

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

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## Executive summary

### Implementation of Employment Directive 2000/78/EC

Directive 2000/78/EC was transposed into national law by means of the adoption of the Equal Treatment Act and amendment of a number of specific acts. A separate set of laws were adopted in the Åland Islands, which is an autonomous province of Finland and has exclusive legislative competence over specific matters within its jurisdiction. Finland was condemned by the European Court of Justice in February 2005 for having exceeded the deadline for the national transposition of the Directive, particularly as regards Åland Islands.

Finnish equal treatment law appears to be in full compliance with the EU Employment Equality Directive. In some respects, particularly as regards the material scope of application of the relevant legislation, it goes beyond the requirements set forth by the Directive.

A victim of sexual orientation discrimination can avail of several different legal avenues, of civil or criminal law nature, for the purposes of obtaining redress. No precise statistics on how many such proceedings have been initiated are available, but the available evidence suggests that the number of cases is low.

### Freedom of movement

The provisions regarding freedom of movement of EU citizens and members of their families are laid down in the Aliens Act. These provisions apply equally to everyone irrespective of their sexual orientation. By virtue of the Aliens Act and the Act on Registered Partnerships persons who have contracted a registered partnership have the same rights as persons who are married, and same-sex couples living in the same household have the same rights as different-sex couples living in the same household. As a rule, family members of EU citizens (irrespective of whether they themselves are EU citizens) have the same right of residence in Finland as the EU citizen concerned.

There is no statistical data showing how many LGBT persons have exercised their right to reside in Finland on the grounds of being a family member of an EU citizen. No case law interpreting the domestic law in this respect could be found from the case law database FINLEX or the pertinent legal literature.

## Asylum and subsidiary protection

Under the Aliens Act non-citizens may be granted asylum if they reside outside their home country owing to a well-founded fear of being persecuted for reasons of “membership in a particular social group”. Under the Act, as revised, persecution on the grounds of sexual orientation is to be considered persecution for reasons of “membership in a particular social group”. Family members, including LGBT partners, of persons who have been granted asylum or subsidiary protection are, upon application, also issued a residence permit.

Statistical data showing how many LGBT individuals have sought asylum or a residence permit on the above grounds does not exist in Finland. No significant case law could be found in this context from the case law database FINLEX or the pertinent legal literature.

## Family reunification

A family member of a third country national residing in Finland may be issued a residence permit on the basis of family ties. The material provisions regarding family reunification apply equally to married spouses and individuals in a registered partnership, and to different-sex couples living in a marriage-like relationship and same-sex couples living in such a relationship. Under the Aliens Act, when a non-national is issued a residence permit, his/her family members are issued a similar permit for the same period of time.

Statistical data showing how many LGBT individuals have exercised their above-mentioned rights does not exist in Finland. No case law could be found in this context from the case law database FINLEX or the pertinent legal literature.

## Freedom of assembly

The Constitution and the Assembly Act provide strong protection for the right to exercise the freedom of assembly. Everyone has the right to arrange demonstrations and other public meetings without a permit, as well as the right to participate in them. These rights apply to “peaceful public meetings”, which is interpreted to mean that the purpose of the meeting must not be to break the law for instance by means of inciting hatred, as defined in the Penal Code, against a population group (such as LGBT people). The police is specifically required under domestic law to protect public meetings from illegal third-party interference.

There is no statistical data about the number of pro-LGBT people demonstrations that have been arranged in Finland, nor is there respective data about the number of demonstrations that have been critical of LGBT people or their rights. No case law could be found in this context from the case law database FINLEX or pertinent legal literature.

## Hate speech and criminal law

Hate speech against LGBT groups or individuals may constitute several different types of crimes as defined in the Penal Code, such as invasion of personal reputation, defamation or incitement against a population group. If hate speech takes place in the context of employment or education it may also constitute harassment under the Equal Treatment Act. Homophobic motives may be taken into account as a ground for increasing the punishment for a common crime such as assault.

There is no statistical data showing how many cases have been tried on the grounds of hate speech against LGBT groups or individuals specifically. No case law could be found in this context from the case law database FINLEX or the pertinent legal literature.

## Transgender issues

The issue of discrimination against transgender persons is not specifically addressed in Finnish law. The prevailing legal opinion, as well as the practice of the Ombudsman for Equality, supports the interpretation that the law regarding equality and non-discrimination between women and men applies also to discrimination against transgender persons. A Committee charged with revising equality legislation has proposed that the gender equality legislation be amended so that it would explicitly cover transgender discrimination.

There is a specific piece of legislation that governs the official recognition of the sex of a transsexual person. The new *de facto* sex of a person shall be legally recognized *ex officio* (i.e. there is no room for discretion), provided that certain conditions laid down in law are met. A person whose new *de jure* sex has been recognized by the competent authorities is to be treated as a person of that sex for all purposes under the law, including the change of name.

Statistics about the number of individuals who have changed their *de jure* sex is not readily available, nor are statistics about the number of people who have changed their name for these reasons. Some indirect indicators however may be used, but these do not provide fully reliable information. No case law interpreting the laws in question could be found from the case law database FINLEX or the pertinent legal literature.

## A. Implementation of Employment Directive 2000/78/EC

Directive 2000/78/EC was transposed into national law primarily by means of the adoption of the Equal Treatment Act [*yhdenvertaisuuslaki* (21/2004)]. The Equal Treatment Act is a general piece of legislation in the sense that its overall material scope is wide and it covers several discrimination grounds. A number of more specific, already existing acts were amended when the Equal Treatment Act was adopted with a view to bringing their non-discrimination provisions in line with the latter. These Acts included the Employment Contracts Act [*työsopimuslaki* (55/2001)], Civil Servant Act [*valtion virkamieslaki* (750/1994)], Act on Civil Servants in Municipalities [*kunnallisista viranhaltijoista annettu laki* (304/2003)] and Seaman's Act [*merimieslaki* (423/1978)]. Discrimination is prohibited also in a number of other pieces of legislation that had been enacted already before the transposition of the Directive. Most important of these are the Constitution [*perustuslaki* (731/1999)] and the Penal Code [*rikoslaki* (391/1889)].

Åland Islands is an autonomous province of Finland which has exclusive legislative competence over matters pertaining to, inter alia, civil servants employed by the Province of Åland or one of the municipalities in the Åland Islands, education, self-employment and partially also provision of services in the Åland Islands (e.g. transport services). In consequence, the above-mentioned acts, adopted by the Parliament of Finland, are applicable in the Åland Islands only insofar as they do not deal with these areas, being applicable e.g. with respect to employees in private companies but not civil servants. A distinct set of acts had therefore to be adopted in the Åland Islands to transpose the Directive. The most important of these is the Provincial Act on Prevention of Discrimination in the Province of Åland Islands [*Landskapslag om förhindrande av diskriminering i landskapet Åland* (66/2005)], in addition to which a number of other acts, dealing with specific subject areas such as high school education, were adopted.

EU member states were required to transpose the Employment Directive into national law by 2 December 2003. The Equal Treatment Act, together with the above-mentioned amendments to the other relevant acts, entered into force on 1 February 2004 and Åland Islands' equality legislation entered into force in December 2005. Hence Finland was late in transposing the Directive, particularly in respect to the Åland Islands, and was indeed condemned for this by the European Court of Justice on 24 February 2005.<sup>1</sup>

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<sup>1</sup> ECJ ruling from 24.2.2005, Case C327/04.

The Finnish anti-discrimination legislation is currently under a comprehensive review process. The Ministry of Justice of Finland set up in January 2007 the Equality Committee, and charged it with preparing a proposal for renewed equal treatment legislation. The Committee concluded its work in December 2009 by submitting its report to the Ministry of Justice.<sup>2</sup> The Committee's report contains inter alia the following proposals:

- The scope of application of the Equal Treatment Act would be expanded so that it would cover all public and private activities. Matters belonging to the sphere of private life would however be excluded from the scope. The Committee proposes that the Act on Equality between Women and Men be amended with a view to taking explicitly into account that the concept of gender discrimination includes discrimination based on gender reassignment and gender identity..
- The duty to promote equal treatment would expand so that it would concern all discrimination grounds, including sexual orientation, not just ethnic discrimination as is presently the case. The duty-bearers would include not just government and municipal authorities, but also educational institutions and employers. The general duty would encompass a more specific duty to draw up an equality plan setting out the specific measures by which the general duty will be implemented.
- The prohibition of discrimination would encompass prohibition of multiple discrimination, as well as discrimination by association and discrimination based on assumptions.

The office of the Ombudsman for Minorities would be turned into the office of the Ombudsman for Equality, and the Ombudsman would be charged with supervising compliance with the Equal Treatment Act with respect to all the grounds covered by the Act, including sexual orientation. The powers of the Discrimination Tribunal of Finland would be similarly expanded.

The Government's Proposal for revised equality legislation is expected to be submitted to the Parliament in the autumn of 2010.

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<sup>2</sup> The Report of the Equality Committee, *Proposal for a new Equal Treatment Act* (Committee Reports 2009:4). Available at the website of the Ministry of Justice, at [www.om.fi](http://www.om.fi) (accessed 1.2.2010).

<sup>6</sup> The preparatory works to the Non-Discrimination Act submit that the theoretical ceiling - the amount of which is now 15 000 euros but which will be reviewed every two years - was laid down in law as a guidance for the judges, for the purposes of underlining that substantial amounts should be awarded in discrimination cases.

## A.1. Scope and gaps

Finnish anti-discrimination law, and in particular the anti-discrimination law applicable in the Åland Islands, goes in some respects beyond the requirements set forth by the Employment Directive, particularly as regards its material scope of application. It would seem that the domestic law satisfies all the requirements set forth by the said Directive.

The Equal Treatment Act prohibits discrimination on the grounds of sexual orientation in: access to self-employment and to occupation; support for business activities; recruitment conditions, employment and working conditions (including dismissal and pay), vocational training and promotion; membership of, and involvement in, workers' or employers' organisations; and access to education and training, including advanced training, retraining and vocational guidance. The law protects not just paid workers but e.g. trainees as well. The Act on State Civil Servants, the Act on Municipal Office Holders and the Seamen's Act provide *complementary* protection by means of prohibiting discrimination on the grounds of sexual orientation in their respective fields of application. By way of an apparent mistake, the non-discrimination provision of the Act on State Civil Servants did not initially explicitly refer to sexual orientation as a prohibited ground of discrimination. This omission – which was arguably of no legal consequence as the list of prohibited grounds is open-ended and the preparatory works make it clear that sexual orientation is one of the prohibited grounds - was corrected in late 2007 and the amended non-discrimination provision (section 11 of the Act) entered into force on 1.1.2008.

The Provincial Act on Prevention of Discrimination in the Province of Åland Islands prohibits discrimination on the grounds of sexual orientation in: Access to self-employment and to occupation; vocational guidance, vocational training and retraining, including work training; access to civil service in the Åland Islands or one of the municipalities therein, and the conditions of such service; healthcare and social security; schools; and professional provision of goods and services, including housing. The Provincial Act on Collective Contracts [*Landskaplag om tjänstekollektivavtal* (1978:22, as amended by act of 2005:69)] bans clauses in collective agreements that discriminate on the grounds of sexual orientation. A number of provincial acts which deal with specific forms of education, including higher education, prohibit discrimination on the grounds of sexual orientation in their specific fields of application.

Finnish anti-discrimination law goes, in terms of the material scope of application, beyond the requirements of the Employment Equality Directive. Whereas there were initially some concerns as to whether it fully complies with the Directive in some other respects, these concerns have now been alleviated, because a number of amendments have been made into that law in order to bring it fully in line with the Directive.

## A.2. Enforcement

A victim of discrimination may, on the basis of the Equal Treatment Act, file a claim in a district court with a view to obtaining just satisfaction (“hyvitys”). The amount of just satisfaction can be as high as 15 000 € and even more when the circumstances so warrant.<sup>6</sup> The payment of satisfaction is not connected to criminal liability.

Discriminatory provisions included in an employment contract may be annulled or amended by an ordinary court, or by a Labour Court if the matter deals with a collective agreement.

Criminal charges under the Penal Code may also be brought. Discrimination is a crime under public prosecution in the Penal Code, which means that when a crime report has been filed by the victim or someone else, or when the police otherwise has reason to suspect that a crime has taken place, it is for the police to investigate the matter under the leadership of a prosecutor (pre-trial investigation). A person who is found to be a victim of discrimination may be awarded just satisfaction under the Equal Treatment Act or be awarded compensation for damages from the perpetrator under the Tort Liability Act [*vahingonkorvauslaki* (412/1974, as amended by law 509/2004)]. Damages may, on the above grounds, be claimed from the perpetrator also in civil proceedings where the matter of criminal responsibility is not examined.

As regards employment, compliance by employers with anti-discrimination law is supervised by the Occupational Health and Safety Authority. It may receive communications from employees, and carry out on-site inspections in the private sector, and if it considers that there are probable grounds to believe that discrimination, as defined in the Penal Code, has taken place, it must report the case to a public prosecutor (i.e. the Authority’s duty to act does not depend on the consent of the victim(s) of discrimination).

In case a discriminatory decision is made in the exercise of public powers, a victim of discrimination may file a complaint to the Parliamentary Ombudsman or the Chancellor of Justice of the Government. These bodies do not have the power to amend decisions of authorities or award damages, but they may e.g. issue admonitions or order criminal prosecutions against a public official.

There is no equality body in Finland dealing with discrimination on the ground of sexual orientation. The Ombudsman for Minorities deals only with discrimination on the grounds of ethnic origin and the Ombudsman for Equality deals with gender equality, including discrimination on the grounds of transsexuality but not sexual orientation (see heading G of this report for more details).

Article 9(2) of the Employment Equality Directive, regarding the involvement of associations and other legal entities in judicial or other procedures, did not

lead to the taking of any specific transposition actions. In the Finnish legal system both natural and legal persons can have rights and obligations and have legal standing. However, only those whose rights or obligations are directly at stake have legal standing in court in a particular case. Neither class actions nor organisational standing are possible in discrimination cases. Interested organisations may not bring legal action on behalf of a victim of discrimination without his/her authorization, or as juridical persons formally (in their own name) act as legal counsel even with authorization, or become third parties or even (usually) act as *amicus curiae*. Individual lawyers (or even lay individuals, subject to some restrictions), also when working for an organisation, may, subject to general statutory restrictions for representation, bring legal action and represent a victim in a court upon his/her authorization, and may of course provide legal and other assistance such as advice. There are no procedures for legal authorization of the organisations whose employees can engage in proceedings in this way; hence there are no statistics on this either, and basically any organisation can play a role in this regard. In practice interested organisations do not, primarily because of lack of resources, directly engage in legal proceedings, but only give legal and/or other advice to the (potential) complainants and give contact information for lawyers who have specialized in the subject area.<sup>7</sup> Accordingly the relevance of Article 9(2) for the purposes of vindicating the rights of victims of discrimination has been modest.

### A.3. Statistics and case law

Statistics. According to information obtained from Statistics Finland<sup>8</sup> it is possible to obtain aggregate figures about the number of court cases relating to particular types of criminal or civil law proceedings. However, the existing statistics are not (and cannot be) disaggregated in such a manner that they would disclose e.g. the number of discrimination cases relating specifically to sexual orientation. To obtain the number of such court proceedings, tried under the national transposition legislation, one would have to launch a fully-fledged research into all equal treatment cases decided by the national courts, in order to detect or determine from the actual court decisions or records the specific discrimination ground(s) in relation to which cases have been tried. Such an

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<sup>7</sup> The main national NGO in this field, the Sexual Equality association (Seksuaalinen tasa-arvoisuus ry, SETA), does not currently provide legal advice but only gives information regarding whom to contact for further advice and counselling (authorities or a lawyer or another NGO). The Feminist Association Unioni (Naisasialiitto Unioni ry) offers legal help for women free of charge in all kinds of matters. Trasek, which is an association for transsexual people, offers (at least occasionally) legal advice in relation to issues related to transsexuality. It is impossible to exhaustively list all associations that may be active in this field, as there are 127 000 associations in Finland and basically any one of them could give some advice in legal matters. The main point however is that there are no NGOs in Finland that regularly represent victims of discrimination in a court for free of charge or e.g. for a nominal fee.

<sup>8</sup> Personal communications, 11 and 12 February 2008.

inquiry, the performance of which is subject to several administrative and technical hurdles, is beyond the scope of the present study. One such study has however been done. A study carried out by the Finnish League for Human Rights (*Ihmisoikeusliitto*) surveyed all criminal proceedings between 1.1.2007-31.8.2008 where discrimination was at issue, and found out that none of those cases involved discrimination on the grounds of sexual orientation. The study surveyed also all civil law discrimination cases from the same time period, and found that none of them concerned sexual orientation.<sup>9</sup>

Case law. Decisions of the general courts of law, these including the Courts of Appeal, the Supreme Court, the Administrative Courts and the Supreme Administrative Court, as well as some specialized courts such as the Labour Court, can be found in a publicly accessible database called FINLEX. The database is not comprehensive, as it does not include all cases decided by the above-mentioned courts (but entails discretion by the courts as to which ones of their cases are considered to have general relevance), nor does it include decisions of Courts of First Instance, equality bodies, the Parliamentary Ombudsman or the Chancellor of Justice. A comprehensive keyword-based search of the database<sup>10</sup> was conducted on 13.2.2010 but did not yield any positive hits. This means that no case involving discrimination on the ground of sexual orientation, decided under the transposition legislation, had found its way into the FINLEX database. No case law descriptions regarding sexual orientation discrimination, decided under the transposition laws, could be found from the pertinent legal literature either.<sup>11</sup> As concerns such cases decided by general courts that are not recorded into FINLEX, we are aware of only one case decided on the basis of the Equal Treatment Act that dealt with sexual orientation discrimination.<sup>12</sup> That case is described in Annex 1. One should not draw from the above information the conclusion that there has been only one case so far that would have dealt with sexual orientation discrimination. All available information suggests that the number of cases is low but the precise

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<sup>9</sup> Milla Aaltonen, Mikko Joronen ja Susan Villa, *Syrjintä Suomessa 2008* (Helsinki: Ihmisoikeusliitto, 2009).

<sup>10</sup> The decisions of each relevant judicial body were browsed e.g. with search words “discrimination”, “equal treatment”, “sexual orientation” and “transsexual” and their variants, after which resulting cases were examined as to whether they involved discrimination on the grounds of sexual orientation or transsexuality.

<sup>11</sup> Karoliina Ahtela et al, *Tasa-arvo ja yhdenvertaisuus* (Helsinki: Talentum, 2006). Rainer Hiltunen refers to two court cases regarding discrimination on the grounds of sexual orientation, but these predate the transposition legislation. See Rainer Hiltunen, ‘Combating sexual orientation discrimination in employment: legislation in fifteen EU member states, Chapter 6 Finland’, April 2004. Available at: [http://ec.europa.eu/employment\\_social/fundamental\\_rights/public/pubst\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm) <accessed 13.2.2008>

<sup>12</sup> In addition we are aware of one decision from the district court of Helsinki, where the court dismissed the claim that the respondent had engaged in discrimination on the grounds of sexual orientation (Johanna Korhonen v. Alma media, 9 June 2009, District court of Helsinki). The decision has been appealed.

number of cases is simply not known and not possible to obtain without a thorough study of actual court records.

## B. Freedom of movement

In accordance with sections 8 and 12 of the Act on Registered Partnerships [*laki rekisteröidystä parisuhteesta* (950/2001)] registered partnerships, irrespective of the country in which the partnership has been registered, insofar as the registration is valid in that country, have the same legal effect as marriage unless otherwise provided for by law. Under section 154 of the Aliens Act [*ulkomaalaislaki* (301/2004)] members of the family of a Union citizen include, inter alia, the following: (i) spouse, (by virtue of the Act on Registered Partnerships, this includes registered partners<sup>13</sup> - throughout the Aliens Act) and individuals who, irrespective of their sex, live in the same household in marriage-like circumstances, provided that they have lived in the same household for at least two years; such individuals are to be treated as ‘spouses’ for the purposes of the Aliens Act;<sup>14</sup> (ii) descendants who have not reached 21 years of age or are dependent on the Union citizen, as well as respective descendants of the spouse (again, including e.g. registered partners); and (iii) relatives in ascending line who are dependent on the Union citizen and relatives of similar status of the spouse. Criterion (i) therefore applies also to same-sex couples who meet the prescribed criteria of two years’ co-habitation even if they have not contracted a registered partnership. The section and the Aliens Act as a whole applies also to their children, i.e. the law is the same for children irrespective of whether their parent(s)/legal guardian(s) live in same-sex or different-sex relationship.

Accordingly, same-sex couples enjoy the same rights as different-sex couples when it comes to EU citizens’ freedom of movement in Finland. As is obvious, same-sex couples both of whom are EU citizens have independent subjective rights regarding entry and stay in Finland, i.e. these rights are not derived from the rights of the partner, and the rules laying down these rights do not discriminate on the grounds of sexual orientation. The relevant substantive rights are specified in Chapter 10 of the Aliens Act, and provide, inter alia, that Union citizens are to be granted entry into Finland provided that they hold a valid passport or other valid identity card. EU citizens can reside in Finland for up to three months without registering their right of residence, and the same right applies to members of their families, irrespective of whether the latter are Union citizens or not. Union citizens can reside without registration ‘for a reasonable period of time’ even after the three months’ deadline if they look for work and have genuine chances of finding it.<sup>15</sup>

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<sup>13</sup> This is clear also in view of the explanatory memorandum to the Government proposal for the Aliens Act, HE 205/2006, p. 29-30.

<sup>14</sup> This has been recognized also in case law, e.g. Supreme Administrative Court KHO:2009:85 (9.10.2009).

<sup>15</sup> Section 158 of the Aliens Act.

Union citizens who reside in Finland for longer than three months have to register their residence. A Union citizen has the right to reside in Finland for longer than three months if, as specified in more detail in section 158a of the Aliens Act, (i) he/she is in employment or is self-employed; (ii) he/she has got sufficient funds to support him-/herself and his/her family and has got, if necessary, a sickness insurance for the said persons, with a view to their residence not burdening the Finnish social security system; (iii) he/she is enrolled in an accredited educational institution and has the sufficient funds and if necessary a sickness insurance for him-/herself and his/her family, *or* (iv) he/she is a family member – as defined above – of a person who has got the right of residence as specified in (i)-(iii), irrespective of whether he/she is a Union citizen.<sup>16</sup> However, where the right of residence is based on studying (as specified in condition (iii) above), family members' right of residence is restricted to spouses, including those in registered relationships and those, irrespective of their sex, who have lived in the same household for two years (by virtue of article 154, referred to above, persons in such relationships are to be regarded as 'spouses' in this context), and their children (or dependent minors) who are under 21 years of age.<sup>17</sup>

Family members' right of residence remains unaffected by the death or departure from the country by the Union citizen, provided that the family member him-/herself is a Union citizen. The same applies in the event of divorce (or, by implication, dissolution of registered partnership). Before being granted *permanent residence* the family member must however meet the criteria specified in section 158 a(1). In the event of the death of an EU citizen, his/her family members who are not citizens of the Union retain the right of residence, provided they have resided in Finland for at least one year before the death. Specific criteria apply to their right to obtain permanent residence. In the event of dissolution of marriage (or registered partnership), the right of residence is retained if the marriage (or registered partnership) has lasted for three years, one year of which must have been spent in Finland, or if one or more of the other conditions specified in section 161e, subsection 2, apply.

Sections 167 – 170 of the Aliens Act deal with refusal of entry, deportation and expulsion. These provisions make no distinctions between same-sex and different-sex couples.

LGBT partners of citizens of Finland are in a position to benefit from the freedom of movement and residence in another EU member state according to Directive 2004/38/EC in the sense that the Finnish law provides – as already noted - for the opportunity to contract a registered partnership equivalent to marriage. There is no information on the basis of which one could draw conclusions, either way, as to whether the rights specified in the said directive can effectively be enjoyed in practice in the other member states, i.e. whether

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<sup>16</sup> Section 158a, subsections 1 and 2.

<sup>17</sup> Section 158a, subsection 3.

the other member states have correctly transposed the directive into their domestic laws.

## B.1. Statistics and case law

Statistics. According to information obtained from Finnish Immigration Service (Maahanmuuttovirasto) on 12.2.2010,<sup>18</sup> the statistical information requested by the FRA does not exist, mainly because family members are not required to indicate whether they live in a same-sex or different-sex relationship or whether they are married or have contracted a registered partnership, in addition to which the various registration procedures differ to the extent that no overall, reliable statistics can be provided.

Case law. A comprehensive keyword-based search of the FINLEX case law database, conducted on 14.2.2010, did not yield any case law that would be relevant in this context. Nor could any relevant case law be found from the pertinent legal literature.<sup>19</sup>

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<sup>18</sup> Information by telephone on 12.2.2010.

<sup>19</sup> Tapio Kuosma: *Uusi ulkomaalaislaki* (Helsinki: Lakimiesliiton kustannus, 2004).

## C. Asylum and subsidiary protection

Section 87 of the Aliens Act provides that non-citizens “residing in the country are granted asylum if they reside outside their home country or country of permanent residence owing to a well-founded fear of being persecuted for reasons of ethnic origin, religion, nationality, membership in a particular social group or political opinion and if they, because of this fear, are unwilling to avail themselves of the protection of that country.” New section 87b of the Act, which entered into force in June 2009, specifies in subsection 4 that sexual orientation is one factor that that may constitute a “particular social group” within the meaning of section 87. Illegal forms of sexual conduct (as defined in the EU countries’ legislation, in accordance with directive 2004/83/EC) cannot be considered to constitute “sexual orientation” for the purposes of this provision. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually belongs to a sexual minority, provided that the actor of persecution attributes such a characteristic to the applicant.<sup>21</sup> Individuals who are granted asylum are also granted formal refugee status.<sup>22</sup>

LGBT persons who are not considered to meet the requirements of granting asylum under section 87 but who are in their home country or country of permanent residence under the threat of death penalty, torture or other inhuman treatment or treatment violating human dignity, may be issued a residence permit on the grounds of “subsidiary protection” under section 88 of the Aliens Act. Article 88 may also be applicable in a situation where a person is in need of protection because homosexuality is criminalized in his/her home country or country of permanent residence, or because he/she would be subjected to harassment in that country.<sup>23</sup>

Under section 114 a residence permit is issued on the basis of family ties to a family member of a refugee or a non-national who has been issued a residence permit on the basis of a need for protection or who has enjoyed temporary protection if (i) the sponsor lives in Finland or has been issued a residence permit for the purpose of moving to Finland, and (ii) the applicant is not considered a danger to public order, security or health. If the above conditions for granting a residence permit are not readily met, the decision to grant or not to grant the permit shall be made on the basis of a comprehensive consideration

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<sup>21</sup> Section 87b, subsection 5, of the Act.

<sup>22</sup> Section 106(1) of the Aliens Act.

<sup>23</sup> This interpretation is based on the fact that the Explanatory memorandum to the Government proposal for the Aliens Act mentions for instance discrimination against women, as defined in the UN CEDAW convention, as a factor to be taken into account in the application of section 88. See HE 28/2003 vp, pp. 177-178. There is no case law on this as far as we know.

of all relevant facts, i.e. a failure to meet the requirements set forth by law do not automatically lead to a decision not to grant the permit.<sup>24</sup>

The definition of “family member” for the purposes of section 114 regarding residence permits for family members of refugees and non-nationals who have been issued a residence permit on the basis of need for protection is laid down in section 37 of the Aliens Act. Under the said article family members are the following: (i) spouse of a person residing in Finland (the concept of “spouse” covering individuals in registered relationships<sup>25</sup>), (ii) unmarried children under 18 years of age over whom the person residing in Finland or his or her spouse had guardianship and (iii) persons living continuously in a marriage-like relationship within the same household regardless of their sex, provided that they have lived together for at least two years or that they have a child in joint custody or that there is some other “weighty reason” for it. If the person residing in Finland is a minor, his or her guardian is considered a family member.

Accordingly, LGTB partners are accepted as family members in the context of asylum and/or subsidiary protection insofar as they live in a registered partnership, have lived in the same household for at least two years, have a child in joint custody *or* if there is some other weighty reason for it.

## C.1. Statistics and case law

Statistics. According to information obtained from Finnish Immigration Service (Maahanmuuttovirasto) on 12.2.2010,<sup>26</sup> the statistical information requested by the FRA does not exist. As regards data about numbers of persons who have sought asylum or subsidiary protection this data does not exist because the specific grounds on which applications are made – and decided upon - are not registered in a manner that would permit generation of statistical data. As regards other data requested by the FRA under this heading, the information does not exist because of reasons described above under heading B1.

Case law. A comprehensive keyword-based search of the FINLEX case law database, conducted on 14.2.2010, did not yield any case law that would be relevant in this context. Nor could any relevant case law be found from the pertinent legal literature.<sup>27</sup> According to information obtained from the Finnish Refugee Advice Centre (Pakolaisneuvonta)<sup>28</sup> their lawyers have assisted

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<sup>24</sup> Section 106(2) of the Aliens Act.

<sup>25</sup> This is expressly written down to section 37. See also the explanatory memorandum to the Government proposal for Aliens Act, HE 205/2006, p. 139 and the Act on Registered Partnerships.

<sup>26</sup> Information by telephone on 12.2.2010.

<sup>27</sup> Tapio Kuosma: *Uusi ulkomaalaislaki* (Helsinki: Lakimiesliiton kustannus, 2004).

<sup>28</sup> Telephone interview on 14.2.2008.

individuals who have sought asylum in Finland because of fear of persecution on grounds of sexual orientation. Some of the applications have been successful, whereas others have not; statistics on these matters (re this specific ground for seeking asylum) do not exist.

## D. Family reunification

Family member of a third country national within the meaning of Council Directive 2003/86/EC can be issued a residence permit on the basis of family ties. The material provisions regarding family reunification apply equally to married spouses and individuals in a registered partnership, and to different-sex couples living in a marriage-like relationship and same-sex couples living in such a relationship. The concept of a family member applicable in this context is defined in section 37 of the Aliens Act. Under the said article family members are the following: (i) spouse of a person residing in Finland (the concept of “spouse” covering individuals in registered relationships<sup>30</sup>), (ii) unmarried children under 18 years of age over whom the person residing in Finland or his or her spouse had guardianship and (iii) persons living continuously in a marriage-like relationship within the same household regardless of their sex, provided that they have lived together for at least two years or that they have a child in joint custody or that there is some other “weighty reason” for it. If the person residing in Finland is a minor, his or her guardian is considered a family member.

Under the Aliens Act, when a non-national is issued a residence permit, his/her family members are issued a similar permit for the same period of time. For instance under section 45(3) of the Aliens Act, when a non-national is issued a temporary residence permit, his/her family member(s) are issued a temporary residence permit for the same time period. The same principle applies to continuous and permanent residence permits.

Under certain conditions individuals, including LGBT persons, enjoy the opportunity to reside in Finland even in the event that the family tie is broken.<sup>31</sup>

### D.1. Statistics and case law

Statistics. According to information obtained from Finnish Immigration Service (Maahanmuuttovirasto) on 12.2.2010,<sup>32</sup> the statistical information requested by the FRA under this heading does not exist for reasons specified under headings B and C above.

Case law. A comprehensive keyword-based search of the FINLEX case law database, conducted on 14.2.2010, did not yield any case law that would be

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<sup>30</sup> This is expressly written down to section 37. See also the explanatory memorandum to the Government proposal for Aliens Act, HE 205/2006, p. 139 and the Act on Registered Partnerships.

<sup>31</sup> See e.g. sections 54(6) and 56(2) of the Aliens Act.

<sup>32</sup> Information by email on 12.2.2008 and 13.3.2008.

relevant in this context. Nor could any relevant case law be found from the pertinent legal literature.<sup>33</sup>

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<sup>33</sup> Tapio Kuosma: *Uusi ulkomaalaislaki* (Helsinki: Lakimiesliiton kustannus, 2004).

## E. Freedom of assembly

Section 13 of the Constitution [*perustuslaki* (731/1999)] provides that “everyone has the right to arrange meetings and demonstrations without a permit, as well as the right to participate in them.” More detailed provisions on the exercise of the freedom of assembly are laid down in the Assembly Act [*kokoontumislaki* (530/1999)].

The Assembly Act concerns public meetings, including demonstrations, and lays down the regulatory provisions on the arrangement of such meetings. It specifies that public meetings shall be arranged peacefully and without infringing the rights of participants or bystanders. It also prohibits any discrimination in the context of arrangement of the meeting.<sup>34</sup> For instance, it is prohibited to deny, without legally valid reasons, access to a public meeting (incl. demonstration) on the basis of sexual orientation or to remove a person thereof on the same grounds.<sup>35</sup>

The Act further specifies that public meetings may be arranged by private individuals with full legal capacity, by corporations and foundations,<sup>36</sup> and that everyone has the right to participate in a public meeting.<sup>37</sup> The meeting may be arranged outdoors in a public square, opening, street and in another similar public place that is suitable for meetings, without the permission of the owner or holder. The owner or holder, the state or the municipality in a typical case, may restrict the use of such a place for meeting purposes if it is to be anticipated that the arrangement of the meeting will cause unreasonable inconvenience to the owner or holder or unreasonable damage to the environment. The arranger of a public meeting that is to be held outdoors must notify the local police of the meeting orally or in writing at least six hours before the beginning of the meeting (also a later notification may be considered valid).<sup>38</sup> That notification shall contain information on, inter alia, the arranger and the purpose of the meeting.

The Constitution and the Assembly Act provide strong protection for the freedom to arrange gay pride parades and pro-gay rights demonstrations. Under section 19 of the Act it is the specific duty of the police to safeguard the exercise of the freedom of assembly. The exercise of this right is subject only to the conditions laid down in the law, particularly the requirement that the

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<sup>34</sup> Section 3 of the Act.

<sup>35</sup> See also section 11:9 of the Penal Code.

<sup>36</sup> A person who has attained 15 years of age may arrange a public meeting, unless it is evident that he/she will not be capable of fulfilling the requirements that the law imposes on the arranger of a meeting. Persons without full legal capacity may arrange public meetings together with persons with full legal capacity. Section 5 of the Act.

<sup>37</sup> Sections 5 and 6 of the Act.

<sup>38</sup> Section 7(1) of the Act.

meeting be peaceful and does not infringe the rights of the participants or bystanders. The condition that the meeting be peaceful is interpreted to mean that the purpose of the meeting must not be illegal;<sup>39</sup> it appears for instance that there is no right to convene a demonstration, even in the (alleged) interests of promoting gay rights, if its purpose is to incite hatred – as defined in the Penal Code – against a religious or ethnic group that is considered by the arrangers to be unfriendly to LGBT people. The law does not however allow the infringement of the freedom of assembly where only a few demonstrators engage in criminal activity but the purpose of the meeting as such is not incompatible with the law.<sup>40</sup> In such a case it is the duty of the arranger of the meeting to see to the compliance with the law and to prevent any actions that may be punishable under law.<sup>41</sup> Only if the measures taken by the arranger prove inadequate, a senior police officer has the right to interrupt the meeting or order it to disperse.<sup>42</sup>

Police has the duty to protect public meetings from illegal third-party interference. In this context it is significant that violence perpetrated by other than participants of the public meeting, e.g. counter-demonstrators, is not a ground for considering that the meeting is not “peaceful” within the meaning of the law. The Penal Code contains two provisions that are particularly important in this context: Chapter 14, section 5 contains the penal provision for violation of political rights (applicable e.g. where a person is prevented, by means of threats or violence, from expressing his/her opinions or from participating to a public meeting), and section 6 of that chapter contains the penal provision for the prevention of an assembly. Also other provisions of the Penal Code may apply particularly in case of violent counter-demonstrations.

Also demonstrations and other public meetings that are critical of, or hostile towards, LGBT persons and/or their rights are subject to the requirement that the meeting be “peaceful” and that its purpose is therefore not illegal. In this context it is important that incitement against a population group, as defined in section 11:10 of the Penal Code, arguably though not (yet) explicitly prohibits any incitement against LGBT persons.<sup>43</sup> The arrangement of a public meeting the purpose of which is incompatible with section 11:10 is not protected by the Assembly Act. It is the duty of the arranger of a meeting (the purpose of which as such is not illegal) to take action to ensure that individual participants refrain

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<sup>39</sup> See Teuvo Pohjolainen – Tuula Majuri: *Kokoontumisvapaus* (Helsinki: Lakimiesliiton kustannus, 2000), p. 115.

<sup>40</sup> *Idem*.

<sup>41</sup> Section 17 of the Act.

<sup>42</sup> Section 21(2) of the Act.

<sup>43</sup> See e.g. Ari-Matti Nuutila, ‘Sotarikokset ja rikokset ihmisyyttä vastaan’ in Olavi Heinonen et al, *Rikosoikeus* (Helsinki: WSOY, 2002). A working group established by the Ministry of Justice has proposed that chapter 11 section 10 of the Penal Code be amended so that it would explicitly mention sexual minorities as groups that are protected under the said provision (oikeusministeriön mietintöjä ja lausuntoja 3/2010)

from breaching the law, in particular the Penal Code.<sup>44</sup> Where the measures taken by the arranger prove inadequate, a senior police officer has the right to interrupt the meeting or order it to disperse.<sup>45</sup>

## E.1. Statistics and case law

**Statistics.** Given that the arrangement of demonstrations and other public meetings is not subject to any procedure for obtaining prior permission, as explained above, there is no statistical data indicating how many pro-LGBT or homophobic demonstrations have been arranged in Finland or in how many instances the arrangement of such demonstrations has been prohibited or interfered with.

**Case law.** A comprehensive keyword-based search of the case law database FINLEX, conducted on 14 February 2010, did not yield positive results as regards court decisions that would be relevant in this context. Given that the case law database is not comprehensive, one cannot conclusively infer from this that there have been no such cases.<sup>46</sup>

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<sup>44</sup> Section 17 of the Act.

<sup>45</sup> Section 21(2) of the Act.

<sup>46</sup> In the framework of the Non-Discrimination Governmental Expert Group, the Finnish government's reaction to the first version of this national study notes that there has been one case in Finland where people attending a Pride event were verbally harassed by a small group of Christian fundamentalists.

## F. Hate speech and Criminal law

Hate speech may constitute several different types of crimes as defined in the Penal Code, three of which are most important.

First, hate speech may constitute an invasion of personal reputation as defined in chapter 24, section 8 of the Penal Code. Under the said provision, a person who “unlawfully publicly spreads information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subject that person to contempt, shall be sentenced for an *invasion of personal reputation* to a fine or to imprisonment for at most two years”. Given that information about sexual orientation is usually considered to constitute information about private life (such information being protected by the right to privacy), and that many LGBT persons do not wish to make such information generally known, and considering that the publication of such information may have harmful effects on such persons, homophobic hate speech directed against a specific individual can constitute an invasion of personal reputation as defined chapter 24, section 8 of the Penal Code.<sup>47</sup> Making of incorrect statements about the sexual orientation of a person is likely to be considered to constitute defamation, referred to below, rather than invasion of personal reputation.<sup>48</sup>

Second, hate speech may constitute defamation as defined in chapter 24, section 9 of the Penal Code. Under the said provision “a person who... makes a derogatory comment on another...shall be sentenced for defamation to a fine or to imprisonment for at most six months”. A comment relating to sexual orientation may constitute defamation even where the perpetrator was mistaken about the sexual orientation of the offended person. Section 10 of the same chapter lays down the conditions for aggravated defamation, which takes place *inter alia* when the offence is committed by using the mass media or when it has caused major or long-lasting suffering. Hate speech directed against specified individual(s) can therefore also be dealt with under this provision.

Third, hate speech may constitute incitement against a population group as defined in chapter 11, section 10 of the Penal Code. Under the said provision “a person who spreads statements or other information among the public where a certain race, a national, ethnic or religious group or comparable group is threatened, defamed or insulted shall be sentenced for *incitement against a population group* to a fine or to imprisonment for at most two years”. Whereas it is not entirely clear which groups are to be considered “comparable” to ethnic or religious groups, legal literature has supported the interpretation that LGBT

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<sup>47</sup> See also Ari-Matti Nuutila ‘Yksityisyyden, rauhan ja kunnian loukkaamisrikokset’ in Olavi Heinonen et al, *Rikosoikeus* (Helsinki: WSOY, 2002).

<sup>48</sup> HE 184/1999 vp.

groups are protected under this provision.<sup>49</sup> This interpretation is nowadays also supported by the fact that legal protection against discrimination has explicitly been extended to cover groups distinguished by sexual orientation. Moreover, a working group established by the Ministry of Justice has proposed that the provision be amended so as to explicitly cover sexual minorities.<sup>50</sup> Yet, there is no case law, as far as we know, confirming that LGBT-groups are to be considered to constitute a ‘population group’ for the purposes of the law.

Hate speech may also be dealt with under other branches of law than criminal law. Hate speech may constitute discrimination within the meaning of the Equal Treatment Act. Section 6 of the Act stipulates that harassment is one form of discrimination and that harassment is about “deliberate or de facto infringement of the dignity and integrity of a person or group of people by the creation of an intimidating, hostile, degrading, humiliating or offensive environment (harassment)”. In view of section 6, particularly recurring hate speech – and even “lesser” forms of intimidation - may therefore come to be considered harassment. The material scope of application of the Equal Treatment Act is, in the case of sexual orientation, restricted to the fields of employment and education.<sup>51</sup> An employer or a provider of education that infringes the provisions of section 6 is liable to pay compensation to the injured party for suffering up to 15000 euros and even more in exceptional circumstances.<sup>52</sup>

A victim of hate speech may also be entitled to obtain damages under the Tort Liability Act (*vahingonkorvauslaki* (412/1974, as amended e.g. by law 509/2004)]. Chapter 5, section 6 of the Act stipulates that a person is entitled to compensation for suffering where, inter alia, (i) his/her private life has been infringed by means of an act punishable under law, (ii) he/she has been discriminated against by means of an act punishable under law; or where (iii) his/her dignity has been purposefully or out of gross negligence seriously injured. Therefore compensation for suffering may be obtained where criminal acts as defined in the above-mentioned provisions of the Penal Code – chapter 24, sections 8 and 9 and chapter 11, section 10 – or where discrimination as defined in chapter 11, section 11 or chapter 47, section 3 or 3a are at stake. A victim is entitled to damages even where the perpetrator has not in fact been charged with any of the above-mentioned offences.<sup>53</sup>

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<sup>49</sup> See e.g. Ari-Matti Nuutila, ‘Sotarikokset ja rikokset ihmisyyttä vastaan’ in Olavi Heinonen et al. *Rikosoikeus* (Helsinki: WSOY, 2002).

<sup>50</sup> Oikeusministeriön mietintöjä ja lausuntoja 3/2010.

<sup>51</sup> Section 2 of the Act.

<sup>52</sup> Section 9 of the Act. The theoretical ceiling, the amount of which is currently 15 000 euros and which will be reviewed every two years, was according to the preparatory works to the Non-Discrimination Act adopted for the purposes of conveying to the courts the message that the amount of compensation in discrimination cases should be substantial.

<sup>53</sup> See HE 167/2003 vp, p. 54. The situation was interpreted differently before the amendment of the Tort Liability Act in 2004, see e.g. Helsinki Court of Appeals 30.6.2005, case no. 2327.

An amendment to the Penal Code was passed in 2003 with a view to making certain types of motivations a ground for increasing the punishment. The amendment entered into force on 1 January 2004. Accordingly, chapter 6, section 5 of the Penal Code now provides that “the following are grounds for increasing the punishment:...(4) the offence has been directed at a person belonging to a national, racial, ethnic or other population group due to his/her membership in such a group”. Although sexual minorities are not expressly referred to, it is clear from the pertinent preparatory works – that are, as mentioned, of major significance for interpretation in the Finnish legal culture – that the provision is meant to be applicable with respect to crimes that are motivated by hatred against sexual minorities.<sup>54</sup> The working group established by the Ministry of Justice has proposed that also this provision be amended so that sexual orientation would be explicitly mentioned therein.<sup>55</sup> All of this notwithstanding, there is no case law on this as far as we know. The provision can be applied, in principle, with respect to all types of crimes.<sup>56</sup>

The Prosecution Service pays special attention to the processing of hate crimes. The Prosecutor General has given guidelines and instructions in this regard to the prosecutors. Typical hate crimes and ‘general’ crimes that appear to incorporate a hate-based motive are considered socially important and each case shall be reported to the Office of the Prosecutor General.

## F.1. Statistics and case law

As pointed out in section A.3., overall data about specific crimes, such as incitement against a population group, do exist, but this data is not disaggregated according to the target group. Therefore the requested information, i.e. data about the numbers of criminal court cases regarding homophobic hate speech, number of convictions regarding homophobic hate speech, range of sanctions in such cases, number of non-criminal court cases initiated for homophobic statements, number of non-criminal court cases initiated for homophobic statements which were successfully completed, or the number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing, cannot be submitted. Such statistical data could only be obtained through a fully-fledged research into actual court records. However, the police produces on a yearly basis a report on racist crime, which indicates the numbers of *suspected* cases with a racist motive that have been reported to the police. The 2009 report included, for the first time, also information about other kinds of hate crimes, including crimes with a suspected homophobic motive. According to the report, 23 crimes with a suspected homophobic motive were reported to the police in Finland in 2008.

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<sup>54</sup> HE 44/2002 vp, p. 203 ff.

<sup>55</sup> *Rasistiset rikokset*. Oikeusministeriön mietintöjä ja lausuntoja 3/2010.

<sup>56</sup> Idem.

A comprehensive keyword-based search of the case law database FINLEX, conducted on 12 February 2010, did not yield positive results as regards court decisions in the types of court proceedings enumerated above. One cannot, as mentioned before, draw from this the conclusion that there have been no such cases, as the case law database is not comprehensive and does not include e.g. the decisions of Courts of First Instance.

## G. Transgender issues

The issue of discrimination against transgender persons is not specifically addressed in the domestic law. However, section 6 of the Constitution provides for equality before the law and prohibits discrimination on the grounds of, inter alia, gender and “other reason relating to a person”. In the Finnish legal system there is a general piece of legislation that addresses gender equality (Act on Equality between Women and Men), and a separate general piece of legislation (Equal Treatment Act) that addresses discrimination on the grounds of e.g. sexual orientation. The latter Act does not specifically mention discrimination against transgender people, but its list of prohibited grounds of discrimination is open-ended, extending to “other statuses” in addition to those that are explicitly mentioned. The Ombudsman for Equality (gender equality) has taken the position that discrimination against transgender persons can be dealt with under gender discrimination legislation. The Ombud took this position in 2005, following a Parliamentary Committee<sup>57</sup> which in turn based itself on ECJ’s decision in *P v. S.*<sup>58</sup> This position has received support in the pertinent literature.<sup>59</sup> The Ombud has indicated that it conceives its mandate in this respect broadly (i.e. as not just covering equality for persons who have undergone gender reassignment treatments but transgender people in general), on the grounds that the text of the law is open enough to support this interpretation and as otherwise legal protection for these persons would be insufficient.<sup>60</sup> Although this position in our view merits support, it could in theory also be argued that discrimination against transgender people forms a prohibited ground of discrimination of its own, being an “other status” within the meaning of the domestic law.<sup>61</sup> The Equality Committee, commissioned to make a proposal for revised equality law, proposed in its Report that the Act on Equality Between Women and Men be amended so as to explicitly cover transgender discrimination.<sup>62</sup>

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<sup>57</sup> Työelämä- ja tasa-arvovaliokunnanmietintö 3/2005 vp (regarding HE 195/2004 vp).

<sup>58</sup> European Court of Justice, case c-13/94.

<sup>59</sup> Jukka Lehtonen ja Kati Mustola ‘Seksuaalisuuden ja sukupuolen moninaisuus työssä - tutkimuksen tausta ja keskeiset käsitteet’, in Jukka Lehtonen & Kati Mustola (toim.), ”Eihän heterotkaan kerro...” Seksuaalisuuden ja sukupuolen rajankäyntiä työelämässä. Työministeriö, tutkimukset ja selvitykset 2/04, p. 19.

<sup>60</sup> Information from the Office of the Ombud on 11.2.2008 and 13.2.2008 (by telephone and email).

<sup>61</sup> That this is an option was also suggested by the above-mentioned report of the Parliamentary Committee, see TyVM 3/2005 vp. See also the case from the Vaasa Administrative Court, explained in the Annex, where discrimination on the grounds that the person lived in a same-sex relationship was considered to constitute discrimination on the grounds of “other status”, not sexual orientation.

<sup>62</sup> The Report of the Equality Committee, *Proposal for a new Equal Treatment Act* (Committee Reports 2009:4). Available at the website of the Ministry of Justice, at [www.om.fi](http://www.om.fi) (accessed 1.2.2010).

The relevant provisions of the Aliens Act that deal with freedom of movement, asylum and subsidiary protection and family reunification, discussed above, apply also with respect to transgender people. Moreover, the relevant provisions apply equally to couples that are married and couples that live in a registered partnership, and to same-sex and different-sex couples that live in the same household – so the fact that a person has undergone or is undergoing a gender reassignment procedure should not affect his/her legal rights. There are no legal grounds to suspect that transgender people would not/should not be considered to constitute a “particular social group” within the meaning of section 87 of the Aliens Act, given that sexual minorities clearly qualify; therefore asylum or residence permit on the basis of need for protection may be granted on the grounds that the person concerned has a well-founded fear of being persecuted for reasons of his/her transsexuality.<sup>63</sup> The laws regarding freedom of assembly and protection from hate speech apply equally to transgender people as well.

The Act on the Recognition of the Sex of a Transsexual Person [*laki transseksuaalin sukupuolen vahvistamisesta* (563/2002)] entered into force in January 2002. Under that Act, the competent authorities shall recognize (officially confirm) that a person belongs to the opposite sex than that recorded into the population register, provided that he/she (i) provides a medical report testifying that he/she permanently experiences being a member of the opposite sex and that he/she lives in that gender role and that he/she been sterilized or is otherwise incapable of having children; (ii) is an adult (over 18 years of age); (iii) is not married or in a registered partnership (exceptions apply<sup>64</sup>) and is a Finnish citizen or is resident in Finland. The competent authority for this is the local register office (“maistraatti”).

A person whose new *de jure* sex has been recognized by the authorities is to be treated as a person of that sex for all purposes under the law.<sup>65</sup> Under the Name Act [*nimilaki* (695/1985)] one can simply notify (no permission required) the local registry office of one’s new first name – provided e.g. that the name is not offensive.<sup>66</sup> The change of the first name by way of simple notification procedure can be done only once, after which the change of the name is subject to an application procedure under which a person’s first name can be changed if there are “valid grounds thereto”.<sup>67</sup> Whereas the Name Act prohibits men from having women’s names and vice versa, this is no obstacle where the new sex status has already been officially recognized. In practice transsexuals have been

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<sup>63</sup> Applications based on this ground appear not to be numerous. Information (telephone conversation) from the Finnish Refugee Advice Centre on 14.2.2008.

<sup>64</sup> Section 2 of the Act provides that, if the other spouse gives his/her consent to this, a marriage is transformed into a registered partnership and a registered partnership is transformed into a marriage, in which case being married or in a registered partnership is not an obstacle for having one’s real sex legally recognized.

<sup>65</sup> Section 5 of the act.

<sup>66</sup> Section 32c.

<sup>67</sup> Section 32d.

able to register their new first name already after having started hormonal treatment, i.e. before having had their “new” sex officially recognized.<sup>68</sup>

## G.1. Statistics and case law

Statistics. The office of the Ombudsman for Equality does not keep the kind of systematic records that would reliably give the exact numbers of communications submitted to them with regard to transgender issues. According to information obtained from the Ombud’s office on 11.2.2008 and 12.2.2010, less than ten cases of suspected discrimination against transgender people have been communicated to the Ombud per year since 2005.<sup>69</sup> A manual examination on 14.2.2010 of the case law of the Equality Board (“*tasa-arvolautakunta*”) did not disclose any cases that would have dealt with discrimination on the grounds of transsexuality.

According to information provided by the Finnish Population Center, direct and precise statistics on the numbers of people whose de jure sex has been changed or on numbers of name changes due to such change of de jure sex are not available. However, the personal identity code (PIN), which is automatically issued to each citizen of Finland and those residing in Finland for one year or more and upon application also to other persons residing in Finland, reveals the de jure sex of the person concerned (for women the PIN is an even number and for men it is an odd number), and numbers of changes of the PIN which involve a change in the number which indicates sex can be given. The numbers of such changes have increased gradually, being 43 in 2000 and 90 in 2007. However, these figures include ‘false positives’, the amount of which could be even 50% of the cases or more, because the numbers include cases where the PIN that a foreigner has had is changed (or actually: corrected) in a manner that indicates a change of sex even though there has been no change in this regard. Therefore the figures based on changes of the PIN are not very reliable.<sup>70</sup>

The number of name changes, where the name has been changed from a male name to a female name or vice versa, may actually give a more reliable picture of the situation. Also the numbers of such changes has increased over the years, being 8 in 2000 and 24 in 2007. These numbers are not fully reliable either, as they underestimate the number of changes of de jure sex and changes of name affected by virtue of the change of sex, because they do not include cases where a particular name is gender neutral (i.e. used by both women and men). The actual number of changes of de jure sex is therefore somewhere between the number of changes indicated in the previous chapter (number of changes of PIN

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<sup>68</sup> HE 56/2001 vp.

<sup>69</sup> Telephone conversation on 11.2.2008, email 13.2.2008 and 12.2.2010.

<sup>70</sup> Based on information obtained from the Finnish Population Centre by telephone and email in February 2008.

from male to female and vice versa) and the number of changes of name from male to female or vice versa..<sup>71</sup>

Case law. We are not aware of any case law that would be directly relevant in this context. A keyword-based search of the case law database FINLEX, conducted on 14 February 2010, did not yield positive results.<sup>72</sup> Again it must be kept in mind that this does not necessarily mean that there are no relevant cases in this regard in Finland.

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<sup>71</sup> Based on information obtained from the Finnish Population Centre by telephone and email in February 2008.

<sup>72</sup> In case KHO:2009:15 (3.2.2009), the Supreme Administrative Court of Finland upheld the decision of the local registry office whereby the office had refused to change the PIN of the male-to-female transsexual applicant to reflect her new (*de jure* and *de facto*) sex. The grounds for this decision was that the applicant was married, and her spouse did not give her consent for the change of PIN, in consequence of which their marriage would have been transformed into a registered partnership.

## H. Miscellaneous

The FRA National Guidelines for this Flash Report ask the Member States to provide information about developments that are similar to or comparable with the developments in Lithuania as concerns the law on the protection of minors against the detrimental effects of public information and the proposed criminalization of promotion of homosexual relations in public places. There are no similar or comparable laws or policies in Finland.

The FRA Guidelines also request the provision of information about the use of “phallometry” during asylum procedure. There is nothing to suggest that such a method would be used or would have been used in Finland.

# I. Good practices

The following may be presented as good practices from Finland:

1. Data collection on hate crimes. Finland has, since 1997, collected and reported data on a yearly basis on the racist crimes reported to the police. The methodology used is rather robust: researchers analyse each and every crime report that fits a certain profile, and analyse the case with a view to determining whether it was partly or wholly racially motivated. This allows the researchers to analyse not just the yearly number of racist crimes, but also to draw conclusions as to who are typical offenders, what are typical racist crimes and where and when these crimes occur and who are the victims. The 2009 report, for the first time, included data on several types of hate crimes, including crimes perpetrated because of the victim's (perceived) sexual orientation. It is expected that the future reports will also have this broader approach.
2. Change of name of transsexual individuals. A person whose new sex status has been recognized in accordance with the Act on the Recognition of the Sex of a Transsexual Person [*laki transseksuaalin sukupuolen vahvistamisesta* (563/2002)] has under the Name Act [*nimilaki* (695/1985)] the right to have his/her first name changed by means of a simple notification procedure.<sup>73</sup> In practice - and this is considered to constitute a good practice in this context - transsexuals are able to register their new first names already after having started hormonal treatment, i.e. before having had their "new" sex officially recognized.

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<sup>73</sup> The simple notification procedure applies where the person concerned changes his/her name for the first time. Otherwise an application procedure applies, under which a person's name can be changed if there are "valid grounds thereto", there being no reasonable doubt that gender reassignment would not qualify as such "valid ground"..

# Annex 1 – Case law

## Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	N/A (Ref. No. 04/0253/3)
Decision date	27.8.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Vaasan Hallinto-oikeus/Vaasa Administrative Court
Key facts of the case (max. 500 chars)	The Cathedral Chapter of the Evangelical Lutheran Church of Finland had made a decision that the applicant was not eligible to be appointed a chaplain (assistant vicar), as she was publicly living in a same-sex relationship and had announced that she would officially register the relationship.
Main reasoning/argumentation (max. 500 chars)	The Constitution and the Equal Treatment Act provide for equality before the law and prohibit discrimination on the grounds of, inter alia, sexual orientation and “other reasons related to a person”. Same-sex relationship is to be considered to constitute an “other reason related to a person”, on the basis of which it is not possible to discriminate, considering inter alia that the contemporary Finnish society approves of same-sex relationships as is evident from the legislation regarding the right of same-sex couples to register their relationship (Act on Registered Partnerships). The decision of the Cathedral Chapter might have been justified had there been an applicable legal basis for it in the form of an exception to the applicability of non-discrimination norms. No such exception was however provided for e.g. by the Church Order (which lays down rules for appointing vicars and chaplains) or the Church Act.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The decision confirms that the Equal Treatment Act and the Constitution are applicable in a case involving sexual orientation discrimination in the Church; Discrimination on the basis of living in a same-sex relationship was considered an “other reason related to a person”, not sexual orientation discrimination as such.; (Implicitly:) The having of a particular sexual orientation was not considered to be a <i>bona fide</i> occupational requirement for the

	position of a chaplain.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Vaasa Administrative Court annulled the decision of the Cathedral Chapter.

No other cases to report.

## Annex 2 – Statistics

### Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender	8	12	5	9	16	19	21	24
Number of persons who changed their gender/sex in your country under the applicable legislation	43	46	27	36	41	64	80	90

**N.B. These statistics should not be taken at a face value because of reasons explained under heading G.1. which compromise the validity of the statistics.**