



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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CommDH(2009)19
English only

**Contribution of the Commissioner for Human Rights
to the work of the European Committee
on Legal Co-operation (CDCJ)**

A. General observations

1. On 30 March 2009, the Commissioner for Human Rights received the *Comparative study on partnership regulation in the Council of Europe's member states with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity*¹ as prepared by the Danish Institute for Human Rights for the attention of the Committee of Experts on Family Law (CJ-FA). This study was sent to the Commissioner for information and possible comments by the Bureau of the European Committee on Legal Co-operation (CDCJ). The aim of the present contribution is to provide the CDCJ with elements regarding the Commissioner's observations and comments on the issues touched upon by the above mentioned study.
2. As the Commissioner has outlined in his contribution to the DH-LGBT², he observes that lesbian, gay, bisexual and transgender (LGBT) persons continue to be confronted with discrimination, violence and prejudices in many Council of Europe member states because of their real or perceived sexual orientation or gender identity, as well as with homophobia and transphobia more generally. The Commissioner considers these problems as a priority theme for his Office. He is deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity and he raises his concerns consistently during his dialogue with member states of the Council of Europe.
3. The Commissioner relies generally on the non-discriminatory application of the existing human rights treaties, in particular the European Convention on Human Rights (ECHR) and Article 14 which prohibits any form of discrimination in the exercise of the rights and freedoms guaranteed by the Convention as well as Protocol 12 to the ECHR. Whereas sexual orientation and gender identity are not explicitly mentioned as discrimination grounds, the drafters of Protocol 12 pointed out in the explanatory memorandum that it prohibits discrimination on grounds of sexual orientation. This is however, not the case with gender identity, although it would undoubtedly be understood as such since the list of grounds in Protocol 12 is not exhaustive and because of the jurisprudence of the European Court of Human Rights in relevant cases.

B. Specific comments regarding the topic of partnership regulation in the Council of Europe's member states with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity

Same sex partnerships

4. The Commissioner notes that in many Council of Europe member states there is no possibility of legal recognition of same sex partnerships. However, in five member states civil marriage is open for same sex couples (Norway, Sweden, Netherlands, Spain, Belgium) and in some other countries there is a legal possibility for same sex partnership. During his visits, the Commissioner recommends to the authorities to ensure legal recognition of same sex partnerships³. Recent practices and proposals in some Council of Europe member states to amend their domestic constitution to introduce a clause banning same sex marriage were considered by the Commissioner as being discriminatory.⁴

¹ CDCJ(2009)9 restricted.

² Contribution of the Commissioner for Human Rights to the work of the Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT), CommDH/(2009)7.

³ Report by the Commissioner for Human Rights, on his visit to "the former Yugoslav Republic of Macedonia", from 25 to 29 February 2008, CommDH(2008)21, Recommendation 62.

⁴ Memorandum to the Latvian Government: Assessment of the progress made in implementing the 2003 recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)9, § 89.

5. The Commissioner observes that some member states have set up special governmental working groups to investigate the possibility to introduce same sex partnerships. He encourages his development.
6. During his missions and further to information addressed to the Commissioner by individuals, he notes important difficulties to which non-recognition of same sex partnership can lead including:
 - ✗ Exclusion from pension schemes that offer particular benefits for family members
 - ✗ Denial of inheritance rights in the event that one's partner dies
 - ✗ Denial of tax benefits and other social benefits for spouses and parents, including parental leave from employment
 - ✗ Non-recognition of families for immigration purposes – often effectively barring the right to family life and family reunification
 - ✗ Non-recognition as "next of kin", restricting the ability to be consulted and make decisions in the event of a medical emergency.
7. An important area of concern is moreover the consequences of the failure to provide a legislative framework for parenting by same-sex partners on the rights of children raised in LGBT families. Children raised in LGBT families may be denied their right to live with their parents or may face difficulties if their parents are not legally regarded as such. This is clearly not consistent with the child's best interests, which the Commissioner states should be the primary consideration in *all* actions concerning them.
8. The Commissioner also notes the lack of recognition of same sex partnerships (or marriages) carried out with legal effect in 'third' countries, in particular when partners are exercising their right to free movement. He recommends to take legislative action to overcome the discrimination experienced by some couples on the grounds of their sexual orientation.
9. The Commissioner believes that there is a need for legal recognition of same sex partnerships which guarantees the same rights as different sex partnerships in the areas of social security, family reunification, freedom of movement, inheritance, employment and pension benefits. When the recognition of same sex partnerships is in place, full equality should be the norm. The law should not fall behind increasingly common legal standards in many EU countries and the general principle of non-discrimination.⁵
10. Whereas the Commissioner notes that under international human rights law, family law is left to the national margin of appreciation, he believes that equal access to exercise and enjoy the rights within the areas of family law (such as adoption and assisted reproduction, family reunification, health, housing and property) should be guaranteed to all persons, irrespective of their sexual orientation or gender identity.
11. He notes in this regard the 2008 Fundamental Rights Agency report "*Homophobia and Discrimination on Grounds of Sexual Orientation in the EU member states: Part I- Legal Analysis*" which argues that "[...] international human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official recognition, the *de facto* durable relationships they enter into leads to extending to them such advantages. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate choice not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows a *contrario* that advantages recognised to married couples should be extended to unmarried same-sex couples either when these couples form a registered

⁵ Follow-up report on Slovenia: Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2006)8, § 42.

*partnership, or when, in the absence of such an institution, the de facto relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory”.*⁶

Adoption

12. Regarding adoption of children the Commissioner argues that there is no right to adopt – the best interest of the child must be the decisive consideration. However, the obvious human rights approach is that same sex couples (individually or jointly) should have the same right as other adults to be considered as candidates when decisions are taken about who would be the best adoptive parent for a child. This approach is also very much in line with the provisions in the Convention on the Rights of the Child. The focus should be on the best interest of the child, and adoption procedures should ensure a broad screening of potential adoption parents. No assumption should be made that it is in the child’s best interest for adoption to only be open to heterosexual married couples and single people.

Transgender persons

13. Particular problems are faced by transgender persons. In some member states gender reassignment leads to the automatic dissolution of an existing marriage, since two people of the same gender are not allowed to stay married. In the Viewpoint “Discrimination against transgender persons must no longer be tolerated” (05 January 2009) the Commissioner expressed his concern in this regard and referred to the requirement in many countries that *“a married person divorces before his or her new gender can be recognised, even though the couple itself does not want to divorce. This in turn may have an impact on children of the marriage. In fact, in several countries the parent who has undergone the gender change will lose custody rights. Legislation requiring divorce needs to be reformed in the spirit of the best interests of the child”*.
14. The European Court of Human Rights has held that States are required under Article 14 of the ECHR to permit post-operative transsexuals to marry in their new gender.⁷ At least three member states are known not to comply with this ruling.⁸ The Commissioner believes that Council of Europe Member States should take all necessary concrete action to ensure that transphobia is stopped and that transgender persons are no longer discriminated against in any field.

⁶ Fundamental Rights Agency report *“Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis”*, p. 13-14.

⁷ *Christine Goodwin v. United Kingdom*, Application no. 28957/95, judgment of 11 July 2002.

⁸ *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care* (for Ireland and Portugal) and *Inclusion of transgender individuals into the labour market-- A Research Study* by the Malta Gay Rights Movement (for Malta).