pp. 443 and 480; available at: www.wodc.nl/onderzoeksdatabase/cenr-2008.aspx (13.02.2010).

¹⁴³ Kalidien and Eggen (2009) *idem*, p. 357. For further analysis of these and other statistics, see also M. Davidović and P. R. Rodrigues (2008) 'Opsporing en vervolging in 2007', in: J. van Donselaar and P. R. Rodrigues (eds) *Monitor Racisme & Extremisme. Achtste Rapportage*, Amsterdam: Pallas Publications, pp. 199-228, available at: www.monitorracisme.nl/content.asp?PID=12&LID=1 (01.02.2010).

¹⁴⁴ C. Brants, R. Kool and R. Ringnalda (2007) *Strafbare discriminatie*, The Hague: Ministry of Justice / WODC, pp. 108-116, available at: www.wodc.nl/onderzoeksdatabase/strafmaat-discriminatiezaken.aspx (14.02.2010).

concerned homosexuality.¹⁴⁵ Unfortunately, the inventory does not specify what proportion of these instances could be classified as homophobic speech in the sense of Articles 137c, 137d and 137e of the Penal Code. The inventory also covers many instances where (in the sense of Article 266 of the Penal Code) someone got insulted in anti-homosexual terms, without necessarily being (seen as) LGBT. So for various reasons it is difficult to compare the 2008 data with those over 2000-2004. Hate speech was also included (but not counted separately) in the even wider inventory made by the ‘Art.1’ (the national association against discrimination) of complaints registered by the anti-discrimination bureaus. Over the years 2004-2006 some 4 per cent of all complaints concerned sexual orientation, a proportion that went up to 6 per cent in 2007 and 5 per cent in 2008.¹⁴⁶ See also Chapter H.1. Violence against LGBT people.

F.2. Hate speech in civil law

Article 6:162 of the Civil Code provides for a civil tort procedure. In the LGBT context, this article has been invoked several times to challenge hate speech. In 1987 COC Nederland unsuccessfully instituted civil proceedings against the Roman Catholic archbishop on this basis. The court of appeal ruled that, although the archbishop could have chosen his words more carefully, his statement that homosexuality is an abnormality of Creation was not needlessly hurtful.¹⁴⁷ In 1990 civil proceedings were successfully instituted against a married couple who had distributed flyers stating (amongst other things) that AIDS was caused by homosexual conduct and that homosexuals deserved the death penalty.¹⁴⁸

Where anti-LGBT hate speech in employment or in the provision of goods or services takes the form of harassment, the sanctions of tort, contract or anti-discrimination law may apply; see Chapter A.3. Sanctions.

¹⁴⁵ F. Tas and W. de Wit (2009) *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague: Ministry of the Interior, pp. 10 and 17, available at: www.minbzk.nl/actueel?ActfsmIdt=120677 (13.02.2010).

¹⁴⁶ W. Dinsbach, M. Coenders and I. Boog (2009) *Kerncijfers 2008 – Landelijk overzicht van discriminatieklachten geregistreerd bij antidiscriminatiebureaus en meldpunten in Nederland*, Rotterdam: Art.1, available at: www.art1.nl/artikel/6881-Kerncijfers (13.02.2010).

¹⁴⁷ Amsterdam Court of Appeal, 10.12.1987, *NJCM-Bulletin* 1989, 305, available at: <http://hdl.handle.net/1887/4078> (13.02.2010). See also www.ihlia.nl/dutch/algemeen/archief/thematische-archieven (13.02.2010).

¹⁴⁸ Supreme Court, 02.02.1990, *Nederlandse Jurisprudentie* 1991, 289.

F.3. Homophobic motivation as aggravating factor in sentencing

Neither the Penal Code nor the *Wetboek van Strafvordering* [Code of Criminal Procedure] provide for homophobic motivation as an aggravating factor in sentencing. However, since 2003 the *Aanwijzing Discriminatie* [Instruction on Discrimination] of the Public Prosecution Service has been in force.¹⁴⁹ On the basis of this instruction, the public prosecutor must increase the sentence s/he demands in his/her closing speech by 25 per cent in the case of an offence with a discriminatory background relating to race, religion, belief, disability or sexual orientation. Since 2007 the instruction also requires the police to use a uniform registration format for all incidents of criminal discrimination that are reported to the police or that the police discovers. This registration does not only cover the specific crimes of Articles 137c to 137g and 429*quater* of the Penal Code, but also any other crime committed with a discriminatory aspect. The instruction also indicates how data from this registration must be reported (also regionally).

The first year for which a (national) report on this basis has been produced is 2008, during which 2240 incidents were registered. Although for a third of these incidents no ground of discrimination had been recorded, the report concludes that up to 380 incidents (i.e. 17 per cent) could be classified as sexual orientation discrimination.¹⁵⁰ For most incidents, the sexual orientation of the victim(s) is not known. Of the 70 incidents where the victim was recorded as being homosexual, a third concerned threatening behaviour, a third (also) concerned physical violence, and in two thirds of the incidents the victim had (also) been insulted.¹⁵¹ The report does not specify in which of these cases the discriminatory background could, should or would be considered as an aggravating factor in sentencing.

There are examples of cases in which the court takes a discriminatory aspect of an offence into account in sentencing.¹⁵² However, it seems difficult to draw any firm conclusions from this practice, because a discriminatory aspect is often not the only relevant aspect in sentencing. Furthermore, it is often not possible to identify to what extent various elements contributed to the level of final sentence imposed.

¹⁴⁹ This concerns an instruction on the basis of Article 130(4) of the *Wet Rechterlijke Organisatie* [Act on the Judicial System]. For the text of the current (2007) version of the instruction, see: www.om.nl/organisatie/beleidsregels/overzicht/discriminatie (13.02.2010).

¹⁵⁰ F. Tas and W. de Wit (2009) *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague: Ministry of the Interior, pp. 10, 17 and 28, available at: www.minbzk.nl/actueel?ActfmlId=120677 (13.02.2010).

¹⁵¹ Tas en De Wit (2009) *idem*, p. 18.

¹⁵² 's-Gravenhage Regional Court, 14.04.2006, *LJN* AX9566; Maastricht Regional Court, 08.05.2007, *LJN* BA4620; Roermond Regional Court, 23.12.2009, *LJN* BK8235 and BK7698.

G. Transgender issues

In Dutch law discrimination on the ground of ‘transsexuality’ is regarded as a form of sex discrimination.¹⁵³ Moreover, the ETC recently issued an opinion stating that discrimination on the ground of ‘transvestism’ is also to be regarded as a form of sex discrimination.¹⁵⁴ Discrimination on grounds of gender identity or gender expression is therefore covered by the GETA, by some anti-discrimination provisions in the Penal Code (see Chapter G.5. below), by a few other prohibitions of sex discrimination, by the new provision in the law on health and safety at work (see Chapter A.1.), by the new law on local anti-discrimination provisions (see Chapter A.4.), and by Article 1 of the Constitution. Regrettably, even the standard form prescribed under the latter law for the registration of discrimination complaints does not mention gender identity/expression explicitly.

G.1. Legislation regarding change of sex

Article 1:28 of the Civil Code provides that courts may allow an individual to change his/her sex in his/her birth certificate. For this to be granted it is necessary that the requesting person is, as far as possible and sensible from a medical and psychological point of view, physically transformed into the new sex.¹⁵⁵ Secondly, the permanent incapability to beget a child or to give birth to a child is an express condition for a legal change of sex. Organisations take a firm stand against this which they consider to be a humiliating requirement.¹⁵⁶ The Commissioner for Human Rights of the Council of Europe (recalling the Yogyakarta Principles) has called for the abolition of both the absolute infertility requirement and the physical transformation requirement.¹⁵⁷ On 15 June 2009 the Minister of Justice has informed Parliament that he is preparing a bill to amend Article 1:28.¹⁵⁸ From the letter it is not clear whether this will only involve the sterilisation requirement, or also the physical transformation requirement.

¹⁵³ Leeuwarden Court of Appeal, 13.01.1995, *Nederlandse Jurisprudentie* 1995, 243, and, for example, ETC 17.02.1998, opinion 1998-12, ETC 07.11.2000, opinion 2000-73, ETC 09.03.2006, opinion 2206-33. See Annex 1 of this report.

¹⁵⁴ ETC 15.11.2007, opinion 2007-201. See also Annex 1.

¹⁵⁵ See for application of this clause: 's-Hertogenbosch Court of Appeal 24.04.2007, *LJN* BA5428.

¹⁵⁶ COC Nederland en MOVISIE (2007) *Beleidsvisie Homo-, lesbisch, biseksueel en transgenderbeleid, Visie van de Nederlandse homobeweging op de in het coalitieakkoord uitgezette lijn*, available at: www.movisie.nl/115041/def/home/publicaties/publicaties/?OnderwerpID=115468 (13.02.2010); ‘Transgenders “vermist”’, emancipatienota laat groep in de kou staan’, in: *Spits* (13.11.2007), p. 13.

¹⁵⁷ *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to the Netherlands 21-25 September 2008*, Strasbourg: Council of Europe 11.03.2009, CommDH(2009)2, p. 33, www.coe.int/t/commissioner/Activities/visitsbycountry_en.asp (07.02.2010).

¹⁵⁸ *Parliamentary Documents Lower House* (2008-2009) 27017, nr. 53.

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

In April 2007 the Court of Appeal of 's-Hertogenbosch ruled that the applicant's physical change of sex was not yet sufficiently complete for a change of sex to be granted in his birth certificate within the meaning of Article 1:28 of the Civil Code. The court based its decision upon the finding that hormonal treatments had only started in September 2006 and surgery was yet to take place.¹⁵⁹

In 2005 an individual who felt intersexual or asexual, neither male nor female, requested that his sex be crossed out in his birth certificate. The Supreme Court dismissed this claim in 2007, ruling that it falls within the *margin of appreciation* of national states under Article 8 of the ECHR to require that a person's sex in his/her birth certificate is either male or female and not gender-neutral. According to the court, the general interest outweighed the individual interest in this respect.¹⁶⁰

Information obtained from the *Raad voor de Rechtspraak* [Council for the Judiciary] (by email of 25.02.2010) indicates that the annual number of (positive or negative) court decisions on requests of people wishing to change the sex in their birth certificate under Article 1:28 of the Civil Code seems to be rising, from 57 in 2004 to 86 in 2009 (see Annex 2 – Statistics).

By law, the costs of surgical treatment to adjust primary sexual characteristics, are covered by the standard health insurance.¹⁶¹ The non-coverage for surgical treatment to adjust secondary sexual characteristics is a topic of legal and political controversy. In September 2008 a court ruled that a local authority was right in refusing to give a transitioning transsexual a special social security allowance to meet these costs.¹⁶² In November 2009 the Equal Treatment Commission came to the conclusion that the refusal of a health insurance company to pay for the breast implants for a male-to-female transsexual amounted to indirect sex discrimination, because the costs for breast amputation (for example for female-to-male transsexuals) were being covered. However, the ETC considered this indirect discrimination to be justified, because the exclusion of breast implants from the insurance coverage is explicitly mentioned in

¹⁵⁹ 's-Hertogenbosch Court of Appeal, 22.05.2005, *LJN* BA5428.

¹⁶⁰ Supreme Court, 30.03.2007, *LJN* AZ5686.

¹⁶¹ Article 2.4(1b) of *Besluit zorgverzekering* [Health Insurance Regulation].

¹⁶² 's-Hertogenbosch Regional Court, 22.09.2008, *LJN* BF1834.

the government's rules and regulations.¹⁶³ Currently the Minister for Health is in consultation about the issue with *Transgender Netwerk Nederland* and with the *College voor Zorgverzekeringen* [Health Insurances Board].¹⁶⁴

G.2. Legislation regarding change of names

The civil courts have the competence, once an appeal for a change of sex has been granted and if so requested, to order the change of the applicant's first names (Article 1:28b(2), Civil Code). In this respect, the court has to judge whether the interest for the granting of the request is sufficiently substantial. In addition the requested name must meet the general requirements of the law on first names (Article 1:4, Civil Code).

In this respect the following case is interesting. In 2002 a Luxembourg national petitioned to the Regional Court of The Hague for a change of sex and names. The request for change of sex was granted under Dutch law. The change of names was problematic due to the fact that the applicant did not have Dutch nationality and, under rules of Dutch Private International Law the applicable law was that of Luxembourg, which at the time of procedures did not allow for a change of name in the situation at issue. Nevertheless, referring to the Goodwin judgement of the European Court of Human Rights, the regional court ruled that a change of sex is a change of status within the meaning of Article 1 of the Convention on the recording of surnames and forenames in civil status registers (Istanbul 1958)¹⁶⁵ and ordered the change of the applicant's names.¹⁶⁶

G.3. Transgender and asylum

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

Furthermore a transgender person can rely on Article 29(1b) of the Aliens Act if s/he can show substantial grounds for believing that s/he faces a real risk of being

¹⁶³ ETC 16.11.2009, opinions 2009-107 and 2009-108 (see Annex 1 of this report). Exceptionally, English translations of these two opinions are available at: www.cgb.nl/artikel/publications (14.02.2010). See Article 2.1, *Regeling zorgverzekering* [Health Insurance Rules].

¹⁶⁴ *Parliamentary Documents Lower House* (2009-2010) 27017, nr. 56, p. 3.

¹⁶⁵ Convention No. 4 of the *Commission Internationale de l'Etat Civil (CIEC)* [International Commission on Civil Status (ICCS)], available at: www.ciecl.org (13.02.2010).

¹⁶⁶ Den Haag Regional Court, 14.10.2002, *LJN* AF4586; see R. A. Lawson (2003) 'In de schaduw van Goodwin', in: *NJCM-Bulletin*, pp. 313-317.

subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the ICCPR or Article 3 of the CAT. In Dutch case law, eligibility for protection as a refugee or subsidiary protection beneficiary is often jointly examined.¹⁶⁷

The protection for humanitarian reasons that is applied to Iranian LGBT people since 2006, explicitly includes transgender asylum seekers.¹⁶⁸

The Aliens Circular contains specific guidance with respect to homosexual asylum seekers from twelve countries, but only for three countries the guidance specifically also covers transsexuals (Iran, Nepal and Turkey) and only for two countries (Nepal and Turkey) also transvestites.¹⁶⁹

While awaiting a final decision in their case, asylum seekers are excluded from medical treatments with the purpose of change of sex.¹⁷⁰ In 1995 it was agreed with the Amsterdam VU Hospital that if an asylum seeker requests change of sex treatment, no treatment will be started before it is certain that the treatment will be completed in the Netherlands.¹⁷¹

G.4. Transgender and freedom of assembly

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

The authors of this report are not familiar with demonstrations against tolerance of transgender persons in the period 2000-2009.

There are several interest groups for transgender people in the Netherlands. Since 2006 they work together in *Transgender Netwerk Nederland*¹⁷², which receives a government subsidy of €200,000 over the period 2008-2010.¹⁷³ Manifestations in favour of tolerance of transgender include the *Transfusion Festival*, which took place on 11 November 2007 in Amsterdam, and will be repeated on 22 May 2010,¹⁷⁴ and the *Netherlands Transgender Film Festival*. The latter has been organised biannually

¹⁶⁷ For example, 's-Gravenhage Regional Court, location Amsterdam, 22.01.2004, *LJN* AO3931.

¹⁶⁸ Aliens Circular C24/12.3.11.

¹⁶⁹ Aliens Circular C24/12.3.11, 23.3.3 and 26.3.2.

¹⁷⁰ Article 3b.1 of the *Besluit Zorgverzekering* [Health Insurance Regulation], as amended by Royal Decree of 21.11.2008, *Staatsblad* (2008) 528. See also paragraphs 10.18 and 10.21 of *Regeling Zorg Asielzoekers* [Health Care Rules for Asylum Seekers], available at: www.rzasielzoekers.nl (08.02.2010).

¹⁷¹ See IND Informatie- en Analysecentrum (2008) *Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland*, The Hague: Ministry of Justice, pp. 33 and 49, available at: www.ind.nl/nl/inbedrijf/overdeind/cijfersenfeiten/Bibliotheek_indiac.asp (01.02.2010).

¹⁷² See www.transgendernetwerk.nl (08.02.2010).

¹⁷³ *Parliamentary Documents Lower House* (2009-2010) 27017, nr. 56, p. 1.

¹⁷⁴ See www.transfusionfestival.nl (22.01.2010).

since 2001 and shows film and video productions that contribute to understanding and generate discussions on transgender issues.¹⁷⁵ Moreover, since a few years an event to mark the *International Transgender Day of Remembrance* to remember all those people who have been violently attacked or murdered because of their being transgender, is also being organised each year in November in one of the main Dutch cities.¹⁷⁶ See also Chapter E.2. Demonstrations in favour of tolerance of LGBT people.

G.5. Transgender and criminal law

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

In 1995 a report was made to the police of defamation and incitement of hatred against transsexuals by a Dutch singer who wrote the song '*Hij is een transseksueel*' ['He is a transsexual']. The public prosecutor dropped the case against him. An appeal against the non-prosecution before the Court of Appeal was dismissed. The Court ruled that, although the statements in the lyrics of the song were insulting for transsexuals as a group, Article 137c of the Penal Code (the defamation clause) does not include transsexuality as a discrimination ground. With regard to legislative history, the Court considered that the description of the offence was explicitly limited to the grounds mentioned. Furthermore, the Court was of the opinion that the lyrics of the song did not incite hatred (within the meaning of Article 137d) against transsexuals. The author of the song was not prosecuted.¹⁷⁷

¹⁷⁵ See www.transgenderfilmfestival.com (13.02.2010).

¹⁷⁶ See the website of the Vereniging Landelijke Kontaktgroep Travestie en Transseksualiteit (the Dutch interest group for transvestism and transsexuality), www.lkgtent.nl (13.02.2010) and www.transgenderdor.org (09.01.2010).

¹⁷⁷ Leeuwarden Court of Appeal, 13.01.1995, *Nederlandse Jurisprudentie* 1995/243.

H. Miscellaneous

H.1. Violence against LGBT people

In recent years the Dutch media have reported an increase in violence against LGBT people. There were some incidents that attracted great (international) media attention, including the assault on a gay American tourist attending the Dutch Queen's Day festivities in 2005 and the violent attacks on gay visitors to the 2007 We Are Amsterdam Gay Pride (see Chapter E.5. Disturbances at demonstrations in the Netherlands). These news reports create the impression that physical homophobic violence has increased in the Netherlands in recent years. This has led to several policy and research initiatives (see also Chapter I. Good Practices).

Currently the police and the public prosecution service are improving the way crimes with a homophobic (or other discriminatory) background are being registered and reported (see Chapter F.3. Homophobic motivation as aggravating factor in sentencing). The first reports based on these registrations, however, do not indicate any precise number of incidents of anti-LGBT discrimination that are violent in character. The reports suggest that a large part of all 380 reported anti-LGBT incidents in 2008 are incidents of physical violence or threatening behaviour.¹⁷⁸ The LGBT network of the Amsterdam police force has also made figures available about LGBT-related incidents.¹⁷⁹ These figures (251 in 2007, 300 in 2008, 371 in 2009) are much higher (in proportion) than the national figures.¹⁸⁰ The difference can be partly explained by different definitions, and partly by a greater experience of the Amsterdam network in recognising the anti-LGBT background of reported incidents. Researchers of the University of Amsterdam have taken a close look at the 251 incidents of 2007. They conclude that 201 of these can be classified as anti-homosexual violence, including 79 incidents of verbal violence, 38 of serious threatening behaviour, 17 of robbery, and 67 incidents of physical violence. They

¹⁷⁸ *Rapportage homofoob geweld – Politiegegevens Periode 1 januari – 1 juli 2008*, Apeldoorn: Police Academy of the Netherlands (2008), available at: www.politie.nl/LHP/publicaties.asp (13.02.2010); and F. Tas and W. de Wit (2009) *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague: Ministry of the Interior, pp. 18 and 25, available at: www.minbzk.nl/actueel?ActItd=120677 (13.02.2010).

¹⁷⁹ L. Buys, G. Hekma and J.W. Duyvendak (2009) *Als ze maar van me afblijven – Een onderzoek naar antihomoseksueel geweld in Amsterdam*, Amsterdam University Press, p. 40, available at: <http://amsterdam.nl/?ActItd=156860> (13.02.2010); and a press release of 19.01.2010 issued by the LGBT organisation *COC Amsterdam*, available at: www.eenveiligamsterdam.nl/thema's/thema's/overlast/geweld_tegen_homo's (23.01.2010).

¹⁸⁰ Of all 2240 incidents recorded nationally in 2008, only 354 came from the Amsterdam police force; see F. Tas and W. de Wit (2009) *POLDIS 2008 – Criminaliteitsbeeld Discriminatie*, The Hague: Ministry of the Interior, p. 6, available at: www.minbzk.nl/actueel?ActItd=120677 (13.02.2010). It seems highly unlikely that almost all of these 354 incidents of discrimination were related to sexual orientation.

also observe that the latter number has been growing since 2006.¹⁸¹ Figures recently released by the LGBT network of the police indicate that in 2008 the Amsterdam police recorded 54 incidents of anti-homosexual physical violence, and in 2009 no less than 82 such incidents.¹⁸²

Furthermore it may be noted that the number of incidents of homophobic discrimination reported to anti-discrimination bureaus has risen from 127 in 2002 (3 per cent of the total number of complaints of discrimination), to 236 in 2008 (5 per cent of the total number of complaints of discrimination).¹⁸³ However, it seems difficult to draw firm conclusions from these statistics, since not all victims report their case. On the other hand, greater publicity of the anti-discrimination bureaus may have led to a higher number of reports.¹⁸⁴

The scale of the problem of violence against LGBT people, cannot only be assessed on the basis of reported incidents, but also on the basis of research. One survey found that among 776 homosexual respondents 3.3 per cent indicated that they had been assaulted as a consequence of their homosexual orientation and 11.8 per cent that they had been threatened with physical violence as a consequence of their homosexual orientation.¹⁸⁵ The Ministry of Justice commissioned a review of existing literature on the topic, which was presented to Parliament in December 2009. The review lists three common reasons of victims of anti-LGBT violence for not reporting it to the police: doubts regarding the expertise of the police, the tendency to play down what has happened, and the wish not to become known as LGBT. Another conclusion is that in particular knowledge about anti-lesbian and anti-transgender violence limited.¹⁸⁶

In 2006 the Netherlands Institute for Social Research / SCP¹⁸⁷ carried out research into social acceptance of homosexuality in the Netherlands. The researchers concluded that homosexuality is widely accepted, but still needs special attention and policy. Several groups (young people, religious people and immigrants) tend to adopt

¹⁸¹ L. Buys, G. Hekma and J.W. Duyvendak (2009) *Als ze maar van me afblijven – Een onderzoek naar antihomoseksueel geweld in Amsterdam*, Amsterdam University Press, p. 41, available at: <http://amsterdam.nl/?ActItnltdt=156860> (13.02.2010).

¹⁸² See the aforementioned press release issued by *COC Amsterdam*.

¹⁸³ In 2001, 260 complaints on grounds of sexual orientation (6.7 per cent of all complaints) were filed. This relatively high number can be partly contributed to controversial statements made by one imam that year; see M. van San and J. de Boom (2006) *Geweld tegen homoseksuelen*, Rotterdam: RISBO, pp. 28-29, available at: www.politieenwetenschap.nl/pdf/geweld_tegen_homosexuelen.pdf (13.02.2010).

¹⁸⁴ *Proceedings of the Lower House, Appendix* (2007-2008). nr. 130 (*herdruk*), pp. 279-280.

¹⁸⁵ M. van San and J. de Boom (2006) *Geweld tegen homoseksuelen*, Rotterdam: RISBO, pp. 37-39, available at: www.politieenwetenschap.nl/pdf/geweld_tegen_homosexuelen.pdf (13.02.2010).

¹⁸⁶ J. Schuyf (2009) *Geweld tegen homoseksuele mannen en lesbische vrouwen – Een literatuurstudie naar praktijk en bestrijding*, Utrecht: Movisie, pp. 53 and 58; available at: www.wodc.nl/onderzoeksdatabase/aard-en-omvang-van-homofob-geweld.aspx?cp=44&cs=6796 (13.02.2010). See also *Parliamentary Documents Lower House* (2009-2010) 27017, nr. 58.

¹⁸⁷ The SCP, established in 1973, is a government agency which conducts research into the social aspects of all areas of government policy; see www.scp.nl.

a negative attitude towards homosexuality. According to the SCP, homosexuality remains a private matter: people expect more 'reserved behaviour' from homosexuals than from heterosexuals in public places.¹⁸⁸

H.2. No ban on information about homosexuality

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

There is a provision which aims to protect children from seeing certain sexual and/or violent expressions. Article 240a of the Penal Code makes it a crime to offer or show to a child under 16 a picture or object if showing that picture or object can be considered harmful to children under 16. Texts are not covered by the prohibition. It seems very unlikely that this prohibition (in its current form dating back to 2001) has been used to specifically punish the offering or showing of pictures of a homosexual nature. There are certainly no recent example of that.

¹⁸⁸ The English translation of this study was published in 2007: S. Keuzenkamp and D. Bos (2007) *Out in the Netherlands. Acceptance of homosexuality in the Netherlands*, The Hague: The Netherlands Institute for Social Research/SCP, available at: www.scp.nl/english/Publications (13.02.2010).

I. Good practices

I.1. Gender neutrality

One of the most important achievements in tackling discrimination on grounds of sexual orientation in Dutch law is the gender neutrality of marriage (since 2001), registered partnership (since 1998) and rules on *de facto* cohabitation (since the 1970s). This gender-neutrality indisputably advances the emancipation of LGBT people. Increasingly it also applies to parenting rights (joint parental authority since 1998, most forms of adoption since 2001, automatic joint parental authority since 2002, intercountry adoption since January 2009).¹⁸⁹ In December 2009 the government presented a draft-bill to make it possible for lesbian partners to become joint parents without having to go to court for an adoption.¹⁹⁰ That bill would reduce the last remaining difference between same-sex and different-sex couples in family law.

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

I.2. The Equal Treatment Commission

The Dutch Equal Treatment Commission as such, its existence and functioning, can be regarded as good practice. Its existence has helped to make legal protection against discrimination on grounds of sexual orientation adequate, extensive and easily accessible. Increasingly this is also true for discrimination on grounds of gender identity and expression. The ETC has developed a highly sophisticated case law and it may be regarded as one of the leading bodies in this field in Europe. Its work is being complemented by the local and regional anti-discrimination bureaux

¹⁸⁹ See K. Waaldijk, *More or less together: levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries*, Paris: Institut National d'Études Démographiques, p. 147, available at: <http://hdl.handle.net/1887/12585> (12.02.2010). The Dutch ban on intercountry adoption by same-sex spouses was lifted by the law of 24.10.2008, *Staatsblad* (2008) 425, that came into effect on 01.01.2009.

¹⁹⁰ See press release of Ministry of Justice of 14.12.2009, available at: <http://english.justitie.nl/currenttopics/pressreleases/> (13.02.2010). The text of the draft-bill is available at: www.internetconsultatie.nl/ouderschapsduomoeder (13.02.2010).

(see paras 75-76 above), by the Inspectorate for Health and Safety at Work (see para. 35 above) and by the Education Inspectorate (see below).

1.3. Government policy on LGBT emancipation

Since more than 20 years the Dutch government has had an explicit *homo-emancipatiebeleid* [policy on homosexual emancipation]. In November 2007 the current government issued its policy paper on this topic for the period 2008-2011.¹⁹¹ The main purpose of this policy is the advancement of social acceptance of LGBT people in the Netherlands. In the policy paper the government announced that it has five goals for the aforementioned period: (a) to ensure that homosexuality can be a topic of discussion in all population groups; (b) to tackle the problem of violence and harassment against LGBT people; (c) to stimulate the setting up of civil society organisations, at both local and national level; (d) to contribute to an LGBT-friendly environment in schools, in the workplace and in sport; and (e) to fulfil an active role in the international and European field. Combating discrimination on grounds of sexual orientation is one of the official priorities of the human rights policy of the Minister of Foreign Affairs. This has led to several initiatives at the United Nations, at the Council of Europe, and bilaterally.¹⁹²

On 1 October 2009 the Minister of Education, Culture and Research, who is responsible for the government's LGBT emancipation policy, sent a letter to Parliament describing the main aspects of current and new policy with regard to transgender issues.¹⁹³

1.4. Police

In response to the lack of willingness among homosexuals to report homophobic offences, the police force of Amsterdam established the *Roze in blew* [Pink in Blue] network, consisting of LGBT police officers. The network represents the interests of LGBT people within and outside the police. Victims of homophobic offences can call a specific telephone number to report crimes against LGBT people.¹⁹⁴

¹⁹¹ Emancipatienota 'Gewoon homo zijn', *Parliamentary Documents Lower House* (2007-2008) 27017, nr. 3. The Dutch government's first policy paper on LGBT emancipation dates back to 24.04.1986, when it sent the report *Overheidsbeleid en homoseksualiteit* to Parliament (*Parliamentary Documents Lower House* (1985-1986) 19504, nr. 2).

¹⁹² Ministerie van Buitenlandse Zaken, *Mensenrechtenrapportage 2008*, *Parliamentary Documents Lower House* (2008-2009) 31263, nr. 27.

¹⁹³ *Parliamentary Documents Lower House* (2009-2010) 27017, nr. 56.

¹⁹⁴ See www.politie-amsterdam-amstelland.nl/get.cfm?id=586 (13.02.2010); and M. van San and J. de Boom (2006) *Geweld tegen homoseksuelen*, Rotterdam: RISBO, p. 24, available at: www.politiewetenschap.nl/pdf/geweld_tegen_homosexuelen.pdf (13.02.2010).

In August 2008 the *Landelijk Homonetwerk Politie* [National LGBT Network Police] was founded, which, among other things, aims to contribute expertise and information to others in the police force (including the Police Academy), to stimulate all police regions start a regional Pink in Blue network, and to support the Euro Gaypolice Association (EGPA). Regional networks now exist in 11 of the 25 police regions of the Netherlands.¹⁹⁵

In March 2008 two police forces have started to make it easier to report homophobic and transphobic incidents. This can now also be done online. The project also covers incidents resulting from discrimination on grounds of race, religion or belief. The pilot of this *Hate Crimes* project will run until the end of 2011; thereafter the project may be extended to all police regions.¹⁹⁶

In order to get a better overview of the level of homophobic aggression in the Netherlands, the police and the National Expertise Centre for Diversity (LECD) of the Public Prosecution Service developed a system to improve the registration of offences and crimes with a discriminatory aspect. Moreover, the Public Prosecution Service introduced a new information management system that provides for the option to specify the grounds of discrimination involved in an offence or crime.¹⁹⁷

An important new phenomenon is the *Regionaal Discriminatieoverleg* [Regional Discrimination Meeting]. Since 2008 this meeting of the public prosecutor who is specifically responsible for discrimination cases, the police, and the anti-discrimination bureau of the region, must take place at least twice a year in each region. It is its task to discuss all discrimination incidents reported to one of the three parties, to agree on steps to be taken to deal with these incidents, to signal trends, to make suggestions for policy changes, and to facilitate reporting.¹⁹⁸

1.5. Education

One of the goals of the policy paper on ‘homosexual emancipation policy’ is to contribute to an LGBT-friendly environment in schools. Although it is part of the mandate of the Education Inspectorate to ask for a school policy for LGBT students and staff, schools are not legally obliged to pursue a security policy (‘veiligheidsbeleid’) specifically focused on LGBT people.¹⁹⁹ However, the General

¹⁹⁵ See www.politie.nl/lhp/ (13.02.2010).

¹⁹⁶ See www.hatecrimes.nl (07.02.2010), also in English.

¹⁹⁷ *Proceedings of the Lower House, Appendix* (2007-2008). nr. 130 (*herdruk*), pp. 279-280.; see also paras 119-120 above.

¹⁹⁸ The way these meetings should operate, is described in the *Aanwijzing Discriminatie* [Instruction on Discrimination] that was issued on 29.10.2007 by the board of the Public Prosecution Service, available at: www.om.nl/organisatie/beleidsregels/overzicht/discriminatie (13.02.2010).

¹⁹⁹ Equal Treatment Commission 27.01.2006, CGB oordeel 2006-13.

Teachers' Union *AOB*, calls for specific policy on homosexuality in secondary schools.²⁰⁰

In addition, the organisations, *COC Nederland* and *Art.1*, have developed teaching materials aimed at making homosexuality a subject for discussion in secondary education. These teaching packs were warmly welcomed by local government. For instance, on 20 November 2007 (the International Day of the Rights of the Child) *Art.1* launched its schools project [*ÉÉN*]. In January 2008 a pilot with the teaching pack '*Spreek je uit!*' ['Speak out!'] started in The Hague and, in the province of Limburg, the campaign '*Vrolijke Scholen*' was launched, which aims to inform schools about how to be more gay-friendly.²⁰¹

In December 2009 the Lower House of Parliament adopted a resolution noting that many schools do not pay sufficient attention in their teaching to sexuality and sexual diversity, and considering that teaching on those topics is of great importance for safety at school and for tolerance and acceptance of homosexuality. The resolution asks for the inclusion of teaching on sexuality and sexual diversity in the official *Kerndoelen* [Primary Objectives] of primary and secondary education. In response the Minister for Education has promised in February 2010 that he will make the Primary Objectives more explicit in this respect.²⁰²

²⁰⁰ See www.aob.nl (05.02.2010).

²⁰¹ See www.art1.nl (05.02.2010) and www.gayandschool.nl (05.02.2010).

²⁰² *Parliamentary Documents Lower House* (2009-2010) 27017, nrs. 59 and 66.

Annex 1 – Case law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case law Chapter B. Freedom of movement

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

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

Case law Chapter C. Asylum and subsidiary protection

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

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

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

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

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

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

Chapter C, Asylum and subsidiary protection, case law relevant to Article 10/1/d of Council Directive 2004/83/EC, case 4

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

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

No relevant case law available.

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

No relevant case law available.

Case law Chapter E. Freedom of assembly

Chapter E, Freedom of assembly, case 1

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

Chapter E, Freedom of assembly, case 2

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

Case law Chapter F. Hate speech and criminal law

Chapter F, Hate speech, case 1

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

Chapter F, Hate speech, case 2

Case title	Insulting character of a term depends on context in which it was used.
Decision date	06.01.2004
Reference details	<i>Hoge Raad</i> [Supreme Court], no. 01019/03, <i>LJN</i> : AN8498.
Key facts of the case	After being called to account for urinating in public, the defendant had called a police officer ' <i>homofiel</i> ' ('homosexual') during the lawful discharge/execution of his duties.
Main reasoning/argumentation	The Court ruled that an apparently neutral term such as ' <i>homofiel</i> ' ('homosexual') can be insulting if used in a certain context as a term of abuse and with the intention to insult. The police officer might reasonably take offence at the term, since no person can be required to accept, in this way and under these circumstances, statements concerning issues that belong to the very core of personal integrity, intimacy and privacy. According to the Court, in the given circumstance the purpose of the term ' <i>homofiel</i> ' ('homosexual') was to injure the police officer's reputation.
Key issues (concepts, interpretations) clarified by the case	This judgement gives a further specification of the term 'context' as introduced in the Supreme Court judgment of 19.12.2000 (no. 01926/99, <i>LJN</i> : AA9745, <i>Nederlandse Jurisprudentie</i> 2001, 101). In that earlier case the court had ruled that the terms ' <i>vuile homo's</i> ' ('dirty fags') and ' <i>vieze smerissen</i> ' ('dirty fuzz') were insulting given the context in which the terms were used <i>and</i> the combination of the words used.
Results (sanctions) and key consequences or implications of the case	On the basis of Article 266 of the Penal Code, the defendant was sentenced to a fine of 50 Euro, with an alternative imprisonment of one day. In a recent case the Regional Court of 's-Hertogenbosch ruled that, given the lack of a special context, the use of the term ' <i>homo</i> ' ('gay') in a remark to a police officer during the lawful discharge/execution of his duties did not have an insulting (thus deserving of punishment) character. (Regional Court 's-Hertogenbosch 21.08.2007, no. 01-000504-07, <i>LJN</i> : BB2083)

Chapter F, Hate speech, case 3

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

Chapter F, Hate speech, case 4

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

Chapter F, Hate crimes, case 1

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

Chapter F, Hate crimes, case 2

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

Chapter F, Hate crimes, case 3

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

Case law Chapter G. Transgender issues

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

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

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

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

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

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

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

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

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

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

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

Case title	Breast implants for transsexuals not covered by health insurance
Decision date	16.11.2009
Reference details	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordelen</i> [opinions] 2009-107 and 2009-108 English translations of both opinions available at: www.cgb.nl/artikel/publications (14.02.2010)
Key facts of the case	In two very similar cases the health insurance companies of two male-to-female transsexuals have refused to pay for the costs of breast implants. The applicants claim that they have been discriminated by the insurance companies, because the latter do not refuse to pay the costs of female-to-male transsexuals for breast amputation.
Main reasoning/argumentation	The ETC considers that in the context of transsexuality breast implants and breast amputations are comparable medical treatment, and that the distinction made by the insurance companies between both treatments leads to a particular disadvantage for male-to-female transsexuals. Therefore there the insurance companies make an indirect distinction on grounds of sex. However, they are making this distinction because the current rules and regulations do not allow them to include breast implants in their basic health insurance policy. Therefore the ETC considers the indirect distinction to be objectively justified.
Key issues (concepts, interpretations) clarified by the case	
Results (sanctions) and key consequences or implications of the case	Held: no breach of the General Equal Treatment Act. In addition, the ETC uses its competence to forward these opinions to the Minister of Health, indicating that it does not seem rational to include breast amputations in the basic health insurance and to exclude breast implants from it.

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

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

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

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

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

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

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

No relevant case law available.

Annex 2 – Statistics

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

Equal Treatment Commission	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total number of complaints received by the Commission on discrimination on grounds of sexual orientation ²⁰³	7	7	6	5	10	15	4	10	7	12
Total number of opinions delivered by the Commission on complaints of discrimination on grounds of sexual orientation (plus – in brackets – the number of opinions on complaints of discrimination on grounds of gender identity)²⁰⁴	4 (+1)	4	2 (+2)	6 (+1)	3 (+2)	3	7 (+3)	5 (+1)	4 (+3)	2 (+2)
– employment	1 (+1)	2	1	4 (+1)	1	0	4 (+3)	2	3	1
– education	0	0	0	0	0	0	0	0	0 (+2)	0
– housing	0	0	0	0	0	0	0	0	0	0
– other goods and services	3	2	1 (+2)	2	2 (+2)	3	3	3 (+1)	1 (+1)	1 (+2)

²⁰³ See the annual reports of the Equal Treatment Commission for 2004 and 2008, available at: www.cgb.nl. The 2008 annual report is available in English at: www.cgb.nl/artikel/publications (14.02.2010). The figure for 2009 was provided by the ETC by email of 11.03.2010.

²⁰⁴ All opinions can be found at www.cgb.nl. For an overview in Dutch of all ETC opinions about alleged discrimination on grounds of sexual orientation, gender identity/expression, and civil status, see also www.emmeijers.nl/waaldijk.

Equal Treatment Commission	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total number of opinions delivered by the Commission finding that there was indeed discrimination on grounds of sexual orientation (plus – in brackets – the number of opinions finding discrimination on grounds of gender identity)	2	0	0 (+2)	2	2 (+1)	3	2 (+2)	2 (+1)	1 (+1)	1
– employment	0	0	0	1	1	0	2 (+2)	2	1	0
– education	0	0	0	0	0	0	0	0	0 (+1)	0
– housing	0	0	0	0	0	0	0	0	0	0
– other goods and services	2	0	0 (+2)	1	1 (+1)	3	0	0 (+1)	0	1
National number of sanctions/compensation payments issued (compliance measures taken by defendant in sexual orientation cases, known by the Equal Treatment Commission)²⁰⁵	1	1	1	1	0	1	3	3	0	?

²⁰⁵ This information is obtained from the ETC. The ETC explicitly remarked that this is not an exhaustive overview.

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

Chapters B, C and D

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

Chapter E, Freedom of assembly

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

Chapters F, G and H

The authors of this report submitted an official request (in writing, 18.01.2008 and 22.01.2008) to the Ministry of Justice to provide the information as requested in the guidelines under Chapters F and G. The authors received a letter (dated 27.02.2008) from the director of the Information Service of the Ministry of Justice indicating that the letters had been forwarded to the Council for the Judiciary and to public prosecution service. The Council for the Judiciary was later able to provide some figures (see below). In 2010 also some figures regarding hate crimes were found (see Chapters F.1., F.3. and H.1.).

Chapters G, Requested changes of sex in birth certificates

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

Chapter I, Statistics relevant to the impact of good practices

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