

FRA

Thematic Legal Study on Homophobia
and Discrimination on Grounds of
Sexual Orientation
(Estonia)

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DISCLAIMER: This study has been commissioned as background material for a comparative report on homophobia and discrimination on grounds of sexual orientation by the European Union Agency for Fundamental Rights. The views expressed here do not necessarily reflect the views or the official position of the FRA. The study is made publicly available for information purposes only and does not constitute legal advice or legal opinion.

Foreword

- [1]. The study was compiled by Ms Merle Haruoja, Ms Marianne Meiorg and Mr Kari Käsper, experts of Estonian human rights law. Ms Haruoja is Head of the Estonian Institute of Human Rights and Ms Meiorg and Mr Käsper work for the Human Rights Centre at International University Audentes.
- [2]. The research team took into account all information available from publicly accessible sources. In addition, formal Letters of Inquiry were sent to public authorities including *Tööinspeksioon* [Labour Inspectorate], *Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board], *Tallinna Sotsiaal- ja Tervishoiuamet* [Tallinn City Social Welfare and Health Care Board], *Õiguskantsleri kantselei* [Office of the Chancellor of Justice], *Soolise võrdõiguslikkuse volinik* [Gender Equality Commissioner], *Sotsiaalministeerium* [Ministry of Social Affairs], *Justiitsministeerium* [Ministry of Justice] and *Riigikohus* [Supreme Court of Estonia]. Research team members also consulted with several NGOs active in the field of prevention of discrimination on the grounds of sexual orientation.
- [3]. The team used comparative and analytical approaches to the research subject. Where necessary, EU and national law were compared, contrasted, and deficiencies in national law were highlighted. Relevant Estonian laws, regulations and practices were analysed.
- [4]. In general, it can be said that the public authorities were forthcoming in providing information. However, as the LGBT rights have not apparently been a priority, very little statistical data is available. In addition, the laws and regulations regarding the prohibition of discrimination based on sexual orientation were recently adopted and therefore no developed practice or case law has emerged yet.

Contents

FOREWORD	2
EXECUTIVE SUMMARY.....	4
1. Implementation of Employment Directive 2000/78/EC.....	7
2. Freedom of Movement	13
3. Asylum and Subsidiary Protection.....	19
4. Family Reunification	21
5. Freedom of Assembly	22
6. Criminal Law, Hate Speech	24
7. Transgender Issues	26
8. Miscellaneous	29
CONCLUSIONS.....	31
ANNEXES	32

Executive Summary

Implementation of Employment Directive 2000/78/EC

- [5]. Currently, the Directive is not fully implemented, although efforts are made to do that by adopting the draft of *Võrdse kohtlemise seadus* [Equal Treatment Act].¹
- [6]. The main regulation in the field of employment in Estonia is *Eesti Vabariigi töölepingu seadus* [Republic of Estonia Employment Contracts Act],² which prohibits discrimination based on sexual orientation. Complaints on the subject can be submitted to the Chancellor of Justice or to *töövaidluskomisjon* [labour dispute committee]. The Chancellor has only been presented with three applications on the subject, while the latter has received none related to discrimination on the grounds of sexual orientation.

Freedom of Movement

- [7]. Directive 2004/38/EC is fully implemented by *Euroopa Liidu kodaniku seadus* [Citizen of European Union Act],³ which provides every citizen of any European Union Member State full freedom of movement. The accompanying right is only for spouses, children or dependents. Unmarried couples or couples in civil unions or registered partnerships are not recognised as ‘spouses’. In addition, under current developments in the Estonian legal system, same-sex marriages are not recognised as marriages for the purposes of migration laws, including for the purposes of residence permits. However, LGBT partnerships may fall under the concept of ‘household’ but there is no practice to confirm it.
- [8]. In fact, it can be questioned whether Estonia has fully implemented Article 3(2)(b) of Directive 2004/38/EC, which provides that the partner with whom the Union citizen has a durable relationship, duly attested, ‘shall, in accordance with its national legislation, facilitate entry and residence for the following persons’.

¹ Available at: http://www.riigikogu.ee/?page=pub_ooc_file&op=emsplain&content_type=text/html&file_id=97063 (15.02.2008).

² Estonia/Riigikantselei (1992) *Riigi Teataja* I [State Gazette I], 15/16, 241.

³ Estonia/Riigikantselei (08.06.2006) *Riigi Teataja* I, 26, 191.

- [9]. According to officially available information, there are no cases or any other statistical information on sexual orientation issues related to freedom of movement.

Asylum and Subsidiary Protection

- [10]. Directive 2004/83/EC is fully implemented by *Välismaalasele rahvusvahelise kaitse andmise seadus* [Act on Granting International Protection to Aliens].⁴ The Act does not expressly provide sexual orientation as a ground for persecution and there is no specification as to whether it could be included under ‘a particular social group’.
- [11]. The Act provides for an accompanying right to asylum/subsidiary protection only to a number of persons closely connected to the applicant and that list does not include partners with whom the person is not married or has contracted a civil union or registered partnership. As already mentioned under the Freedom of Movement heading, there are doubts as to whether same-sex marriages are considered marriages.

Family Reunification

- [12]. Family reunification is regulated by the Act on Granting International Protection to Aliens. As in the case of accompanying right to asylum/subsidiary protection, the exhaustive list of persons considered family members for the purposes of family reunification does not include partners with whom the person is not married or has contracted a civil union or registered partnership. As already mentioned under the Freedom of Movement heading, there are doubts as to whether same-sex marriages are considered marriages.

Freedom of Assembly

- [13]. It can be said that this area of law remains underdeveloped and the application of rules is unclear in the context of discrimination on the basis of sexual orientation. There have been few cases of the public exercise of the right and there have been controversies regarding its exercise.
- [14]. It appears that although the public authorities clearly understand and heed the obligation not to interfere with demonstrations, severe administrative and financial burdens have been placed on the organisers of such events. The

⁴ Estonia/Riigikantselei (2006) *Riigi Teataja* I, 2, 3.

authorities have appeared uncooperative and unhelpful in providing assistance when registering an event or protection.

Criminal Law, Hate Speech

- [15]. Homophobic hate speech has been criminalised in *Karistusseadustik* [Penal Code].⁵ However, the provision has not been applied by the authorities in practice, therefore, its effectiveness remains unclear.

Transgender Issues

- [16]. Transgender issues have a significantly short history in the Estonian legal system. There is no practice, reported cases or statistics on the subject. Therefore, there has not been any opportunity to develop an approach to transgender discrimination.
- [17]. Provisions affecting specific aspects of transsexuality and gender/sex change are not available in one compact legal act but rather dispersed in a number of legal acts. Full gender/sex change in medical as well as legal terms is facilitated.

Miscellaneous

- [18]. Additionally, it should be mentioned that *Eesti Vabariigi Põhiseadus* [Constitution of the Republic of Estonia]⁶ includes in its catalogue of fundamental rights the prohibition of discrimination.
- [19]. In the past two years there have been only a few studies that have addressed sexual orientation issues or, specifically, discrimination on the grounds of sexual orientation, but this inclusion has only been incidental.

⁵ Estonia/Riigikantselei (2001) *Riigi Teataja* I, 61, 364.

⁶ Estonia/Riigikantselei (28.06.2007) *Riigi Teataja* I, 43, 311.

1. Implementation of Employment Directive 2000/78/EC

[20]. Employment Directive 2000/78/EC regarding discrimination on the grounds of sexual orientation is currently partly implemented by *Eesti Vabariigi töölepingu seaduse ja Eesti Vabariigi ülemnõukogu otsuse 'Eesti Vabariigi töölepingu seaduse rakendamise kohta' muutmise seadus* [Amendment Act of the Republic of Estonia Employment Contracts Act and the Decision of the Supreme Council of the Republic of Estonia 'On the Implementation of the Employment Contracts Act'].⁷ The Directive will be fully implemented by the Equal Treatment Act, which currently is in the second round of discussions in *Riigikogu* [Parliament] held 20.02.2008. The Equal Treatment Act is also intended to implement Racial Equality Directive 2000/43/EC.

[21]. After the adoption of the Amendment Act of the Republic of Estonia Employment Contracts Act and the Decision of the Supreme Council of the Republic of Estonia 'On the Implementation of the Employment Contracts Act', the Employment Contracts Act contains one provision on discrimination based on sexual orientation:

“§ 10. Prohibition on discrimination against employees

(1) Employers shall not, upon employment and entry into employment contracts, discriminate against persons applying for employment on any of the grounds specified in subsection (3) of this section.

(2) Employers shall not discriminate against employees on any of the grounds specified in subsection (3) of this section upon remuneration, promotion in employment or office, giving instructions, termination of employment contracts, access to retraining or in-service training or otherwise in employment relations.

(3) Discrimination prohibited on the basis of subsections (1) and (2) of this section shall be taken to occur where a person applying for employment or an employee is discriminated against on grounds of...sexual orientation...’

[22]. The purpose of the proposed Equal Treatment Act is to guarantee the protection of persons from discrimination based on race, nationality, colour, religion or belief, age, disability or sexual orientation. The draft excludes discrimination based on gender because this is covered by *Soolise võrdõiguslikkuse seadus* [Gender Equality Act].⁸ The draft provides for principles of equal treatment,

⁷ Estonia/Riigikantselei (30.04.2004) *Riigi Teataja* I, 37, 256.

⁸ Estonia/Riigikantselei (21.04.2004) *Riigi Teataja* I, 27, 181.

tasks for implementing and promoting these principles and resolution of disputes.

[23]. The main features of the draft of the Equal Treatment Act:

- § 2 defines the scope of the Act that corresponds in full to the combination of the scopes of Directives 2000/78/EC and 2000/43/EC defined in their Articles 3; the Act applies not only in the area of employment but also in health care, social security, education, access to goods and provisions of services;
- § 3 defines discrimination, which fully corresponds to Art 2 of Directives 2000/78/EC and 2000/43/EC;
- § 10 provides for exceptions to the prohibition of discrimination in the interests of public security and order, prevention of crimes, protection of health, rights and freedom of others. All measures taken must be proportional to one of the stated aims.
- The procedural provisions of the two mentioned Directives are fully transposed by the Act. For example burden of proof Articles are transposed by §9 of the Act providing for a shared burden and stating that respondent's refusal to prove his/her non-violation of a equal treatment principle is equal to admittance to discrimination;
- Chapter 4 renames the Gender Equality Commissioner as *Võrdõiguslikkuse volinik* [Equality Commissioner]. It also extends the Commissioner's competence for resolving discrimination complaints to include discrimination based on sexual orientation.

[24]. According to the draft Equal Treatment Act, the Equality Commissioner would be appointed by the Minister of Social Affairs, as is the case with the current Gender Equality Commissioner. If the draft is adopted, the complaint procedure will remain simple – the person must only submit an application to the Commissioner, who will consider it and provide his/her opinion within two months. These opinions are not legally enforceable but merely 'provide an assessment which...allows for an assessment of whether the principle of equal treatment has been violated in a particular legal relationship'.⁹

[25]. Currently, complaints over discrimination based on sexual orientation can be submitted to the Chancellor of Justice. This institution was established by the Constitution. He/she is appointed by the Parliament on the proposal of the President of the Republic. In addition to the constitutional task of reviewing legislation's conformity with the Constitution, the Chancellor was also given the task of monitoring whether state agencies respect fundamental rights and

⁹ § 17 (2) of the Gender Equality Act and § 18 (2) of the Equal Treatment Act.

freedoms and with the principles of good governance. This right is provided in § 19 of *Õiguskantsleri seadus* [Chancellor of Justice Act]:¹⁰

‘§ 19. Right of recourse to Chancellor of Justice

(1) Everyone has the right of recourse to the Chancellor of Justice in order to have his or her rights protected by way of filing a petition to request verification whether or not a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties (hereinafter agency under supervision) adheres to the principles of observance of the fundamental rights and freedoms and to the principles of sound administration.

(2) Everyone has the right of recourse to the Chancellor of Justice for the conducting of a conciliation procedure if he or she finds that a natural person or a legal person in private law has discriminated against him or her on the basis of:

[...]

12) sexual orientation...’

[26]. The Chancellor and the Gender Equality Commissioner (future Equality Commissioner) are legally separate and independent positions. The Commissioner, being a public official, can be the subject of a complaint filed with the Chancellor. One of the major differences between the two positions is that the Commissioner is specialised in discrimination issues while the Chancellor is not. Another major difference is that the Chancellor may only review cases regarding actions by ‘a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties’, while the Commissioner can review cases also in regard to private persons with no public duties. When the dispute concerns only private persons, the Chancellor only has the possibility to conduct conciliation procedure if the parties agree to it.

[27]. The Chancellor’s competence on equality and equal treatment matters, including equality concerning sexual orientation, is the following:

- the review of the conformity of a legal act with the constitution and laws (competence for normative review);
- the breach of the prohibition of discrimination during the exercise of public duties (competence as ombudsman);

¹⁰ Estonia/Riigikantselei (18.03.1999) *Riigi Teataja* I, 29, 406.

- conciliation proceedings between private parties (competence to settle disputes involving discrimination).

- [28]. The procedure of complaints to the Chancellor is simple. The complainant must only submit an application, which can also be done through the Chancellor's website.¹¹ The Chancellor will then provide an opinion on whether or not discrimination had taken place. As in the case of the (Gender) Equality Commissioner, the opinion of the Chancellor is not legally binding. In case of a conciliation procedure, the application is forwarded to the opponent, who may respond. If no solution is reached, the parties will meet for negotiations. Any agreement reached is subject to enforcement procedure.¹²
- [29]. The Office of the Chancellor reports it has received only three petitions concerning discrimination based on sexual orientation.¹³ See Annex 2 on the statistical information.
- [30]. In case of discrimination in employment, a person can also turn to a labour dispute committee. According to § 3 of *Individuaalse töövaidluse lahendamise seadus* [Individual Labour Dispute Resolution Act],¹⁴ a disagreement arising from the employment relationship of an employee and employer may be resolved by a labour dispute committee if they find that a labour dispute cannot be resolved by agreement. This body is not specialised in equality and discrimination matters but can be turned to in such matters.
- [31]. According to the information from the Labour Inspectorate that has competence over labour dispute committees, there are no reported labour cases on the grounds of sexual orientation (no petitions and applications to the Inspectorate and to the labour disputes committees).¹⁵
- [32]. Although *actio popularis* as a possibility is not recognised in Estonian courts, civil society organisations do have a limited possibility to act in support of an individual who is a direct victim of a legal act or action. According to the Code of Civil Procedure, a person may participate in court disputes personally, through a contractual representative (§ 217) or use the help of an adviser (§ 228).¹⁶ According to § 217, a contractual representative must essentially be someone with certified knowledge of law or one plaintiff/defendant (in case where there are multiple plaintiffs/defendants) or an ascendant, descendant and

¹¹ In Estonian: <http://www.oiguskantsler.ee/index.php?menuID=34>. In English: <http://www.oiguskantsler.ee/index.php?menuID=69>.

¹² Section 23 of the Chancellor of Justice Acts.

¹³ Estonia/*Õiguskantsleri kantselei* [Office of the Chancellor of Justice] (04.02.2008) *Vastus teabenõudele* [Response to request for information] no. 5-3/0800287.

¹⁴ Estonia/Riigikantselei (1996) *Riigi Teataja* I, 3, 57.

¹⁵ Estonia/*Tööinspeksioon* [Labour Inspectorate] (18.01.2008) *Vastus teabenõudele* [Response to request for information].

¹⁶ Estonia/Riigikantselei (2005) *Riigi Teataja* I, 26, 197.

spouse. In *Riigikohus* [Supreme Court] a contractual representative must be a sworn attorney.

- [33]. Only recently organisations have gained access to financial support to represent individuals in court or act as representatives. So far, only *Eesti Juristide Liit* [Estonian Union of Lawyers]¹⁷ and *SA Õigusteenuste Büroo* [Foundation Office of Legal Services]¹⁸ have received such aid but neither is specifically orientated to victims on the grounds of sexual orientation. The former provides legal assistance from law students who have no authorisation to represent clients in court and the latter provides assistance to low-income individuals.
- [34]. In addition to contractual representatives, the Code of Civil Procedure foresees the possibility to use the help of an advisor that can be anyone with an active civil procedural legal capacity (§ 228).¹⁹ An adviser may appear in court together with the participant in the proceeding. He/she cannot perform procedural acts or file petitions but can provide explanations and anything presented by an adviser is deemed to have been presented by the participant in the proceeding unless the participant in the proceeding immediately withdraws or corrects it. However, this possibility is rarely, if ever, used by civil society organisations and the victims of discrimination. In fact, as a result of an e-mail correspondence with one of the organisations, it seems that this possibility is not even known to the organisations or the victims.²⁰
- [35]. According to information received from the Chancellor of Justice, there has only been one case concerning employment relations (no 12/071719).²¹ This case is summarised in Annex 1. The Labour Inspectorate has no case-law in regard to sexual orientation to report.²²
- [36]. The case-law of Estonian courts is available on the Internet. The case-law of the Supreme Court can be accessed through the database to be found in the Court's homepage.²³ The database covers all the decisions given by the Court. The last keyword-based search conducted on 03.04.2008 did not give any results. An inquiry with the Supreme Court confirmed that they have no case-law in regard to sexual orientation.²⁴ The case-law of the first and second court instances is available in databases KOLA²⁵ and KIS²⁶ The KOLA database

¹⁷ See: <http://www.juristideliit.ee/est/tegevus/tasuta-F5igusabi.php> (14.02.2008).

¹⁸ See: <https://www.otb.ee/> (14.02.2008).

¹⁹ Active civil procedural legal capacity is the capacity of a person to exercise civil procedural rights and perform civil procedural obligations in court by the person's acts - § 202 of the Code of Civil Procedure.

²⁰ E-mail correspondence with Ms Lisette Kampus, member of Diversity and the executive board of ILGA-Europe (03-04.04.2008).

²¹ Response to request for information.

²² Response to request for information.

²³ See: <http://www.riigikohus.ee/> (03.04.2008).

²⁴ Estonia/*Riigikohus* [Supreme Court of Estonia] (31.01,2008) *Vastus küsimustikule* [Response to Questionnaire].

²⁵ See: <http://kola.just.ee/> (03.04.2008).

includes all decisions up to 31.12.2005 that have entered into force provided that they were not subject to the limitation for disclosure provided by law. The KIS database includes decisions as of 01.01.2006. The last keyword-based search conducted on 03.04.2008 did not give any results. Therefore, according to the databases no cases related to discrimination based on sexual orientation have reached the courts.

²⁶ See: <http://www.kohus.ee/kohtulahendid/index.aspx> (03.04.2008).

2. Freedom of Movement

- [37]. In the case of EU citizens and their family members, the right to move and reside within the territory of Estonia is regulated by the Citizen of European Union Act. The same right in the case of Third Country citizens is regulated by *Välismaalaste seadus* [Aliens Act].²⁷
- [38]. The Citizen of European Union Act is implementing the Directive 2004/38/EC of 29.04.2004. Therefore, according to the Act, every citizen of any EU Member State has the right to stay in Estonia on the basis of a valid travel document or identity card for a period of up to three months (§ 7). This right is independent and does not depend on the citizenship of the person's partner, spouse, parent or any other family member. Such right may only be restricted if there is good reason to believe that the person poses a danger to public order, national security or the health of other persons (§ 8).
- [39]. The case is somewhat different when the family member of the EU citizen is a Third Country citizen. According to § 3 of the Citizen of European Union Act, family members are:
- a spouse of the EU citizen;
 - a child under 21 years of age or a dependent adult child of the EU citizen or of his/her spouse (dependent child);
 - a dependent parent of the EU citizen or of his/her spouse; or
 - any other person who, in the EU citizen's country of origin, is a dependant of the EU citizen or is a member of his/her household, or who is permanently unable to cope independently owing to health reasons or disability and it is necessary that the EU citizen personally cares for him/her.
- [40]. The term 'spouse' referred to in § 3 of the Act is somewhat controversial when looked in the light of the rest of Estonian legislation. According to *Perekonnaseadus* [Family Law Act],²⁸ marriage is contracted between a man and a woman. Therefore, in the Estonian legal system only heterosexual marriages can be contracted. This is strengthened by the opinion of the Chancellor of Justice, expressed in his statement on regularisation of same-sex family relations:

'Marriage as a type of family has been afforded special protection by the state, especially as a basis for the society and for the continuation and growth of the nation (§ 27 (1) of the Constitution). This means that marriage is a sustainable unit, formed from a man and a woman, who can have

²⁷ Estonia/Riigikantselei (1993) *Riigi Teataja* I, 44, 637.

²⁸ Estonia/Riigikantselei (1994) *Riigi Teataja* I, 75, 1326.

common descendants and who are thus the guarantors for the continuation of the society. The fact that same sex persons do not have this possibility, is a difference, which can provide a reasonable explanation for different treatment of different sex and same sex couples...Therefore my opinion is that the unequal treatment of homosexual persons within the meaning of contracting a marriage is justified'.²⁹

- [41]. It is somewhat unclear whether this also affects the legal status of homosexual marriages contracted in another state once the married couple enters the territory of Estonia. It must be noted, however, that the Citizen of European Union Act merely refers to 'a spouse of the citizen of the European Union' without mentioning the legal status of the marriage in the country of origin, as opposed to a person falling under the fourth category of persons who constitute 'family members' because 'in the country of origin of the citizen of the European Union, [he/she] is a dependant of the citizen of the European Union or is a member of his or her household'.
- [42]. The impression that homosexual marriages are not recognised in the context of freedom of movement is strengthened by paragraph 54 (4) of the Government of the Republic Regulation of 19.08.1997 no. 159 *Perekonnaseisukaardide koostamise, muutmise, parandamise, taastamise ja tühistamise ning perekonnaseisutunnistuste väljaandmise korra kinnitamine* [The Confirmation of the Rules on the Compilation, Modification, Correction, Recovery and Annulment of Vital Records and Issuance of Vital Statistics Certificates],³⁰ which states that marriage is not allowed to be contracted between persons of the same sex. In addition, § 10 of the draft of the new Family Law Act declares invalid a marriage contracted between persons of the same sex.³¹
- [43]. However, according to § 55 (2) of *Rahvusvahelise eraõiguse seadus* [Private International Law Act],³² 'marriage contracted in a foreign state is deemed to be valid in Estonia provided that it is contracted pursuant to the procedure provided by the law of the state where the marriage is contracted and provided that the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses'. There is no practice to confirm that this is actually the view that Estonian authorities take when interpreting § 3 of the EU Citizen Act and the term 'spouse'.³³ *Siseministeerium* [Ministry of Interior] did state that they see no reason why same-sex spouses could not be considered as spouses within the meaning of the EU Citizen Act, if their marriage was contracted according to the regulations in place in their country of

²⁹ Estonia/Õiguskantsleri kantselei, 01.2006 no. 6-1/060166/0600782.

³⁰ Estonia/Riigikantselei (1997) *Riigi Teataja* I, 62, 1067.

³¹ Available at:

http://www.riigikogu.ee/?page=pub_ooc_file&op=emsplain&content_type=text/html&file_id=95812 (15.02.2008).

³² Estonia/Riigikantselei (24.04.2002) *Riigi Teataja* I, 35, 217.

³³ Estonia/Kodakondsus- ja Migratsiooniamet [Citizenship and Migration Board] (08.04.2008) *Küsimus tõlgendamise kohta* [Question on Interpretation].

origin.³⁴ This should currently be considered as a general policy of Estonian authorities, which is yet to be confirmed by actual practice. It is worth to note, however, that the Migration Board responded that same-sex spouses would likely be interpreted as ‘members of a household’, discussed below in paragraph [45], rather than as ‘spouses’.³⁵

- [44]. As opposed to doubts surrounding LGBT marriage, the view on registered partnerships or civil unions is clear under Estonian legislation. According to the Family Law Act, the only union between two people that brings with it rights and obligations is marriage (§ 1 (2)). In the present context this is confirmed by § 3 of the Citizen of European Union Act, which excludes any other union but marriage between two people as a basis for freedom of movement entitlements. This does not contradict Art 2/2/b of Directive 2004/38/EC. Therefore in general, homosexual couples, whether married or having contracted a registered partnership will follow under the category of other family members in Art 3/2 of Directive 2004/38/EC.
- [45]. Paragraph 3 of the Citizen of European Union Act also provides that a family member in the context of that Act can also be ‘a member of a household’, thus fully reflecting Art 3/2/a of Directive 2004/38/EC. According to § 3 (3), a member of a household is ‘the person ... who resides together with a citizen of the European Union in a shared household and has a personal income’. This could, in principle, also cover LGBT partnerships. The Citizenship and Migration Office noted that, in principle, this can include LGBT partnership.³⁶ However, it was also noted that there has only been 1-2 cases where ‘household’ has been cited as a ground for being a family member and these cases did not include LGBT partnerships. It is thus difficult to state with certainty that under Estonian legislation LGBT partnerships fall under the concept of ‘the household’ and can benefit from the right to enter and stay in Estonia as a family member of EU citizen.
- [46]. It may however be questioned whether Estonia has fully implemented Art 3/2/b of Directive 2004/38/EC, which provides that the partner with whom the EU citizen has a ‘durable relationship, duly attested’, ‘shall, in accordance with its national legislation, facilitate entry and residence for the following persons’. But the Citizen of European Union Act does not recognise any other ‘durable relationship’ but marriage and, to some extent applicable here, members of a household. There is no basis, thus, under which a ‘durable relationship’ would be a basis for entry and stay in Estonia of a partner of EU citizen.

³⁴ Telephone conversation with Ms Grete Kaju, legal advisor for the Department of the Migration and Border Control Policy, Ministry of Interior (08.04.2008).

³⁵ Estonia/Kodakondsus- ja Migratsiooniamet [Citizenship and Migration Board] (08.04.2008) *Küsimus tõlgendamise kohta* [Question on Interpretation].

³⁶ Telephone conversation with Ms Liis Annus, Head of Department for Documentation of Foreigners (27.02.2008).

[47]. In the context of the present study, the children and dependents of the LGBT EU citizens are the only group of individuals that can, for sure, take advantage of the provisions on the right to move and stay in Estonia. The particularities of their right to move and stay are provided in § 10 of the Citizen of European Union Act:

‘(1) A family member has the right to stay in Estonia together with a citizen of the European Union on the basis of a valid travel document for a period of up to three months after the date of entry in Estonia.

(2) For entry in Estonia, a family member must have a valid travel document and a visa. Visa is not required from a family member if:

1) the family member has a residence card issued by a Member State of the European Union, Member State of the European Economic Area or the Swiss Confederation, or

2) the family member is a citizen of the state with which Estonia has entered into an agreement to forego the visa requirement or in the case of which Estonia has unilaterally foregone the visa requirement.

3) A family member is prohibited to stay in Estonia if he or she has no right to stay or another legal basis to stay in Estonia.

4) A family member staying in Estonia on the basis of the right to stay shall, within three months after the date of entry in Estonia, apply for temporary right of residence, or leave Estonia before the expiry of such term, unless he or she has applied for temporary right of residence.

5) The stay in Estonia of a family member who has applied for temporary right of residence is legal until the processing of his or her application for temporary right of residence has been concluded.

6) A family member staying in Estonia on the basis of the right to stay is prohibited from employment or operation as a self-employed person in Estonia’.

[48]. In light of Regulation (EC) no. 539/2001 and its amendments, it must be noted that § 10 (2) 2) of the Citizen of European Union Act is in contradiction with it. Given that EU regulations are supreme, the provision in this Act has lost its validity. This also seems to be the opinion of the Ministry of Foreign Affairs, which has published updated information on visa matters on its website www.vm.ee. There is, however, no information on whether the particular provision in the Citizen of European Union Act will be updated in the near future.

- [49]. The right to stay of the family member may be restricted if there is good reason to believe that the person poses a danger to public order, national security or the health of other persons (§11).
- [50]. In Estonia the residence system is divided into two: temporary residence of five years and permanent residence.
- [51]. Every EU citizen has a right to acquire temporary residence. For a stay that exceeds the three-month-period for which only a travel document or identity card is needed he/she must register his/her residence (§ 13). The temporary residence extends automatically for another five years if he/she continues to be registered as a resident in Estonia and there are no reasons to extinguish or terminate it. At the same time, after five years of residence, the EU citizen may apply for permanent residence (§ 40). Under certain conditions, the EU citizen may also apply for a permanent residence permit before the expiry of five consecutive years of residence (§ 40 (2)). These are rights that the partner of an EU citizen who is himself/herself an EU citizen can take advantage of independently of the partner.
- [52]. In the case of an EU citizen's family member who is not an EU citizen, obviously, the conditions set for the term 'family member' under § 3 of the Act must be satisfied. Also, there are certain additional requirements for the EU citizen with whom the person wishes to reside (§ 20 (1)). Since LGBT spouses seem to be wholly excluded, for the purposes of this study the provisions on residence permits are relevant only for the EU citizen's children or dependents.
- [53]. The family member must apply for an extension of the temporary residence permit, showing the continuance of the conditions under which he/she had previously received the permit (§ 28). In case of a child § 45 (4) would also be relevant, which states that a newborn child of a family member with permanent right of residence in Estonia is entitled to permanent right of residence regardless of nationality. In case of the death of the EU citizen with right of residence in Estonia, the family member has the right to apply for a permanent residence permit under certain conditions (§ 45 (3)).
- [54]. The possibility of the partners of EU citizens to take advantage of the freedom of movement and residence is mainly a question of a national legislation in very EU Member State when it comes to the aspects that have been left for them to decide. If the partner is an EU citizen, he/she has the freedom of movement already as an EU citizen, independent from his/her partner. If the partner is a Third-Country national, the situation is somewhat stricter. Estonia does not recognise LGBT registered partnerships or civil unions as already discussed in paragraph [40]. Thus, if according to a host state LGBT partnerships would be recognised, couples from Estonia cannot take advantage of that in the context of freedom of movement. Under Estonian law, same-sex couples also cannot marry, as already discussed in paragraphs [40] and [40].

- [55]. Estonia does however recognise the concept of ‘household’, which is a basis for the freedom of movement for a member of a household. The Statistics Estonia, which uses this concept, applies three criteria to determine whether there is a ‘household’ – (1) same address; (2) joint financial and/or food resources; and (3) individuals consider themselves to be one household.³⁷ According to the Statistics Estonia, there is no reason to exclude LGBT partners from this concept if they fulfil these criteria.³⁸ Moreover, they have considered LGBT partnerships as cohabiting couples for the purposes of statistics. Therefore, LGBT couples forming a ‘household’ in Estonia can benefit from the freedom of movement. The same applies to their children and other family members that are part of the household.
- [56]. According to the information from the Citizenship and Migration Board, there have been no cases on the grounds of sexual orientation and no statistics have been compiled.³⁹ There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail in paragraph [36].

³⁷ Definition available on at: http://pub.stat.ee/px-web.2001/I_Databas/Social_life/06Households/02Household_budget/02Monthly_expenditure/HH09.htm (28.02.2008). Based on § 5 of *Rahva ja eluruumide loenduse seadus* [Population and Housing Census Act], Estonia/Riigikantselei (11.06.1998) *Riigi Teataja* I, 52/53, 772.

³⁸ Telephone conversation with Mr Arvo Valtin, Executive Data Administrator, Department of Social Surveys Service (28.02.2008).

³⁹ Estonia/*Kodakondsus- ja Migratsiooniamet* [Citizenship and Migration Board] (04.02.2008) *Vastus teabenõudele* [Response to request for information].

3. Asylum and Subsidiary Protection

- [57]. Council Directive 2004/83/EC of 29.04.2004 is fully implemented into Estonian national law by the Act on Granting International Protection to Aliens.
- [58]. According to § 4 (1) a refugee is an alien who, owing to a well-founded fear of being persecuted or for reasons of race, religion, nationality, political opinion or membership in a particular social group, is outside his/her country of nationality and is unable or, owing to such fear, unwilling to avail himself/herself of the protection of that country and with regard to whom no circumstance exists precluding recognition as a refugee. There is no specification as to what is meant by those grounds for persecution. Nor was explanation provided in the Explanatory Note accompanying the Act's draft.⁴⁰ It is therefore unclear whether sexual orientation can be considered under 'a particular social group'. The same was admitted by an official from the Citizenship and Migration Board during a 14.02.2008 phone conversation. The official stated that this question will be dealt with once such grounds (for persecution) are cited by an asylum seeker.
- [59]. In Estonia, the Citizenship and Migration Board is responsible for granting refugee status or subsidiary protection. According to information from the Board, there are no cases on this issue, and thus no practice to determine whether the Board accepts the interpretation of 'a particular social group' offered by Article 10 (1) (d) of the Council Directive.⁴¹
- [60]. According to § 7 of the Act on Granting International Protection to Aliens, family members of a refugee and of a person enjoying subsidiary protection are:
- his/her spouse;
 - his/her and his/her spouse's unmarried minor child, including adopted child;
 - unmarried minor child under his/her or his/her spouse's custody and maintained by him/her or his/her spouse, including adopted child. In case of shared custody the agreement of the other party sharing custody is required;
 - his/her or his/her spouse's unmarried adult child if the child is unable to cope independently owing to his/her state of health or disability;
 - a parent or grandparent maintained by him/her or his/her spouse if the country of origin does not provide support resulting from other family ties.

⁴⁰ Explanatory Note attached to the draft, available at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=052630010&login=proov&password=&system=ems&server=ragne11> (15.02.2008).

⁴¹ Response from the Citizenship and Migration Board.

- [61]. The above list is exhaustive, therefore, partners to whom the seekers of asylum or subsidiary protection are not legally married are excluded. The marriage must have been concluded before arriving in Estonia. Here again arises the issue over same-sex marriages already discussed under the Freedom of Movement heading in paragraphs [40]-[43]. In addition, as already discussed in paragraph [44], no other unions or relationships but legally certified marriage between two individuals are recognised.
- [62]. According to information from the Citizenship and Migration Board, there have been no cases on the grounds of sexual orientation and no statistics have been compiled.⁴² There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail in paragraph [36].

⁴² Response from the Citizenship and Migration Board.

4. Family Reunification

[63]. According to § 65 of the Act on Granting International Protection to Aliens, the Citizenship and Migration Board decides on the reunification of families only if the persons applying for it constitute ‘family members’ of a person enjoying temporary protection. The exhaustive list of such persons is provided in § 7 (4) of the same Act:

- his/her spouse;
- his/her or his/her spouse’s unmarried minor child, including adopted child;
- other close relative who lived with him/her in the country of origin and was dependent on him/her.

[64]. Here again arises the issue over same-sex marriages already discussed under the Freedom of Movement heading in paragraphs [40]-[43]. In addition, as it can be seen from § 7 (4), cohabiting or registered partners are not included in the list of ‘family members’. Therefore, registered or merely cohabiting same-sex couples will not have a right to unification.

[65]. According to information from the Citizenship and Migration Board, there have been no cases on the grounds of sexual orientation and no statistics have been compiled.⁴³ There is no such statistical information available from the Ministry of Social Affairs or other official or unofficial sources. This includes information regarding the impact/social reality of relevant legislation for LGBT person. Similarly, no cases have reached any courts either, which is explained in detail in paragraph [36].

⁴³ Response from the Citizenship and Migration Board.

5. Freedom of Assembly

- [66]. In general, freedom of assembly is guaranteed according to § 47 of the Constitution. More specific regulation is provided by the *Avaliku koosoleku seadus* [Public Assembly Act],⁴⁴ which sets out possible restrictions for freedom of assembly. There is no specific mention of discrimination on the grounds of sexual orientation in the Act, therefore, any discrimination that may occur is a question of the application and interpretation, rather than the text, of the law. Based on the Act, local authorities have specified their own more detailed rules that determine the specifics of registering a public event and the basis and responsibilities for the organisers.
- [67]. Inciting hatred, violence or discrimination on grounds of sexual orientation is not mentioned as a basis for prohibiting a demonstration. Section 3 (3) of the Public Assembly Act declares as prohibited any assembly that incites hatred, violence or discrimination based on the grounds of nationality, race, religious or political opinion. Although there have not been any specifically anti-LGBT demonstrations, there does not seem to be legal basis for prohibiting them.
- [68]. There has been constant public debate surrounding the yearly LGBT Pride parade that has taken place in Tallinn since 2004. During the 2006 parade counter-demonstrators attacked parade participants the police were accused of not providing sufficient protection. This also prompted Amnesty International to issue a statement calling for better protection for the freedom of assembly.⁴⁵ In 2007 parade organisers issued a public statement that parade organisation ‘has turned out to be more complicated than in previous years’ and accused the public authorities of a lack of cooperation.⁴⁶ The organisers also submitted a complaint to the Chancellor of Justice’s office. The Chancellor concluded that although the requirement by *Põhja Politseiprefektuur* [Northern Police Prefecture] to parade organisers to use a private security firm to guarantee participants’ safety is in itself legal, the refusal of the organisers to fulfill the requirement cannot be a ground for refusing to allow the parade to take place.⁴⁷ It also established that the Northern Police Prefecture had not followed

⁴⁴ Estonia/Riigikantselei (1997) *Riigi Teataja* I, 30, 472

⁴⁵ Amnesty International (15.08.2006) *Estonia: The right to freedom of peaceful assembly must be protected*, available at: <http://www.amnesty.org/en/library/info/EUR51/001/2006> (14.02.2008).

⁴⁶ R. Mets (02.07.2007) ‘Pöördumine seoses Tallinna Pride 2007 korraldamisega seonduvalt’, in *Eesti Päevaleht*, available at: <http://www.epl.ee/?arvamus=392837> (14.02.2007).

⁴⁷ Estonia/Õiguskantsleri kantselei (09.2007) ‘Soovitus õiguspärasuse ja hea halduse tava järgimiseks’ [‘Recommendation to observe legality and good governance’], letter to *politseiprefekt* [Police Prefect] Raivo Kütt, p. 13.

standards of good governance by not fully cooperating with the parade organisers, as well as not correctly responding to their initial e-mails.⁴⁸

- [69]. In conclusion, as pointed out by the Chancellor of Justice in his analysis of the Police Prefecture's actions,⁴⁹ although the authorities seem to be well aware of their negative obligations not to disturb the parade, they are not so much aware of the positive obligation to provide an environment where freedom of assembly and related rights can be enjoyed (for example, by protecting protesters from counter-protesters). The Chancellor of Justice also stated that more analysis of the proposal for a new *Korralakaitseadus* [Public Order Defence Act], which will replace the Public Assembly Act, is necessary to determine its impact on freedom of assembly.
- [70]. There is no statistical information available from any official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT persons. Similarly, no cases have reached any courts either, which is explained in detail in paragraph [36].

⁴⁸ Estonia/Õiguskantsleri kantselei (09.2007) 'Soovitus õiguspärasuse ja hea halduse tava järgimiseks' ['Recommendation to observe legality and good governance'], letter to politseiprefekt [Police Prefect] Raivo Kütt, p. 13.

⁴⁹ Estonia/Õiguskantsleri kantselei (09.2007) 'Soovitus õiguspärasuse ja hea halduse tava järgimiseks' ['Recommendation to observe legality and good governance'], letter to politseiprefekt [Police Prefect] Raivo Kütt, p. 13.

6. Criminal Law, Hate Speech

[71]. Incitement of hatred and discrimination is prohibited by § 12 of the Constitution of the Republic of Estonia, which reads as follows:

‘...The incitement of national, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable’.

[72]. The Penal Code provides the main provisions regarding hate speech. Section 151 of the Code criminalises ‘activities which publicly incite to hatred, violence or discrimination on the basis of...sexual orientation...if this results in danger to the life, health or property of a person...’ This provision has never been used in practice for homophobic hate speech.

[73]. The Supreme Court has decided what text could be regarded as inciting to social hatred and violence, and interpreted the relevant provision of the Penal Code as follows:

‘§ 151 of the Penal Code is included in division “Offences against equality”. Violation of the right to equality means that in the case of groups that differ on the grounds of ethnic origin, race, colour, sex, language, origin, religion, political opinion, financial or social status a member of one group (“we”) denies the equality of the members of the other group (“others”). Under § 151 of the Penal Code the elements of the offence do not consist only in the denial of equality of the persons belonging to another group but also in incitement to such denial among other persons’.⁵⁰

[74]. There have been no criminal cases brought to court regarding homophobic hate speech, thus there have been no convictions and no sanctions.

[75]. Homophobic motivation is not listed among general aggravating factors in § 58 of the Penal Code.

[76]. In addition to criminal law, civil law also includes a provision in the *Võlaõigusseadus* [Law of Obligations Act],⁵¹ which prohibits defamation or dissemination of incorrect information. There is no information that this provision has ever been applied in the courts in the context of homophobic hate speech.

⁵⁰ Estonia/Riigikohus [Supreme Court] (2007) *Võrdse kohtlemise ja diskrimineerimise alased kaasused Eesti Vabariigi Riigikohtu praktikas 2007*, available at: http://www.riigikohus.ee/vfs/682/t6lkimiseks_MEMO-eriraportoor%20%28L_Kanger%29.pdf (15.02.2008).

⁵¹ Estonia/Riigikantselei (2001) *Riigi Teataja* I, 81, 487.

[77]. There is no statistical information available from any official or unofficial sources regarding the impact/social reality of relevant legislation for LGBT person. Similarly, no cases have reached any courts either, which is explained in detail in paragraph [36].

7. Transgender Issues

- [78]. Transgender issues have a short history in the Estonian legal system. There is no practice, reported cases or statistics on transgender issues, including on discrimination based on a person's transsexuality, except one case, where an application was submitted to the Chancellor of Justice; the case, however, was discontinued (summarised in Annex 1). Therefore, there has not been any opportunity to develop an approach to transgender discrimination. There is also no authority or explanation as to whether transgender issues are covered by regulations on sexual orientation and discrimination based on sexual orientation.
- [79]. However, according to unofficial information received from the Ministry of Social Affairs and from the Gender Equality Commissioner, an application was submitted to the latter at the end of 2007 claiming discrimination in the employment application process owing to the applicant's transsexuality. The Commissioner has not yet processed the application. There is also no information on whether this application will in fact be accepted. If the Commissioner accepts the application and issues an opinion on it, this would mean that according to her opinion transsexuality is an issue of gender and not of sexual orientation. The Commissioner has, during her short period of activity, scrupulously followed her mandate and has declined all applications and requests for information that do not directly pertain to gender issues.⁵² Until the application is processed the issue on discrimination based on transsexuality is unsettled.
- [80]. There are a number of legal acts that include provisions regulating specific acts on transgender issues.
- [81]. The regulation of 07.05.1999 no. 32 by the Ministry of Social Affairs *Soovahetuse arstlike toimingute ühtsed nõuded* [Common requirements to medical acts of sex change]⁵³ provides the basis for medical and legal acts related to gender/sex change. It is the belief of the Ministry of Social Affairs that the regulation has a somewhat vague legal status and it is mainly by tacit agreement that it is followed.⁵⁴
- [82]. The regulation was enacted on the basis of § 8 (1) 6) of the *Rahvatervise seadus* [Public Health Act],⁵⁵ providing that one of the duties of the Ministry of Social

⁵² Estonia/*Soolise võrdõiguslikkuse volinik* [Gender Equality Commissioner] (23.01.2008) *Temaatiline õiguslik uurimus homfoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel*.

⁵³ Estonia/Riigikantselei (27.05.1999) *Riigi Teataja* L, 87, 1087.

⁵⁴ Estonia/*Sotsiaalministeerium* [Ministry of Social Affairs] (08.02.2008) *Vastust Teie 11.01.08 kirjale* [Response to 11.01.08 letter].

⁵⁵ Estonia/Riigikantselei (11.07.1995) *Riigi Teataja* I, 57, 978.

Affairs is ‘to plan and organise implementation of national programmes, projects and other measures for creation of a physical and social environment which is safe for health, prevention of health disorders and disease, and health promotion’. The Ministry of Social Affairs is of the opinion that the link between the general mandate given by § 8 (1) 6) and the regulation is too indirect. However, due to the lack of general unified regulation of the issues of transsexuality, the regulation was based on that provision. This does not make the regulation invalid or illegal. This provision does provide a general basis for the regulation and gender/sex change operations are not in any way legally inhibited.⁵⁶ According to the Ministry of Social Affairs, there has been no need to develop a more comprehensive regulation. Scattered regulation has worked relatively well considering the small population in Estonia.

[83]. According to the regulation of 07.05.1999 no. 32, the precondition for deciding a person’s gender and allowing medical acts necessary for gender/sex change is a decision by the medical expert commission appointed by the Minister of Social Affairs. The applicant must submit an application to the Ministry of Social Affairs requesting a decision by the expert commission. He/she must present the following evidence:

- certification of transsexual identity during at least two years prior to the application;
- a psychiatrist’s decision that excludes the possibility that the wish to undergo gender/sex change is caused by psychiatric disorder;
- compatibility of chromosomatic and gonad gender/sex certified by genetic research.

[84]. The medical expert commission’s decision is the basis for a decree by the Ministry of Social Affairs, which authorises medical acts to change a person’s gender/sex. At least two years must pass from the beginning of the medical treatment before the expert commission will issue a decision on the change of gender/sex. This will be a basis for subsequent legal changes necessary for a person to wholly acquire new gender.

[85]. Name change of the person is performed by the vital statistics office. This possibility is provided by § 15 of *Nimeseadus* [Names Act].⁵⁷

‘If the gender of a person is changed, on the basis of a written application of the person, the parent(s) of the minor or of the guardian of the minor ward, a new given name shall be assigned to the person and a foreign-language surname of the person may be changed if the gender feature is reflected in the surname pursuant to the national tradition of the person’.

⁵⁶ Telephone conversation with Ms Helen Trelin, Advisor, Department of Health, Ministry of Social Affairs (07.04.2008).

⁵⁷ Estonia/Riigikantselei (2005) *Riigi Teataja* I, 1, 1.

- [86]. Section 49 of *Rahvastikuregistri seadus* [Population Register Act] regulates the formation and granting of the new personal identification code for the person who has undergone the gender/sex change, because the code is formed on the basis of a person's sex and date of birth.⁵⁸ According to § 52 of this Act, the new personal identification code will be formed and granted by an authorised processor 'upon amendment of the data on the sex of a person on the basis of an application of the person and a certificate of a medical institution holding a corresponding licence'.
- [87]. The formation and granting of the new personal identification code is also the basis for the issuance of a new birth certificate, which will be organised by the vital statistics office (§ 52 of the Population Register Act). The birth certificate is the basis for a new passport.
- [88]. In addition, the regulation of 18.01.2002 no. 28 '*Riikliku pensionikindlustuse registri*' *pidamise põhimäärus* [Statute for managing the 'state pension insurance register']⁵⁹ is important since it regulates the state pension insurance register. The data in this register is the basis for accounting for social tax paid by or on behalf of persons, their years of pensionable service and accumulation period, and the procedure of determining and paying their state pension and benefits (§ 4 (2)). Paragraph 31 of this regulation provides for a change of data and personal identification code upon a change of gender/sex.
- [89]. According to the database of the Supreme Court and those of the first and second instances referred to in paragraph [36], there are no cases concerning transsexuals. Statistical information on name changes based on change of gender and number of persons who changed their gender/sex is provided in Annex 2.

⁵⁸ Estonia/Riigikantselei (29.06.2000) *Riigi Teataja* I, 50, 317.

⁵⁹ Estonia/Riigikantselei (2002) *Riigi Teataja* I, 7, 38.

8. Miscellaneous

- [90]. It should be mentioned that the Constitution of Estonia includes in its catalogue of fundamental rights the prohibition of discrimination (§ 12): ‘Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds...’
- [91]. As it is stated in the report by the Supreme Court of Estonia on cases concerning equal treatment, ‘this provision is considered to be a very modern one, as it includes inter alia discrimination on the basis of “property or social status”, *i.e.*, the ground that usually is not included in the discrimination catalogue’.⁶⁰ The list of grounds of discrimination is not exhaustive, as is indicated by the phrase ‘or other grounds’. The Supreme Court has developed and repeatedly applied a test for determining whether a treatment is unequal: ‘if there is a reasonable and appropriate ground, the unequal treatment in legislation is justified’.
- [92]. Regardless of the long-time and clear constitutional prohibition of discrimination, the statistical information shows that the Estonian population is fairly ignorant with respect to discrimination based on sexual orientation.
- [93]. The Ministry of Social Affairs ordered a poll in 2007 as part of the EU Equal Opportunities Year.⁶¹ Among other grounds of discrimination, sexual orientation was also included. The poll demonstrated that the Estonian population rarely considers sexual orientation to be one of the grounds of discrimination. Only 1 per cent of the people who had been discriminated against or whose acquaintances had been discriminated against recognised sexual orientation as a probable ground. However, 19 per cent of the respondents who found that discrimination occurs in Estonia often or sometimes did think that sexual orientation is also a ground of discrimination. Yet, ranking the cited grounds of discrimination by rate of incidence, sexual orientation is only 14th.
- [94]. The Ministry of Justice Affairs also referred to a 2007 research project on xenophobic and racist expressions conducted with scientists from Tartu University and Tallinn University.⁶² One of the questions (no. 61) posed in that research was: People of what specific background would you not want to work with? One of the possibilities was homosexuals. The question’s purpose was to measure tolerance of background factors other than nationality.

⁶⁰ Estonia/*Riigikohus* (2007), p. 1.

⁶¹ Response from the Ministry of Social Affairs.

⁶² Estonia/*Justiitsministeerium* [Ministry of Justice] (30.01.2008) *Vastus küsimustele* [Response to questions].

Background	Respondents of Estonian nationality	Respondents of Russian nationality	Total
Homosexuals	37.8	48.2	41
Former prostitutes	27.1	40	31
People with criminal background, former prisoners	62.6	66.2	63.7
Drug addicts	77.4	89.3	81
HIV, AIDS carriers	51.9	52.9	52.2
People with physical disabilities	2.1	7.6	3.8
People of other nationalities	3.5	1	10.8
No such people	13.7	4	10.9
Hard to say	1.3	2.9	1.8

Table 1. Statistics of answers by respondents of Estonian and Russian nationalities. *Ministry of Justice, Vastus küsimustele [Response to questions] (30.01.2008).*

- [95]. Those over 65 are more intolerant (only 5 per cent answered that there are no people who they would not want to work with). People 25-44 are more tolerant towards homosexuals. Men, as compared to women, are less tolerant towards homosexuals (48.9 per cent of men and 28.6 per cent of women). People with higher education are more tolerant (20.5 per cent answered ‘no such people’).
- [96]. On the subject of same-sex marriages and adoption, the Ministry of Social Affairs referred to 2006 Eurostat Eurobarometer research that showed 21 per cent of Estonians thought that same-sex marriages should be allowed everywhere in Europe and 14 per cent would have given homosexuals the right to adopt.⁶³

⁶³ Response from the Ministry of Social Affairs.

Conclusions

- [97]. It is difficult to draw any definite conclusions from the research conducted, as the amount of available information is insufficient for informed analysis. As most laws that provide specific rights for LGBTs are relatively recent, there has not been enough time for practices to be developed.
- [98]. As a result of the research, the team has found that Estonia has or is in the process of implementing all relevant EU legislation. However, whether this process actually results in positive impact in the status and rights of LGBTs remains to be seen.
- [99]. Although Estonia's very modern section on fundamental rights goes beyond those of many other countries, the rest of the body of laws is in need of development. For example, the Estonian legal system does not recognise unmarried couples or couples in civil unions or registered partnerships. This severely affects the rights of LGBTs in areas of freedom of movement, asylum and subsidiary protection, including family reunification. There is also the need to develop the concept of marriage to include LGBT marriages in the definition of marriage under Estonian legislation if Estonia wants to follow the modern development of the rest of Europe.
- [100]. Development is also needed in the area of freedom of assembly and guaranteeing LGBTs the same freedoms as others. In addition, protection against hate speech, provided by law, needs to be put into practice to create an environment that raises public awareness of LGBT rights.
- [101]. In great need of clarification and development is legislation related to transsexuals and gender/sex change. The present dispersed regulation does not sufficiently protect their interests.
- [102]. A positive aspect is legislation on equal treatment, which is under development. Once it has been approved by the Parliament, it will potentially have a positive impact on all aspects of the lives of sexual minorities.
- [103]. Unfortunately there is no good practice to report, which would be innovative and could serve as models for other Member States and the European Union institutions in the context of the present study.

Annexes

Annex 1 – Presentation of Case Law

Implementation of Employment Directive 2000/78/EC

Case title	Conciliation procedure for resolution of discrimination dispute (case no. 12/071719) ⁶⁴
Decision date	[Confidential according to § 35 ⁸ of the Chancellor of Justice Act (25.02.1999)]
Reference details	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
Key facts of the case	The Ministry of Social Affairs forwarded an application to the Chancellor of Justice in which the Applicant claimed that he/she had been discriminated on the grounds of his/her sexual orientation and/or his/her gender (the case involved a transsexual person). The Applicant submitted his/her application to work for two companies, but both companies refused to hire him and the applicant claims it was because of his/her transsexuality. The Chancellor of Justice requested that the Applicant specify his/her request, because the Applicant had not clearly express a request to initiate conciliation proceedings. The Chancellor of Justice turned to the Respondents with a request to participate in the conciliation proceedings and present their explanations and statement regarding the case as described by the Applicant.
Main reasoning/argumentation	[Confidential according to § 35 ⁸ of the Chancellor of Justice Act (25.02.1999)]
Key issues (concepts, interpretations) clarified by the case	[Confidential according to § 35 ⁸ of the Chancellor of Justice Act (25.02.1999)]

⁶⁴ Estonia/*Õiguskantsleri kantselei* (04.02.2008) *Vastus teabenõudele* [Response to request for information] no. 5-3/0800287.

DISCLAIMER: This study has been commissioned as background material for a comparative report on homophobia and discrimination on grounds of sexual orientation by the European Union Agency for Fundamental Rights. The views expressed here do not necessarily reflect the views or the official position of the FRA. The study is made publicly available for information purposes only and does not constitute legal advice or legal opinion.

Results (sanctions) and key consequences or implications of the case	The Respondents did not wish to participate in the conciliation proceedings, therefore, the Chancellor of Justice terminated the proceedings in the present case.
Case title	Statement on regularisation of same-sex family relations (no. 6-1/060166/0600782)
Decision date	01.2006
Reference details	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
Key facts of the case	An Applicant turned to the Chancellor of Justice, claiming that homosexual individuals are discriminated against in § 12 of the Constitution, because they have not been afforded the protection as guaranteed by § 26 and § 27 of the Constitution.
Main reasoning/argumentation	The Application included a claim that homosexual, unlike heterosexual, individuals are discriminated against, because they are not allowed to enter into a legally recognised and protected family relationship.
Key issues (concepts, interpretations) clarified by the case	The Chancellor of Justice found that unequal treatment is justified. A marriage between a man and a woman is a sustainable unit, which can have common descendants and who thereby provide continuity of the society. This differentiates relationships between different and same-sex couples and constitutes a circumstance by which unequal treatment is substantiated. The Chancellor of Justice also stated that the lack of a right for homosexual couples to demand regulation of same-sex relationships derives from international or European Union legal norms, which form a part of the Estonian legal system. Enabling partnerships for same-sex individuals has so far been left to state political decisions.
Results (sanctions) and key consequences or implications of the case	The Chancellor of Justice found that unequal treatment is justified.

Case title	Clarification on refusing the application (no. 14-1/071238/0705697)
Decision date	08.08.2007
Reference details	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
Key facts of the case	An Applicant turned to the Chancellor of Justice, requesting proceedings against a publicly expressed opinion that incited denigration of the gay movement.
Main reasoning/argumentation	Two paramount human rights collide in this particular case. On the one hand, the Constitution emphasises everyone's right to freedom of expression; on the other hand, it is an important aspect of the Constitution that everyone should respect and honour other people's rights and freedoms while exercising their own rights and freedoms and fulfilling their obligations.
Key issues (concepts, interpretations) clarified by the case	The Chancellor of Justice did not initiate proceedings based on the Application, because according to § 19 (1) of the Law of the Chancellor of Justice, everyone has the right to turn to the Chancellor of Justice to review whether any holder of public office has violated human rights. The case described by the Applicant concerned a dispute between two private individuals, for the settlement of which the Chancellor of Justice lacks competence.
Results (sanctions) and key consequences or implications of the case	Since the Applicant did not wish to initiate the conciliation, the proceedings in this application were terminated.

Freedom of Assembly

Case title	Recommendation to observe legality and good governance (no. 7-4/071025/00706331)
Decision date	09.2007
Reference details	<i>Õiguskantsleri kantselei</i> [Office of the Chancellor of Justice]
Key facts of the case	An Applicant turned to the Chancellor of Justice in regard to the activities of the Northern Police Prefecture in the preparation of the public meeting of Tallinn Pride. After two failed attempts to contact the Northern Police Prefecture by e-mail (19.03.2007 and 01.06.2007) to ask clarifications on requirements, propositions and wishes from police in regard to the planned event on 11.08.2007 and proposing to meet to discuss this in more detail, the Police finally responded on 22.06.2007 to the official enquiry (sent on 18.06.2007). The Police declared that the event cannot be organised in Tallinn Old Town as proposed by the organisers due to previous experiences and possible threats to public order and to safety of the participants. Also was noted that the event would disturb the constitutional right of other citizens to freedom of movement in the Old Town. The Police suggested a meeting with the organisers after they have found another place for the event. On 5.07.2007, the Police set additional requirements to the organisation of public meeting, which concerned traffic safety.
Main reasoning/argumentation	<p>The Chancellor starts his reasoning by emphasising the importance of the freedom of assembly and expression for a democratic society, reminding that these freedoms ensure the pluralism of opinions in social and political discussions. He states that, from one side, state must refrain from interfering into the freedom of assembly, but, on the other side, state must also take positive measures to protect legal demonstrations from counter-demonstrations etc. This is especially important in case of persons of minority or who express unpopular views [para. 35]. The Chancellor rejects the position of the Police that the Pride Parade is an event in private interest and, therefore, it is the obligation of the organiser to provide the security - “If the police arrives then things are already bad. Well organised event is such where the police does not have to come at all.” (para 36)</p> <p>The Chancellor also rejects the police’s opinion that by using audio technology, the event turns from public meeting to public event (para 43). He reminds that the essential conditions of the concept of public meeting are multiplicity of participants, common goal, which is not merely social (eg entertaining concert, public gathered to see an accident etc), and internal connection (para 40).</p> <p>Considering that the freedom of assembly is a fundamental freedom, “the enjoyment of that right cannot be made dependent on conditions that make that enjoyment considerably more difficult or practically impossible. The requirement to involve security firm is undoubtedly considerable obstacle, since it brings with it additional</p>

	<p>(possibly considerable) costs for the organiser of the meeting.” (para 67)</p> <p>The Chancellor then goes on to admit that the freedom of assembly is subject to restrictions for the legitimate aim of protecting public order and security of participants when prescribed by law. And although the general obligation to ensure public order is on the police, the organiser of the meeting also has an obligation to take care that the meeting is peaceful and safe (para 69). However, it derives from the meaning of the legislation that the obligations of the organiser are restricted merely with the participants. And the participants are those who actively express the views the meeting intends to promote. Mere observers cannot be considered participants, although it might be difficult to draw the line (para 69-70). Previous negative assessment by the police on the safety of the planned meeting cannot be a basis for refusing the approval to the meeting. This also applies to not fulfilling the requirement to involve a security firm. Such a requirement can only be considered advisory (para 72). “Prohibiting a meeting because of that reasons should be <i>ultima ratio</i> and based on very compelling reasons” (para 73).</p> <p>The Chancellor concluded that considering the circumstances of the specific case, the requirement to involve a security firm was not illegal but this requirement could also not have been legally binding (para 74). The Chancellor admits that the practice does not provide a clear-cut solution as to where the obligations of the organisers of the meeting end and where the obligations of the police start. The uncertainty is further increased by the legal uncertainty of the Public Assembly Act. This is the reason why cooperation between public authorities and individuals is essential. Obviously, the finding of appropriate solutions is always dependent on the other side – organiser of the meeting – but the police can certainly help considerably with its openness, helpfulness and goodwill. (para 79)</p>
<p>Key issues (concepts, interpretations) clarified by the case</p>	<p>The Chancellor clarified the concept of public meeting. He also clarified the obligations of the police in regard to public meeting and its participants.</p>
<p>Results (sanctions) and key consequences or implications of the case</p>	<p>The Chancellor concluded that although the requirement by <i>Põhja Politseiprefektuur</i> [Northern Police Prefecture] to parade organisers to use a private security firm to guarantee participants' safety is in itself legal, the refusal of the organisers to fulfill the require cannot be a ground for refusing to allow the parade to take place.</p>

Annex 2 – Statistics

Implementation of Employment Directive 2000/78/EC

- Statistical information regarding the work of the equality body concerning discrimination on the ground of sexual orientation (official)

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation	0	0	0	0	0	0	1 (family law)	2 (freedom of speech; employment)
Total number of cases of confirmed discrimination	0	0	0	0	0	0	0	0
Sanctions/compensation payments issued	0	0	0	0	0	0	0	0

- Case statistics and complaint data (tribunal, courts, equality bodies, etc.) regarding Employment Directive 2000/78/EC concerning the ground of sexual orientation (official)

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	1
Total finding of discrimination confirmed (by equality body, tribunals, courts, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	0
National total number of sanctions/compensation payments issued (by courts, tribunals, equality bodies, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	0
National range of sanctions/compensation payments (by courts, tribunals, equality bodies, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	0	0	0	0	0	0	0	0

Freedom of Assembly

- Statistical information on freedom of assembly (official)

	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBTs, gay pride parades, etc.	0	0	0	0	1	1	1	1
Number of demonstrations against tolerance of LGBTs	0	0	0	0	0	0	0	0

Criminal Law, Hate Speech

- Statistical information on criminal law, hate speech (official)

	2000	2001	2002	2003	2004	2005	2006	2007
Number of court cases regarding homophobic hate speech initiated	0	0	0	0	0	0	0	0
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	0	0	0	0	0	0	0	0
Range of sanctions issued for homophobic hate speech	0	0	0	0	0	0	0	0

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	0	0	0	0	0	0	0	0

Transgender Issues

- Statistical information on transgender issues (official)

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected owing to change of gender ⁶⁵	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Number of persons who changed their gender/sex in your country under the applicable legislation ⁶⁶	7	1	4	6	6	8	2	7

⁶⁵ Telephone conversation with Ms Eve Mitin, Advisor to the Minister of Interior on name changes, legal questions on preparing vital records (18.02.2008).

⁶⁶ E-mail from Hedy Eeriksoo, Health Care Department of the Ministry of Social Affairs, *Euroopa Komisjoni homofoobia uurimus* (18.02.2008). These numbers refer only to the number of cases for which permission to undergo the medical procedures was granted. There is no statistical information on whether these individuals actually undertook the procedures.