

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Netherlands

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Executive summary

Implementation of Employment Directive 2000/78/EC

- [1]. In the Netherlands, the principles of equality and non-discrimination are firmly enshrined in various realms of the law, e.g. in Article 1 of the *Grondwet* [Constitution], in private and public employment law, in criminal law and the *Algemene Wet Gelijke Behandeling* [General Equal Treatment Act (GETA)]. Dutch law provides for a registered partnership and civil marriage for both same-sex and different-sex couples. The Netherlands is one of few EU Member States which ratified Protocol 12 to the European Convention on Human Rights (ECHR).
- [2]. The GETA outlaws any (direct or indirect) ‘distinction between people on the ground of (...) sex, (...), heterosexual or homosexual orientation’ in the field of employment, in the field of the liberal professions, by organisations of employees, employers or professionals, in the provision of goods or services, in the conclusion, implementation or termination of agreements thereon, and in the provision of educational or careers guidance.
- [3]. The GETA does not apply to legal relationships *within* churches, other religious communities or associations of a spiritual nature. Furthermore ‘requirements which, in view of the private character of the employment relationship, may reasonably be imposed on the employment relationship’ are excluded from the GETA.
- [4]. The GETA provides for a system of justification grounds for discrimination. An important justification in the lesbian, gay, bisexual and transgender (LGBT) context is that institutions founded on religious principles, or on political principles, or schools founded on the basis of religious denomination may impose requirements on the occupancy of a post which, in view of the organisation’s purpose, are necessary to live up to its founding principles (Article 5(2) GETA).
- [5]. It could be argued that the current legal framework fails to meet some of the requirements imposed by EU law. There are possibly existing gaps in implementation with regard to (1) the definition of indirect discrimination, (2) the general exception for internal affairs of churches and other spiritual congregations, (3) the conditional exemptions for organisations based on religion or belief and political organisations, (4) the exception regarding the private character of the employment relationship, (5) sanctions, (6) positive action schemes and (7) harassment.

- [6]. The officially designated equality body is the *Commissie Gelijke Behandeling* [Equal Treatment Commission (ETC)]. The ETC is a semi-judicial independent body the decisions of which are *non-binding* but nevertheless authoritative. The ETC can hear and investigate cases, may conduct an investigation on its own initiative, conducts surveys and issues reports and recommendations.
- [7]. Doubts have been expressed as to whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'. One problem is that the ETC cannot impose sanctions.
- [8]. Organisations can take legal action in court and have the right to ask the ETC to start an investigation. Several gay and lesbian interest groups have been recognised as having standing.

Freedom of movement

- [9]. When it comes to the legal situation regarding partners of EU citizens in the context of the freedom of movement, Dutch law makes no distinction between LGBT partners and non-LGBT partners. Neither does Dutch law make a distinction between couples of two EU citizens and couples of an EU citizen and a third country national partner. As was mentioned above, Dutch law provides for a registered partnership and civil marriage for both same-sex and different-sex couples. Daily practice shows, however, that LGBT partners of Dutch citizens do not always enjoy full freedom of movement and establishment in other Member States.

Asylum and subsidiary protection

- [10]. It is standing policy and standing jurisprudence in the Netherlands that an LGBT asylum seeker is eligible for refugee status and thus a residence permit; the definition as required under EU law, of being persecuted for reasons of membership of a particular social group, includes being persecuted for reasons of sexual orientation. Furthermore, an LGBT asylum seeker can be eligible for a residence permit, if s/he can show that s/he has substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return. In the third place, the situation of LGBT persons in the country of origin can be a reason for so-called categorical protection.
- [11]. LGBT partners and family members of a refugee to whom asylum has been granted can also qualify for a residence permit on asylum grounds.

Family reunification

- [12]. Family members (both third country national and EU citizen) of foreigners with a residence permit have a right to family reunification. The law makes no distinction between LGBT and non-LGBT partners or between their family members.

Freedom of assembly

- [13]. In the Netherlands the right to freedom of assembly is protected in Article 9 of the Dutch Constitution and by international treaties. In general there is no obligation to give prior notice of a planned demonstration. However, knowledge of the content of the demonstration might be necessary in order to estimate the risk of counter-demonstrations and to determine the size of the police presence.
- [14]. For several decades demonstrations/manifestations in favour of tolerance of LGBT people have taken place on a yearly basis. The authors of this report are not aware of any demonstration against tolerance of LGBT people in the Netherlands in the period 2000-2007.
- [15]. No licence for a demonstration in favour of tolerance of LGBT people has been refused in the past decades, apart from one minor case in 2007.
- [16]. In the early 1980s a large-scale demonstration in favour of tolerance of LGBT people was violently disturbed. These disturbances led to a new police policy on LGBT matters. After 1982 incidental disturbances have taken place. Recently during the massive 'We Are Amsterdam Gay Pride' of 2007, four gay men were violently attacked.

Hate speech and criminal law

- [17]. The Dutch *Wetboek van Strafrecht* [Penal Code] outlaws defamation on the grounds of (among others) hetero- or homosexual orientation. Public incitement of hatred, discrimination or violent action against persons on the ground of his/her hetero- or homosexual orientation is also punishable. The sanction for these offences can be imprisonment of up to one year or a fine of up to 7,400 Euro. Annex 1 gives an overview of relevant hate speech case law in the LGBT context.
- [18]. The Dutch Civil Code provides in addition for a civil tort procedure against derogatory speech, which has been invoked several times in the LGBT context.

- [19]. Neither the Penal Code nor the *Wetboek van Strafvordering* [Code of Criminal Procedure] identify homophobic motivation as an aggravating factor in sentencing. However, since December 2007 the Instruction on Discrimination for the Public Prosecution Service is in force, on the basis of which the public prosecutor must increase the sentence s/he demands by 25 per cent in the case of an offence with a discriminatory aspect (including discrimination on grounds of sex or sexual orientation). Furthermore, there are examples of cases in which the court takes a discriminatory aspect of an offence into account in sentencing. However, it is impossible to draw any firm conclusions from that practice. Relevant case law in this respect is included in Annex 1.

Transgender issues

- [20]. In Dutch law discrimination on the ground of ‘transsexuality’ and discrimination on the ground of ‘transvestism’ are regarded as forms of sex discrimination.
- [21]. The Civil Code provides that courts may authorise a person to change his/her sex in his/her birth certificate. This is contingent on the physical transformation into the new sex of the requesting person, as far as this is possible and sensible from a medical and psychological point of view, and sterilisation. The civil courts have the competence, once an appeal for a change of sex has been granted and if so required to order the change of the applicant’s first names.
- [22]. Like lesbian, gay and bisexual people, transgender people can be regarded as members of a social group and thus be eligible for refugee status. In Dutch case law, eligibility for protection as a refugee or beneficiary of subsidiary protection are often jointly examined. Furthermore, the situation of transgender people in the country of origin can be a reason for so-called categorical protection. While awaiting a final decision in their case, asylum seekers are excluded from medical treatments with the purpose of change of sex.
- [23]. Defamation on ground of sex (and thus against transgender people) is not penalised by the Penal Code. Public incitement to hatred on the basis of sex (thus including transsexuality), however, is outlawed by several articles of the Penal Code.

Miscellaneous

- [24]. In recent years the Dutch media has reported an increase in violence against LGBT people. There are no precise statistics in this respect. The number of

incidents of homophobic discrimination reported to anti-discrimination offices rose in the period 2002-2005. However, it is not possible to draw any firm conclusions, since not all victims may report their case, and at the same time a higher number of reports may be result from increased publicity.

Good practices

- [25]. One of the most important achievements in tackling discrimination on grounds of sexual orientation in Dutch law is the gender neutrality of marriage, most parental rights, registered partnership and rules on *de facto* cohabitation.
- [26]. The Equal Treatment Commission has developed a highly sophisticated case law and it may be regarded as one of leading bodies in this field in Europe.
- [27]. Since 1988 the Dutch government has periodically issued a policy paper on 'homosexual emancipation policy' (*homo emancipatiebeleid*).
- [28]. The police have set up a gay network which represents the interests of lesbian, gay and bisexual people within and outside the police. A special telephone number is available for victims of homophobic offences.
- [29]. The police and the Public Prosecution Service have developed systems to improve the registration of offences and crimes with a discriminatory aspect. The systems provide for the option to specify the grounds of discrimination involved.
- [30]. Teaching packages in order to make homosexuality the subject of discussion in secondary education were developed and were warmly welcomed by local government.

Implementation of Employment Directive 2000/78/EC¹

A.1. Main features of implementation

- [31]. In the Netherlands, the principles of equality and non-discrimination are firmly enshrined in various realms of the law. Of particular importance are the *Grondwet* [Constitution], private and public employment law, criminal law and specific additional statutory non-discrimination acts. Family law is of obvious significance as well, since Dutch law provides for a registered partnership and civil marriage for both same-sex and different-sex couples. Moreover, since the Netherlands' constitutional system adheres to a 'monist theory' of international law, international equality guarantees binding upon the Netherlands automatically filter into the national legal system (provided in Articles 93 and 94 of the Constitution).² In this connection it may be noted that the Netherlands is one of few EU Member States which ratified Protocol 12 to the European Convention on Human Rights (ECHR).
- [32]. The Dutch Constitution (1983) contains a non-discrimination clause (second sentence of Article 1): *Discrimination on grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.*³ The wish in Parliament also to cover anti-homosexual discrimination was the main reason for inserting the words 'or any other grounds whatsoever'.⁴ As confirmed in case law the 'other grounds' do indeed include sexual orientation.⁵

¹ The authors of this report wish to acknowledge with gratitude Kees Waaldijk for his contribution to this report.

² R. Holtmaat (2007), *Netherlands country report on the measures to combat discrimination 2006*, for the European Network of Legal Experts in the non-discrimination field, p. 2.

³ Article 1, sentence 2, *Grondwet* [Constitution]: '*Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan.*' In force since 17.02.1983 (*Staatsblad* (1983), nr. 70).

⁴ See C. Waaldijk (1986/1987), 'Constitutional Protection Against Discrimination of Homosexuals', in: *Journal of Homosexuality*, Vol. 13-2/3, p. 59-60.

⁵ *Gerechtshof Amsterdam* [Amsterdam Court of Appeal], 10.12.1987, *NJCM-Bulletin* 1989, 305 at 315 (NJCM is the Dutch section of the International Commission of Jurists). See C. Waaldijk, 'The Netherlands', in: C. Waaldijk and M. Bonini-Baraldi (eds.) (2004), *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden, p. 342, online at www.emmeijers.nl/experts and at www.eu.int/comm/antidiscrimination.

- [33]. Article 429 *quater* of the *Wetboek van Strafrecht* [Penal Code] makes it a criminal offence to ‘discriminate against persons on the grounds of their race, religion, beliefs, sex or heterosexual or homosexual orientation’, but only if a person does this in the execution of a ‘profession, business or official capacity’.⁶ Most employers fall under one of these three categories. For the purposes of this provision, Article 90 *quater* of the Code defines *discrimination* as ‘any form of distinction or any act of exclusion, restriction or preference that intends or may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms in the political, economic, social or cultural field, or in any other area of society’.⁷
- [34]. Furthermore, the ground of sexual orientation is covered by the *Algemene Wet Gelijke Behandeling* [General Equal Treatment Act (GETA)] of 1994.⁸ In 2004, the 1994 Act was amended and complemented by the *EG-Implementatiewet Awgb* [EC Implementation Act (GETA)].⁹
- [35]. The GETA outlaws any (direct or indirect) ‘distinction between people on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’ (Article 1), in the field of employment (Article 5), in the field of the liberal professions (Article 6), by organisations of employees, employers or professionals (Article 6a) and in providing goods or services, in concluding, implementing or terminating agreements thereon and in providing educational or careers guidance (Article 7).¹⁰
- [36]. In contrast to EC law or any other realm of Dutch anti-discrimination law, the GETA is centred around the concept of distinction (*onderscheid*) in lieu of discrimination (*discriminatie*). The difference between the two concepts is that ‘distinction’ is a ‘neutral’ and ‘discrimination’ a ‘pejorative’ notion. The usage of the correct terminology was the subject of discussion during

⁶ The full text of Article 429 *quater* of the *Wetboek van Strafrecht* [Penal Code] is: ‘Hij die in de uitoefening van een ambt, beroep of bedrijf personen discrimineert wegens hun ras, hun godsdienst, hun levensovertuiging, hun geslacht of hun hetero- of homoseksuele gerichtheid wordt gestraft met hechtenis van ten hoogste twee maanden of geldboete van de derde categorie.’.

⁷ The full text of Article 90 *quater* of the Penal Code is: ‘Onder discriminatie of discrimineren wordt verstaan elke vorm van onderscheid, elke uitsluiting, beperking of voorkeur, die ten doel heeft of ten gevolge kan hebben dat de erkenning, het genot of de uitoefening op voet van gelijkheid van de rechten van de mens en de fundamentele vrijheden op politiek, economisch, sociaal of cultureel terrein of op andere terreinen van het maatschappelijk leven, wordt teniet gedaan of aangetast’. See Waaldijk, 2004, p. 345.

⁸ *Staatsblad* [Law gazette] (1994), 230.

⁹ *Staatsblad* [Law gazette] (2004), 119.

¹⁰ Waaldijk, 2004, pp. 345-346. Article 7 also covers the provision of any goods and services that are *not* related to employment.

the implementation of Directives 2000/43/EC and 2000/78/EC and remains a subject of discussion.¹¹

- [37]. The GETA employs the terminology ‘hetero- or homosexual orientation’, to refer to the terminology (in English) used by Directive 2000/78/EC i.e., ‘sexual orientation’. The Dutch Government opted for the term ‘*gerichtheid*’ (orientation) rather than ‘*voorkeur*’ (preference), as the term ‘orientation’ expresses better that not only individual emotions are covered, but also concrete expressions thereof. Another major reason for the Government’s preference for the term ‘hetero- or homosexual orientation’ over ‘preference’ or simply ‘sexual orientation’ was that the latter term could possibly include ‘paedophile orientation’.¹² ‘Bisexual orientation’ is covered by the notion ‘hetero- or homosexual orientation’. Discrimination on the ground of ‘transsexuality’ and ‘transvestism’ is regarded as a form of sex discrimination.¹³
- [38]. Article 1(b) of the GETA defines ‘direct distinction’ as ‘distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’.¹⁴ Article 1(c) of the GETA defines ‘indirect distinction’ as any ‘distinction on the grounds of other characteristics or behaviours than those referred to in Article 1(b) that results in a direct distinction’.¹⁵
- [39]. The GETA does not provide for specific court procedures. Normal procedures of civil or administrative law can be used to enforce the equal treatment standards.¹⁶ All of these procedures lead to a legally binding decision. In practice, in most cases the equality norm is enforced through a

¹¹ See R. Holtmaat (2006), ‘Discriminatie of onderscheid’ in: M. L. M. Hertogh, P. J. J. Zootjens (eds.), *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Wolf Legal Publishers, Nijmegen, pp. 15-45.

¹² Holtmaat, 2007, p. 16.

¹³ For transsexualism see *Gerechtshof Leeuwarden* [Leeuwarden Court of Appeal], 13.01.1995, *NJ* 1995 nr. 243 and e.g. ETC Opinions 1998-12 and 2000-73. For transvestism, see ETC 15.11.2007, Opinion 2007-201.

¹⁴ Article 1(b) of the GETA reads as follows: ‘*In deze wet en de daarop berustende bepalingen wordt verstaan onder: (...) (b) onderscheid: onderscheid tussen personen op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat*’.

¹⁵ Article 1(c) of the GETA reads as follows: ‘*In deze wet en de daarop berustende bepalingen wordt verstaan onder: (...) (c) indirect onderscheid: onderscheid op grond van andere hoedanigheden of gedragingen dan die bedoeld in onderdeel b, dat direct onderscheid tot gevolg heeft*’.

¹⁶ Jurisdiction in conflicts arising from private law employment contracts lies with the *Kantongerechten* [district courts], mostly without any higher appeal. Jurisdiction over conflicts of public employment lies with the administrative chambers of the *Rechtbanken* [regional courts], with an appeal to the *Centrale Raad van Beroep* [Central Appeals Court]. Conflicts about access to public or private employment can be brought before the regional courts. An employment contract may be terminated by court or by the employer with permission of the Centre for Work and Income. This Centre specifically pays attention to possible discriminatory applications for authorisation to dismiss an employee.

procedure before the *Commissie Gelijke Behandeling* [Equal Treatment Commission (ETC)], the officially designated equality body. Compared to civil and administrative court procedures, this is a low threshold procedure. This means inter alia that no legal representation is required and that no fees need to be paid. On the other hand, the opinions of the ETC are non-binding.¹⁷

A.1.1. Scope of the GETA

[40]. Article 5(1) of the GETA prohibits unlawful distinctions in the context of employment. No unlawful distinctions shall be made with regard to the following areas: (a) public advertising of employment and procedures leading to the filling of vacancies; (b) the services of an employment agency (inserted by the 2004 EC Implementation Act); (c) the commencement or termination of an employment relationship; (d) the appointment and dismissal of civil servants; (e) terms and conditions of employment; (f) permission for staff to receive education or training during or prior to the employment relationship; (g) promotions; and (h) working conditions (inserted by the EC Implementation Act). Article 6 of the GETA covers the liberal professions (*het vrije beroep*) and Article 6a (added by the Implementation Act) covers membership and involvement in organisations of employees, employers or professionals and benefits attached to these.¹⁸

[41]. Article 7 of the GETA renders the prohibition of making a distinction on the ground of sexual orientation applicable to (in brief): (a) the supply of or permission for access to goods or services which also includes all forms of education, including higher education;¹⁹ (b) the provision of career orientation and guidance (*loopbaanoriëntatie*); and (c) advice or information regarding the choice of an educational establishment or career. It is furthermore specified in Article 7 that the Act only applies to the above-mentioned areas if the alleged discriminatory acts are committed: (a) in the course of running a business or exercising a profession; (b) by the public services; (c) by institutions which are active in the field of housing, social services, health care, cultural affairs or education; or (d) by private persons not engaged in running a business or exercising a profession in so

¹⁷ R. Holtmaat (2007), 'Summary' in: *Netherlands country report on the measures to combat discrimination 2006*, for the European Network of Legal Experts in the non-discrimination field, p. 5. See also Chapter A.2. below.

¹⁸ Waaldijk, 2004, pp. 354-355.

¹⁹ The material scope of the GETA covers the entire field of education. It thus offers a wider protection than Directives 2000/43/EC and 2000/78/EC.

far as the offer is made publicly.²⁰ Unilateral governmental decisions and acts do not fall under the scope of Article 7.²¹

- [42]. The EC Implementation Act GETA of 2004 has extended the GETA to the fields of social protection, social security and social advantages, but the new prohibition (Article 7a) is limited to distinctions on the ground of race. For other grounds such as sexual orientation, this field will remain subject only to the constitutional and international prohibitions of discrimination.²²
- [43]. The GETA does not apply to legal relations within religious communities, independent sections or associations thereof and within other associations run on a spiritual basis and excludes the application of equal treatment norms to ‘ministers of religion’ (priests, ministers, imams, et cetera). These are considered to be internal affairs of these (religious) organisations. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*.²³
- [44]. Article 5(3) provides that the prohibition of employment discrimination does not cover ‘requirements which, in view of the private character of the employment relationship, may reasonably be imposed on the employment relationship’.²⁴

A.1.2. Justifications

- [45]. The GETA contains a ‘closed’ system of justification grounds for direct discrimination: justifications for unequal treatment are explicitly and exhaustively listed within this Act.²⁵ For cases of indirect discrimination the GETA provides for an open system of justification grounds.
- [46]. In the context of the exceptions of Article 5(2) of the GETA institutions founded on religious principles or on political principles or schools founded on the basis of religious denomination may impose requirements on the occupancy of a post which, in view of the organisation’s purpose, are necessary to live up to its founding principles.²⁶ The Dutch text suggests that requirements other than a particular religion or belief may be established. That suggestion also follows from the stipulation that ‘these

²⁰ Holtmaat, 2007, p. 39.

²¹ J. H. Gerards and A. W. Heringa (2003), *Wetgeving Gelijke Behandeling*, Deventer: Kluwer, pp. 72-73, with references to ETC case law.

²² Waaldijk, 2004, p. 348.

²³ See Article 3 GETA. Holtmaat, 2007, p. 45.

²⁴ Article 5(3) GETA reads as follows: ‘*Het eerste lid is niet van toepassing op eisen, die, gelet op het privé-karakter van de werkverhouding in redelijkheid aan een werkverhouding kunnen worden gesteld*’.

²⁵ Holtmaat, 2007, p. 43.

²⁶ Holtmaat, 2007, p. 44.

requirements may not lead to a distinction based on *the sole fact of* political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status'.²⁷ The requirements that are set on this ground need to be closely linked to the nature and content of the job. This means that only functions that are related to the 'mission' of the organisation can be exempted from the equal treatment norm. (i.e. the exception is not applicable when it concerns a gardener for a church.) It is also a requirement that the organisation applies a consistent policy in this respect.²⁸

- [47]. In essence, the 'sole fact' construction has played an important role with regard to the question of whether a Christian school may lawfully refuse to employ cohabitating homosexuals in a teaching position. It is stated clearly in the Parliamentary Documents that the 'sole fact' that a person is homosexual, may *in se* not lead to the refusal to hire such a person or to dismiss him/her.²⁹ However, this may be different if 'additional circumstances'³⁰ are taken into account.³¹ The Directive's wording in Article 4(2) seems not to allow the sexual orientation of a person to play any role, since only the religion or belief of the person concerned may be taken into account on grounds of the ethos of the organisation. Examples given by the government during the parliamentary discussions and ETC Opinions regarding 'additional circumstances' are all related to behaviour or circumstances that have a relationship with the religious ethos of the organisation.³²

A.1.3. Existing gaps in implementation

- [48]. In the context of the implementation of Directives 2000/43 and 2000/78/EC it is presumed that the Dutch legislator has in some regards fallen short of EU requirements.³³ The European Commission shares this opinion and has very recently delivered the Netherlands a reasoned opinion on the basis of

²⁷ Waaldijk, 2004, pp. 364-365.

²⁸ See ETC Opinion 1996-118 for an explanation of the criteria.

²⁹ *Parliamentary Documents Dutch Upper Chamber of the States-General*, 1992-1993, 22 014, nr. 212c, p. 10-11.

³⁰ In the Parliamentary comments, the example is given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabits with a same-sex partner. According to the example, the teacher may reasonably be expected to elaborate in his classes upon the concept of 'marriage'. See Parliamentary Documents 1990-1991 Memorandum in Reply, p. 41.

³¹ Explanatory Memorandum to the GETA, *Parliamentary Documents Dutch Second Chamber of the States-General*, 1990-1991, 22 014, nr. 3, p. 18-19. See also ETC Opinion 1996-39 and 1999-38 and J. H. Gerards and A. W. Heringa (2003), *Wetgeving Gelijke Behandeling*, Deventer: Kluwer, p. 105.

³² In a recent opinion the ETC interpreted the term 'additional circumstances' restrictively. ETC 15.06.2007, Opinion 2007-100.

³³ 'Summary' in Holtmaat, 2007, p. 2.

Article 226 of the EC Treaty for failure to fulfil the obligations of Directive 2000/78/EC.³⁴

- [49]. A first possible gap in the implementation of the Employment Directive concerns the definition of indirect discrimination. In the GETA this definition is limited to apparently neutral provisions and practices that make some distinction on other grounds than those prohibited; provisions and practices that make no distinction at all fall outside this definition, which therefore can be regarded as being not fully in accordance with Article 2(2b) of the Directive.³⁵
- [50]. Secondly, the internal affairs of churches and other spiritual congregations and the profession of priests, rabbis, imams etc. are completely exempted from the provisions of the GETA (Article 3, GETA). This *unconditional* exemption of harassment and other forms of discrimination is argued to be incompatible with Articles 2(5), 4(1) and 4(2) of the Directive.³⁶ Other experts conclude that Article 3 of the GETA is in line with the exceptions that are possible under the EC Directives.³⁷
- [51]. Furthermore, there are conditional exemptions for organisations based on religion or belief (Article 5(2), GETA). Insofar as these exemptions leave some scope for discrimination on grounds other than religion or belief, they can be regarded as incompatible with Article 4(2) of the Directive.³⁸
- [52]. Conditional exceptions exist not only for organisations based on religion or belief, but also for political organisations. It has been argued that it has not been demonstrated that these exceptions are necessary for the protection of the freedom of association as meant in Article 2(5) of the Directive.³⁹

³⁴ Opinion European Commission (*Ingebrekestelling*) of 31.01.2008, no. 2006/2444, C(2008)0115.

³⁵ Waaldijk, 2004, pp. 352 and 373.

³⁶ Waaldijk, 2004, p. 373 and Opinion EC (*Ingebrekestelling*) of 31.01.2008, no. 2006/2444, C(2008)0115, p. 5.

³⁷ B. P. Vermeulen, 'Kerkgemeenschap en geestelijk ambt', in: M. L. M. Hertogh, P. J. J. Zoontjens (eds.) (2006), *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 247-248.

³⁸ Waaldijk, 2004, p. 373. See also Holtmaat, 2007, p. 47, arguing that the sole fact construction is compatible with the Directive.

³⁹ Waaldijk, 2004, p. 373. See also, however, P. J. J. Zoontjens, 'Gelijkheid, verenigingsvrijheid en privacy', in: M.L.M. Hertogh, P.J.J. Zoontjens (eds) (2006), *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 175-216. The latter author concludes that Articles 5 and 7 GETA are compatible with European law.

- [53]. Furthermore, the exception of Article 5(3) of the GETA regarding the private character of the employment relationship can be considered to be too wide compared to Article 4(1) of Directive 2000/78/EC.⁴⁰
- [54]. As is pointed out in Chapter A.2.3. Sanctions (below), one may conclude that the Directive's requirement that sanctions be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation.
- [55]. In Dutch law positive action schemes are – to a certain extent – only possible with respect to sex, race and disability and not with respect to sexual orientation, while the text of Article 7 of Directive 2000/78/EC extends to all grounds of discrimination, including sexual orientation.
- [56]. A further possible gap in implementation concerns harassment. Before the implementation of Directives 2000/43 and 2000/78/EC, 'harassment' was not defined as a concept in Dutch equal treatment legislation. Post-implementation, 'harassment' is explicitly defined as a form of 'distinction' which can never be justified. The current definition of 'harassment' in the GETA requires that an applicant establishes: (1) that the harassment is 'ground-related' **and** (2) that it has the purpose or effect of violating the person's dignity **and** (3) that it has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In all, this test is stricter than that adopted by the Dutch Equal Treatment Commission in its pre-implementation case law. Hence, the Dutch approach falls short of the *non-regression clause* in Article 8(2) of the Employment Equality Directive.⁴¹
- [57]. In a recent study Professor Holtmaat observed that in other respects the Dutch legislator has gone beyond what is strictly required by the Directives. For instance, the protection against discrimination on the grounds of sexual orientation also applies in the area of goods and services.⁴²

⁴⁰ See Opinion EC (*Ingebrekestelling*) of 31.01.2008, no. 2006/2444, C(2008)0115, pp. 4-5. See also P. J. J. Zoontjes, 'Eenzijdig overheidshandelen', in: M. L. M. Hertogh, P. J. J. Zoontjes (eds) (2006), *Gelijke behandeling: principes en praktijken Evaluatieonderzoek Algemene wet gelijke behandeling*, Nijmegen: Wolf Legal Publishers, pp. 115-174.

⁴¹ 'Summary' in Holtmaat, 2007, p. 3.

⁴² 'Summary' in Holtmaat, 2007, p. 2.

A.2. The Equal Treatment Commission

A.2.1. Mandate of the ETC

- [58]. The Equal Treatment Commission (ETC) is a semi-judicial independent body whose case law is *non-binding* but nevertheless authoritative.⁴³ If the ETC finds discrimination to have occurred, the aggrieved victim may go before a court to ask for this opinion to be ‘enforced’ in order to obtain damages.
- [59]. The ETC can hear and investigate cases on the basis of a written request from: (a) someone who thinks that a prohibited distinction is being or has been made to his or her disadvantage; (b) natural or legal persons who want to know whether they themselves are making a prohibited distinction; (c) a court or other adjudicator who has to decide on an allegation of prohibited distinction; (d) a works council or employee participation body which thinks that a prohibited distinction is being made in the relevant company or organisation; or (e) an association or foundation promoting the interests of persons protected by the Act.⁴⁴
- [60]. Besides this, the ETC may conduct an investigation on its own initiative. ‘All parties involved in any investigation by the ETC are under the duty to provide the ETC with all requested information. A failure to do so may result in criminal law proceedings.’⁴⁵
- [61]. The mandate of the ETC covers conducting surveys and issuing reports and recommendations as well. In short, the ETC (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination.⁴⁶
- [62]. The mandate of the ETC does *not* cover the task of assisting victims of discrimination. This latter function is seen as contradictory to the main task of the ETC, which is to hear and investigate cases of (alleged) discriminatory practices or behaviour.⁴⁷

⁴³ ‘Summary’ in Holtmaat, 2007, p. 5.

⁴⁴ Waaldijk, 2004, p. 368.

⁴⁵ ‘Summary’ in Holtmaat, 2007, p. 5.

⁴⁶ ‘Summary’ in Holtmaat, 2007, pp. 5-6.

⁴⁷ ‘Summary’ in Holtmaat, 2007, p. 5. Since January 2005, by way of experiment, the ETC can refer parties to an external mediator. During this experiment the ETC is financing mediation in disputes that fall within the scope of the ETC. See www.cgb.nl.

A.2.2. The procedure before the ETC

- [63]. No legal representation in cases before the ETC is required. Both under the ordinary civil and administrative law procedures and the ETC procedure, organisations (NGOs and other associations) have legal standing.⁴⁸ (See Chapter A.3. Civil society organisations). Moreover, the procedure before the ETC is free of charge.

A.3. Sanctions

- [64]. Sanctions in case of discrimination are applied by the courts. According to Article 8(1) of the GETA, discriminatory dismissals and victimisation dismissals are ‘voidable’ (*vernietigbaar*).⁴⁹ This applies with regard to both public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. S/he can also claim to be reinstated in the job. Alternatively, s/he can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law. Contractual provisions which are in conflict with the GETA shall be null and void (Article 9, GETA).⁵⁰
- [65]. In addition to these specific and general voiding provisions, the general sanctions of administrative law (in the case of public employment), of contract law (in the case of private employment) and of tort law (in the case of discriminatory denial of access to employment, harassment and provision of goods and services) apply. These include payment of damages and court orders under a *dwangsom* [*astreinte*].⁵¹
- [66]. One expert maintained that ‘Dutch courts are very restrictive in granting damages that are not strictly material damages (e.g. wages not paid). Immaterial damages (e.g. hurt feelings) will be only minimally compensated for.’⁵²
- [67]. Article 429 *quater* of the Penal Code threatens with imprisonment of up to two months or a fine of up to 4,500 Euro anyone who (in an official capacity, in a profession or in a business) discriminates on the ground of sexual orientation.

⁴⁸ ‘Summary’ in Holtmaat, 2007, p. 5.

⁴⁹ The term ‘voidable’ (*vernietigbaar*) means that it is not automatically void but that this may be established during a court procedure.

⁵⁰ Holtmaat, 2007, p. 61.

⁵¹ Waaldijk, 2004, p. 369.

⁵² Holtmaat, 2007, p. 62.

- [68]. Articles 13(2), 13(3) and 15 of the GETA mention some additional sanctions. Sanctions under these articles are initiated by the ETC, not by the courts. Under Article 13(2), the ETC may make recommendations (in an Opinion) to the party found to have made an unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an Opinion to the Ministers concerned and to organisations of employers, employees, professionals, public servants, consumers of goods and services and to relevant consultative bodies. Under Article 15(1) the ETC may bring legal action with a view to obtaining a judicial ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.⁵³ This power must be regarded in light of the fact that the ETC's Opinions are not binding. The ETC, however, has never made use of this possibility.⁵⁴
- [69]. Doubts have been expressed as to whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'.⁵⁵ One problem is that the ETC cannot impose sanctions. Discriminatory acts or discriminatory termination of a contract are not automatically void, but need to be contested in court. Another problem is that the equal treatment legislation itself hardly mentions any sanctions. Victims have to know which sanctions normal civil law and administrative law contains. Therefore, it has been proposed in legal doctrine to include the sanctions (that are available under civil and administrative law) in the GETA in order to clarify this point for both the victims and perpetrators of discrimination.⁵⁶

A.4. Civil society organisations

- [70]. Under Article 3:305a and 3:305b of the Dutch *Burgerlijk Wetboek* [Civil Code] and Article 1:2(3) of the *Algemene wet bestuursrecht* [General Act on Administrative Law] a certain type of group action is possible. Organisations can take legal action in court, provided that they are an association or foundation with full legal powers according to the law, and

⁵³ Holtmaat, 2007, p. 61.

⁵⁴ Holtmaat, 2007. See Chapter A.3. for the role of organisations in the procedure before the ETC.

⁵⁵ Holtmaat, 2007, p. 61 and Waaldijk, 2004, p. 369 referring to R. Holtmaat, 'Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag', in: T. Loenen *et al.* (eds.) (2001), *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer: Kluwer, pp. 105-124, and I. P. Asscher-Vonk, "'Sancties' & Conclusie Juridische Analyse', in: I. P. Asscher-Vonk and C. A. Groenendijk (eds.) (1999) *Gelijke Behandeling Regels en Realiteit*, Den Haag: SDU, pp. 202-234 and pp. 301-319.

⁵⁶ See e.g. Asscher-Vonk 1999, p. 233.

provided that their statutory goals cover this particular interest.⁵⁷ From time to time they offer support to individuals starting their own procedure.

- [71]. When organisations bring a claim on their own behalf, they do not need to represent a concrete victim; even when the claim they file relates to discrimination against identified or identifiable victims, they do not need the victim's authorisation.
- [72]. Organisations also have the right to ask the ETC to start an investigation. The interest group must again have full legal powers (it must be an association or foundation according to the law) and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts. (Article 12(2)(e) of the GETA).⁵⁸
- [73]. Several gay and lesbian interest groups have been recognised as having standing. In the LGBT context they were the following: *Stichting Landelijk Koördinatiepunt Groepen Kerk en Homoseksualiteit* [the national coordinating foundation on church and homosexuality]; *Nederlandse Vereniging tot Integratie van Homoseksualiteit COC te Amsterdam* [Dutch Association for the Integration of Homosexuality COC in Amsterdam]; *Nederlandse vereniging tot integratie van homoseksualiteit COC Zwolle* [Dutch Association for the Integration of Homosexuality COC in Zwolle]; *Stichting Bureau Discriminatiezaken Den Haag* [The Hague Anti-discrimination Bureau] and *Stichting Meldpunt Discriminatie Amsterdam* [Amsterdam Anti-discrimination Bureau].⁵⁹
- [74]. There are other institutions in the Netherlands that are partly subsidised by the government and that do have the task of assisting victims of discrimination, such as the National Bureau on Combating Racism Art.1 and the local Anti-Discrimination Bureaus. They are not formally designated bodies in the sense of Article 13 of the Racial Equality Directive, but they do have this function in practice.⁶⁰

A.5. Case law

- [75]. The first reported Dutch case law on dismissals on grounds of sexual orientation (in the sense of an individual characteristic or having a same-

⁵⁷ Holtmaat, 2007, pp. 59-60.

⁵⁸ Holtmaat, 2007, p. 60.

⁵⁹ ETC 19.12.1997, opinion 97-135; ETC 15.12.1998, opinion 98-137; ETC 27.04.1999, opinion 199-36; ETC 15.03.2002, opinion 02-24 and ETC 08.03.2007, opinion 2007-36; ETC 15.06.2007, opinion 2007-100.

⁶⁰ 'Summary' in Holtmaat, 2007, p. 5.

sex relationship) dates from 1950.⁶¹ In these early cases, however, the court did not consider the dismissal to be contrary to any written or unwritten rule.

- [76]. In two cases that were decided in the 1980s (so before the anti-discrimination legislation of 1994 came into force) the courts avoided saying anything about the acceptability of the alleged sexual orientation discrimination. Both cases dealt with the non-renewal of a temporary employment contract for teachers in Catholic education who were very open about their lesbian and gay orientation. In the first case the court did not consider the school bound to give reasons for the non-renewal; in the second case the court did not consider it relevant that the employer based their decision not to renew the contract on the fact that the teacher openly lived in a homosexual relationship.⁶²
- [77]. The first positive decision from a Dutch court about a claim of sexual orientation discrimination in employment was given in 1982 (so even before the constitutional prohibition of discrimination came into force in 1983).⁶³ The case was brought by a gay man who had been discharged from the military on the grounds of 'unsuitability because of illness'. In fact, the military authorities had relied heavily on the man's homosexuality in concluding that he was 'ill'. The court ruled that 'unsuitability because of illness' may not be derived from the sole fact of homosexual orientation.⁶⁴
- [78]. From the 1990s the role of the courts shifted to issues of same-sex partnership and parenting (a trend which had started in the 1970s).⁶⁵
- [79]. The table in Annex 1 contains relevant case law since the adoption of Directive 2000/78/EC, i.e. since 2000.

⁶¹ Rotterdam District Court, 14.11.1950 (*NJ* 1951, 355); Utrecht District Court, 29.07.1955 (*NJ* 1971, nr. 137); Haarlem District Court, 12.04.1957 (*NJ* 1957, nr. 458); *President Rechtbank Arnhem* [President of Arnhem Regional Court], 28 May 1970 (*NJ* 1970, nr. 424); Leeuwarden District Court, 29.02.1972 (*NJ* 1972, nr. 356). The 1955 decision of Utrecht District Court was later challenged before the *Hoge Raad* [Supreme Court] as amounting to a judicial tort for which the State would have to pay compensation; however, on 03.12.1971 the Supreme Court dismissed the action (*NJ* 1971, nr. 137).

⁶² President of Den Bosch Regional Court, 16.07.1982 (*NJCM-Bulletin* 1982, 334); Regional Court Maastricht, 21 May 1987 (case 2401/1985, unpublished).

⁶³ *Centrale Raad van Beroep* [Central Appeals Court], the highest court for cases relating to public employment), 17.06.1982 (*Militair Rechterlijk Tijdschrift*, 1982, 300).

⁶⁴ See A. Mattijssen, 'Wie niet waagt, die niet wint. Homodiscriminatie en civielrecht' in: M. Moerings & A. Mattijssen (eds.) (1992), *Homoseksualiteit en recht*, Arnhem: Gouda Quint, p. 21.

⁶⁵ Waaldijk, 2004, pp. 346-347.

B. Freedom of movement

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

B.1. EU citizens and third country national LGBT partners

[81]. Since 1998 Dutch law has provided for a registered partnership for both same-sex and different-sex couples.⁶⁶ In addition in 2001 civil marriage was opened up for same-sex couples.⁶⁷

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

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

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

⁶⁶ *Aanpassingswet geregistreerd partnerschap* [Registered Partnership Adjustment Act] of 17.12.1997 (*Staatsblad* 1997, nr. 660). In force since 01.01.1998.

⁶⁷ *Wet openstelling huwelijk* [Act on the Opening Up of Marriage] of 21.12.2000 *Staatsblad* (*Law gazette*) 2001/ 9.

B.2. LGBT partners of Dutch citizens and the freedom of movement and residence in other Member States

- [85]. The Dutch recognition of same-sex marriage and registered partnership *should* lead to the conclusion that this enables LGBT partners of Dutch citizens to benefit from freedom of movement in other Member States. However, daily practice proves that this is not the reality.⁶⁸
- [86]. Recently the *Wetenschappelijk Onderzoeks- en Documentatiecentrum (WODC)* [Scientific Research and Documentation Centre] of the Ministry of Justice, commissioned an evaluation of the *Aanpassingswet geregistreerd partnerschap* [Registered Partnership Adjustment Act] and the *Wet openstelling huwelijk* [Act on the Opening Up of Marriage].⁶⁹ The research was carried out by researchers from the University of Utrecht who came to the conclusion that the legal recognition of same-sex marriages and registered partnerships abroad, even within the European Union, is problematic. For example, it was unclear whether the Dutch same-sex marriage and/or same-sex registered partnership would be recognised at all in France and Italy. In other EU Member States, such as Sweden and the United Kingdom, the Dutch same-sex marriage was not recognised as a marriage, but as a registered or civil partnership.⁷⁰

⁶⁸ For example, Germany/Verwaltungsgericht Karlsruhe, 09.09.2004 *Aktenzeichen* AZ 2 K 1420/03, available at www.lsvd.de/bund/lpart/vgkarlsruhe.de, *NIPR* 2005, pp. 138-142. See Annex 1.

⁶⁹ K. Boele-Woelki et al. (2007), *Huwelijk of geregistreerd partnerschap?, Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap*, Deventer: Kluwer.

⁷⁰ Boele-Woelki et al., 2007, p. 190.

C. Asylum and subsidiary protection

C.1. Sexual orientation as ground for asylum

- [87]. It is standing policy and standing case law in the Netherlands that the definition of being persecuted for reasons of membership of a particular social group in the sense of Article 1A of the UN Convention relating to the Status of Refugees includes being persecuted for reasons of sexual orientation (*Vreemdelingencirculaire* [Aliens Circular] C1/4.2.10.2).⁷¹ An asylum seeker who is granted refugee status, is eligible for a residence permit for a fixed period (Article 29(1a), Aliens Act). In order to qualify for refugee status the LGBT asylum seeker must have a well-founded fear of persecution due to his/her sexual orientation.⁷² The existence of a penalty clause that concerns lesbian, gay and bisexual (LGB) people only is an act of persecution. However, the sole criminalisation of LGB acts or of being an LGB person in a certain country does not automatically lead to the conclusion that an LGBT person coming from that country is a refugee. The criminal sanction must attain a certain gravity in order to justify recognition as a refugee.⁷³
- [88]. An LGBT asylum seeker can also rely on Article 29(1b) of the Aliens Act if s/he can show substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) or (with regard to torture) Article 3 of the Convention Against Torture (CAT).
- [89]. Furthermore, the situation of LGBT people in the country of origin can be a reason for so-called protection for humanitarian reasons. This concerns persons who do not qualify for protection under the UN Convention relating to the Status of Refugees nor qualify for subsidiary protection, but for whom the Minister considers there to be pressing humanitarian reasons that it cannot be required of the asylum seeker to return to his country of origin (Article 29 (1)(c), Aliens Act). Since 18 October 2006 this protection for humanitarian reasons has been applied to Iranian LGBT people.⁷⁴ This policy was installed after the Minister had first temporarily suspended all

⁷¹ This policy was the result of a decision by the *Afdeling Rechtspraak Raad van State* [Judicial Division of the Council of State] of 1981: ARRvS, 13.08.1981, no. A-2.1113, RV 1981, 5.

⁷² For specific information on transgender asylum seekers see Chapter G.3 below.

⁷³ 's-Gravenhage Regional Court, location 's-Hertogenbosch, 12.10.2004, AWB 02/3863, *LJN*: AR6786.

⁷⁴ *Vreemdelingencirculaire* [Aliens Circular] C24/12.3.11.

expulsions of Iranian homosexual asylum seekers (*besluit- en vertrekmoratorium*).⁷⁵

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

⁷⁵ *Besluit instelling besluitmoratorium en vertrekmoratorium homoseksuele asielzoekers Iran*, Ministerial order of 28 September 2005, no. 5368748/05/DVB, online available at: http://www.st-ab.nl/wettennr04/0345-003_Besluit_instelling_besluitmoratorium_en_vertrekmoratorium_homoseksuele_asielzoekers_Iran.htm.

D. Family reunification

[91]. On the basis of Article 3.14 of the Aliens Decree, (non-EU) family members of foreigners with a residence permit have a right to family reunification. The law makes no distinction between LGBT and non-LGBT partners or between their family members. Family members in the sense of this article are: (a) the adult person who is, according to Dutch Private International Law, legitimately married to the foreigner or who is, according to Dutch law, the registered partner of the foreigner and (b) the adult person who has a lasting and exclusive relationship with the foreigner, provided that certain formal requirements are met⁷⁶ and (c) the natural or legitimate child of the foreigner who, in the Minister's opinion, is actually a family member of that foreigner and already was so in the country of origin and who comes under the legitimate authority of the foreigner. Thus, Article 4(3) of the Council Directive 2003/86/EC on the right to family reunification is implemented in Dutch law.

⁷⁶ These requirements apply notably to the situation where a marriage could not be concluded (for instance a situation involving a brother and a sister).

E. Freedom of assembly

[92]. In the Netherlands the right to freedom of assembly is protected in Article 9 of the Dutch Constitution. Moreover, since the Netherlands' constitutional system adheres to a 'monist theory' of international law, Article 11 of the ECHR may be directly applied by national courts (see Chapter A., para. 31 above). The practical consequences of the constitutional right to assembly are covered by the *Wet Openbare Manifestaties* (WOM) [Public Manifestations Act].⁷⁷

E.1. Regulation of public demonstrations

[93]. There is no obligation to seek permission for a planned gathering for the public expression of a religion or conviction or any other public assembly or demonstration (hereinafter called *demonstration*). In addition there is no obligation to give prior notice of a planned demonstration. In more detail, Article 3(4) WOM prohibits the city council from asking for prior information about the content of a demonstration. However, for security reasons, the city council may adopt byelaws specifying in which situation a prior notice of a demonstration is required (Article 4, WOM). Furthermore, knowledge of the content of the demonstration might be necessary in order to estimate the risk of counter-demonstrations and to determine the size of the police presence required.⁷⁸ A preventive ban on a demonstration can only be justified in very exceptional cases of *force majeure*, i.e. cases in which it is expected that maintenance of public order, notwithstanding a substantial police presence and a substantial administrative effort, cannot be guaranteed.⁷⁹ The mayor has the power to give participants in a demonstration instructions (Article 6, WOM). S/he also has the power to give the order to end a demonstration immediately (Article 7, WOM).

E.2. Demonstrations in favour of tolerance of LGBT people in 2000-2007

[94]. For some decades several demonstrations/ manifestations in favour of tolerance of LGBT people have taken place every year in the Netherlands. The most prominent are the We Are Amsterdam Gay Pride (formerly

⁷⁷ *Staatsblad* 1988, 157.

⁷⁸ J. P. Loof (2007), 'De burgemeester en de demonstratievrijheid. Over beginselen van behoorlijke besluitvorming inzake betogingen', in: *De Gemeentestem*, nr. 7280, pp. 467-481.

⁷⁹ For example, Maastricht Regional Court, 22.03.2001, *JB* 2001/104.

known as Gay Pride Amsterdam) and Pink Saturday (*Roze Zaterdag*). The latter has taken place in a different city each year since 1978. Over the years, the protest character of this demonstration has been transformed into a parade with the aim of increasing LGBT tolerance. The number of participants grew from 2,000 in 1978 to 30,000 in 2004.⁸⁰ Pink Saturday is nowadays openly supported by the Dutch Queen.⁸¹ Other large-scale demonstrations which aim to increase the tolerance of homosexuality are the Midsummer Canal cultural festival (*MidZomerGracht festival*)⁸² in Utrecht and the Pink May Party (*RozeMeifeest*) in Nijmegen.⁸³

- [95]. Apart from these demonstrations with a festive atmosphere, each year on 4 May (National Remembrance Day for War Victims), special attention is paid to LGBT people. In the cities of Amsterdam and The Hague special lesbian, gay and bisexual (LGB) remembrance meetings take place at the so-called *homomonumenten* [LGB] monuments].⁸⁴ Furthermore, at different locations in the country a wreath remembering LGBT victims is often laid at a Second World War memorial. For the purposes of the table in Annex 2, all these remembrance meetings together will be counted as two meetings per year.
- [96]. In 2007 two demonstrations of a more occasional character took place. In April 2007 COC Nederland, the main NGO active in the field of gay and lesbian rights, organised a demonstration against the so-called '*weigerambtenaren*', civil servants who refuse to marry same-sex couples.⁸⁵ In addition, during the week of the International Day against Homophobia, COC Nederland organised a 'Poland Week', to protest against the increasing homophobia in Poland and in support of the Warsaw Pride that was to take place on 19 May 2007. Protest demonstrations were held on 15 May in The Hague in front of the Polish Embassy and on 17 May in Amsterdam in the central square, the Dam.
- [97]. The overview presented in the table in Annex 2 of demonstrations in favour of tolerance of LGBT people is not and does not claim to be exhaustive.

⁸⁰ http://www.ihlia.nl/algemeen/algemeen_home/dossier_roze_zaterdag, last accessed 25.01.2008.

⁸¹ 'Pro-homo brief van Beatrix', in: *Trouw* 15.09.2007, p. 2-3.

⁸² See www.midzomergracht.nl.

⁸³ See www.rozemeifeest.nl.

⁸⁴ See www.homomonument.nl.

⁸⁵ 'Homomanifestatie tegen weigerambtenaren', at: www.katholiekederland.nl, last accessed 21.01.2008. In the covenant between the coalition partners (CDA, PvdA and CU) it has been agreed that civil servants will be permitted to refuse to conduct a marriage between two people of the same sex should they have conscientious/religious objections, on the condition that gay marriage will still be possible in every village or town hall. The local governments of a number of the major cities (among them Amsterdam and Rotterdam) immediately announced that civil servants who are employed by them will not have the right to refuse to marry gay and lesbian people. Holtmaat, 2007, p. 78.

E.3. Demonstrations against tolerance of LGBT people in 2000-2007

[98]. The authors of this report are not aware of any demonstration against tolerance of LGBT people in the Netherlands in the period 2000-2007.

E.4. Refusals or bans of demonstrations in the Netherlands

[99]. Although in the 1970s and 1980s there were private parties claiming in court that a demonstration in favour of tolerance of LGBT people should be banned,⁸⁶ no authorisation for such a demonstration has been refused in recent decades, apart from one minor recent case. In 2007 the city council of Amsterdam refused a licence for the original plans for five festivities, mainly street parties, forming part of We Are Amsterdam Gay Pride. Since not *all* activities of the Gay Pride are regarded as demonstrations within the meaning of the Public Manifestations Act, but rather as a public event, a so-called event licence was required on the basis of Article 2.11 of the general municipal byelaws of the municipality of Amsterdam. The refusal was due to the fact that the Amsterdam Soccer Tournament was due to take place the same week. The police and the city council feared that the city centre of Amsterdam would become overcrowded, which could lead to disturbances.⁸⁷

E.5. Disturbances at demonstrations in the Netherlands

[100]. During Pink Saturday in 1982, which took place in Amersfoort, onlookers called the demonstrating LGBT people names and pelted them with stones. The pictures of this violence caused a stir in the country. The disturbances gave cause for local policy and new police policy on LGBT matters. Since that date, the police have a positive obligation to protect LGBT people

⁸⁶ Vz. ARRvS (*President of the Judicial Division of the Council of State*) 11.04.1979, *Weekoverzicht RvS*, R.737 and ARRvS 08.01.1981, *Weekoverzicht RvS*, 3.314. In this case Catholic pastors unsuccessfully appealed against a planned demonstration with the aim of protesting against anti-gay statements made by the Bishop of Roermond. See also Vz. ARRvS 27.05.1982, *AB* 1983/62. In this case the court ruled that the refusal by the Mayor of Amersfoort to grant a permit for a third gay demonstration in a row and accompanying encampment was disproportionate.

⁸⁷ 'Politiek kiest voor voetbal-hooligans boven homo-feesten', at: www.gay-pride.nl/nieuws, last accessed 21.01.2008.

from ‘queer bashers’, instead of banishing LGBT people from gay ‘cruising’ areas in public places (*homo-ontmoetingsplekken*).⁸⁸

- [101]. Since 1982 some isolated disturbances have taken place. Recently, during the We Are Amsterdam Gay Pride of 2007, on two occasions a total of four gay men were violently attacked. The police immediately started a thorough investigation, but so far no prosecution has been instituted.⁸⁹ Furthermore, a wreath at the *homo-monument* was destroyed and thrown into the canal. The police arrested two young men for this act of vandalism.⁹⁰ Otherwise, the ‘homo-netwerk’ (*gay network*) of the Amsterdam police did not receive any reports of LGBT-related violence during the 2007 Gay Pride.⁹¹ See Chapter H. Miscellaneous for more information about violence against LGBT people.

⁸⁸ http://www.coc.nl/dopage.pl?thema=any&pagina=algemeen&algemeen_id=171, last accessed 25.01.2008.

⁸⁹ ‘Homo’s mishandeld tijdens Gay-Pride’, at: COC website, 06.08.2007, www.coc.nl, last accessed 25.01.2008 and ‘Homo’s mishandeld tijdens Gay Pride’, 06.08.2007, http://www.nu.nl/news/1185174/10/Homo's_mishandeld_tijdens_Gay_Pride.html, last accessed 25.01.2008.

⁹⁰ ‘Homohaar leidt tot agressie bij Gay Pride in Amsterdam’, in: *Algemeen Dagblad* 07.08.2007, p. 9.

⁹¹ www.politie-amsterdam-amstelland.nl, last accessed 25.01.2008. For more information about this police gay network, see *Chapter I. Good practices*.

F. Hate speech and criminal law

F.1. Hate speech in criminal law

- [102]. Article 137c of the Dutch Penal Code outlaws defamation on grounds of (among others) hetero- or homosexual orientation.
- [103]. The sanction for defamation can be imprisonment of up to one year or a fine of up to 7,400 Euro. If the offence is committed in pursuance of an individual's profession, as habitual practice, or by two or more persons together, the sanction may amount to two years' imprisonment or a fine of 18,500 Euro.
- [104]. Public incitement of hatred, discrimination or violent action against persons on the grounds of his/her hetero- or homosexual orientation is punishable under Article 137d of the Penal Code. The sanctions for this offence are similar to those under Article 137c.
- [105]. On the basis of Article 137e of the Penal Code a person who, for any reason other than that of giving factual information: (1) makes public a statement which s/he knows or should reasonably suspect to be offensive to a group of persons on the grounds of their hetero- or homosexual orientation, or incites hatred of or discrimination against people or violence against their person or property on the grounds of their hetero- or homosexual orientation; or (2) disseminates an object which s/he knows or should reasonably suspect to contain such a defamatory statement or has such in stock for public disclosure or for dissemination, is liable to a term of imprisonment of not more than six months or a fine of 7,400 Euro maximum. If the offence is committed in pursuance of an individual's profession, as habitual practice, or by two or more persons together, the sanction may amount to two years' imprisonment or a fine of 18,500 Euro. If the offence is committed in pursuance of an individual's profession, the offender may be disqualified from the practice of his or her profession.
- [106]. Complicity in activities with the aim of discrimination on the grounds of hetero- or homosexual orientation or financial or any other material support of such discrimination is punishable under Article 137f of the Penal Code with imprisonment of three months maximum or a fine of 3,700 Euro.
- [107]. The tables in Annex 1 give an overview of the most important case law in the field of criminal hate speech.
- [108]. It is also interesting to note in this respect that, in 2007, in response to questions from the Parliamentary Standing Committee on Justice the

Minister of Justice commissioned research on criminal discrimination (*strafbare discriminatie*).⁹²

F.2. Hate speech in civil law

- [109]. Article 6:162 of the Civil Code provides for a civil tort procedure. In the LGBT context, this article has been invoked several times. In 1987 COC Nederland unsuccessfully instituted civil proceedings against a Roman Catholic cardinal on the basis of Article 6:162 of the Civil Code. The court of appeal ruled that, although the cardinal could have chosen his words more carefully, his statement that homosexuality is an abnormality of Creation was not needlessly hurtful.⁹³
- [110]. In 1990 civil proceedings were successfully instituted against the married couple, Goeree and Mansschot, who had distributed flyers stating (amongst other things) that AIDS was caused by homosexual conduct and that homosexuals deserved the death penalty.⁹⁴

F.3. Homophobic motivation as aggravating factor in sentencing

- [111]. Neither the Penal Code nor the *Wetboek van Strafvordering* [Code of Criminal Procedure] provide for homophobic motivation as an aggravating factor in sentencing. However, since December 2007 the *Aanwijzing Discriminatie* [Instruction on Discrimination] (2007A010) of the Public Prosecution Service has been in force.⁹⁵ On the basis of this instruction, the public prosecutor must increase the sentence s/he demands in his/her closing speech by 25 per cent in the case of an offence with a discriminatory aspect in the sense of Article 137c of the Penal Code. Thus, this instruction also applies to discrimination on grounds of sex or sexual orientation.

⁹² C. Brants, R. Kool and R. Ringnalda (2007), *Strafbare discriminatie*, Ministry of Justice/ WODC.

⁹³ Amsterdam Court of Appeal, 10.12.1987, *NJCM-Bulletin* 14-3, 1989 (*COC/Kardinaal Simonis*).

See also <http://www.ihlia.nl/algemeen/archief/thematische-archieven>, last accessed 30.01.2008.

⁹⁴ Supreme Court, 02.02.1990, *NJ* 1991/289.

⁹⁵ This concerns an instruction on the basis of Article 130(4) of the *Wet Rechterlijke Organisatie* [Act on the Judicial System]. For the text of the instruction, see:

<http://archieff.om.nl/beleid/beleidsregel.php?vv=0&cid=17&rid=348>, last accessed 30.01.2008.

[112]. There are examples of cases in which the court takes a discriminatory aspect of an offence into account in sentencing.⁹⁶ However, it seems difficult to draw any firm conclusions from this practice, because a discriminatory aspect is often not the only relevant aspect in sentencing. Furthermore, it is often not possible to identify to what extent various elements contributed to the level of final sentence imposed.

⁹⁶ 's-Gravenhage Regional Court, 14.04.2006, *LJN AX9566* and Maastricht Regional Court, 08.05.2007, *LJN BA4620*.

G. Transgender issues

- [113]. In Dutch law discrimination on the ground of ‘transsexuality’ is regarded as a form of sex discrimination.⁹⁷ Moreover, the ETC recently issued an opinion stating that discrimination on the ground of ‘transvestism’ is also to be regarded as a form sex discrimination.⁹⁸

G.1. Legislation regarding change of sex

- [114]. Article 1:28 of the Civil Code provides that courts may allow an individual to change his/her sex in his/her birth certificate. For this to be granted it is necessary that the requesting person is, as far as possible and sensible from a medical and psychological point of view, physically transformed into the new sex.⁹⁹ Secondly, sterilisation is an express condition for change of sex. Organisations take a firm stand against this which they consider to be a humiliating requirement.¹⁰⁰
- [115]. Article 1:28a of the Civil Code contains the formal requirements for an appeal for change of sex. The requesting person must submit a copy of his/her birth certificate as well as a medical certificate from an expert appointed by law. The expert must be confident that the person requesting a change of sex has the conviction to belong to the opposite sex on a permanent basis. Furthermore, the expert must inform the court on the medical certificate whether, and if so to what extent, the requesting person has been physically transformed into the opposite sex. In the third place, the expert must declare that the requesting person is no longer capable of begetting or giving birth to a child.
- [116]. Through a judgment in April 2007 the Court of Appeal of 's-Hertogenbosch ruled that the applicant's physical change of sex was not yet sufficiently complete for a change of sex to be granted in his birth certificate within the meaning of Article 1:28 of the Civil Code. The court based its decision upon the finding that hormonal treatments had only started in September 2006 and surgery was yet to take place.¹⁰¹

⁹⁷ Leeuwarden Court of Appeal, 13.01.1995, *NJ* 1995 nr. 243 and, for example, ETC Opinions 1998-12 and 2000-73.

⁹⁸ ETC 15.11.2007, Opinion 2007-201. See also Annex 1.

⁹⁹ See for application of this clause: Den Bosch Court of Appeal 24.04.2007, *LJN*: BA5428.

¹⁰⁰ COC Nederland en MOVISIE, *Beleidsvisie Homo-, lesbisch, biseksueel en transgenderbeleid, Visie van de Nederlandse homobeweging op de in het coalitieakkoord uitgezette lijn*, 01.06.2007; ‘Transgenders ‘vermist’; emancipatienota laat groep in de kou staan’, in: *Spits* 13.11.2007, p. 13.

¹⁰¹ 's-Hertogenbosch Court of Appeal, 22.05.2005, *LJN*: BA5428.

- [117]. In 2005 an individual who felt inter- or asexual, neither male nor female, requested that his sex be crossed out in his birth certificate. The Supreme Court dismissed this claim in 2007, ruling that it falls within the *margin of appreciation* of national states under Article 8 of the ECHR to require that a person's sex in his/her birth certificate is either male or female and not gender-neutral. According to the court, the general interest outweighed the individual interest in this respect.¹⁰²

G.2. Legislation regarding change of names

- [118]. The civil courts have the competence, once an appeal for a change of sex has been granted and if so required, to order the change of the applicant's first names (Article 1:28b(2), Civil Code). In this respect, the court has to judge whether the interest for the granting of the request is sufficiently substantial. In addition the requested name must meet the general requirements of the law on first names (Article 1:4, Civil Code).
- [119]. In this respect the following case is interesting. In 2002 a Luxembourg national appealed to the Regional Court of The Hague for a change of sex and names. The request for change of sex was granted under Dutch law. The change of names was problematic due to the fact that the applicant did not have Dutch nationality and, under rules of Dutch Private International Law the applicable law was that of Luxembourg which at the time of procedures did not allow for a change of name in the situation at issue. Nevertheless, referring to the Goodwin judgement of the European Court of Human Rights, the regional court ruled that a change of sex is a change of status within the meaning of Article 1 of the Convention on the recording of surnames and forenames in civil status registers (Istanbul 1958) of the *Commission Internationale de l'Etat Civil (CIEC)* [International Commission on Civil Status (ICCS)] and ordered the change of the applicant's names.¹⁰³

G.3. Transgender and asylum

- [120]. Like lesbian, gay and bisexual people, transgender people can be regarded as members of a social group within the meaning of Article 1A of the UN Convention relating to the Status of Refugees. The fact of belonging to a social group leads to a ground for asylum on the basis of Article 29(1a) of the Aliens Act 2000.

¹⁰² Supreme Court, 30.03.2007, *LJN* AZ5686.

¹⁰³ Den Haag Regional Court, 14.10.2002, *LJN*: AF4586 and R. A. Lawson (2003), 'In de schaduw van Goodwin', in: *NJCM-Bulletin*, pp. 313-317.

- [121]. Furthermore a transgender person can rely on Article 29(1b) of the Aliens Act if s/he can show substantial grounds for believing that s/he faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment upon return, in the meaning of Article 3 of the ECHR, Article 7 of the ICCPR or Article 3 of the CAT. In Dutch case law, eligibility for protection as a refugee or subsidiary protection beneficiary are often jointly examined.¹⁰⁴
- [122]. The protection for humanitarian reasons that is applied to Iranian LGBT people by the declaration of a moratorium on their deportation (*vertrekmoratorium*) since 18 October 2006, explicitly includes transgender asylum seekers.
- [123]. While awaiting a final decision in their case, asylum seekers are excluded from medical treatments with the purpose of change of sex.¹⁰⁵ The Minister for Public Health and the Amsterdam VU Hospital agreed in 1995 that if an asylum seeker requests change of sex treatment a diagnosis will be made, but no treatment will be started before it is certain that the treatment will be completed in the Netherlands.¹⁰⁶

G.4. Transgender and freedom of assembly

- [124]. The law on freedom of assembly as enunciated under Chapter E Freedom of Assembly applies in the transgender context.
- [125]. The writer of this report is not familiar with demonstrations against tolerance of transgender persons in the period 2000-2007.
- [126]. The most prominent interest group for transgender people is the *Vereniging Landelijke Kontaktgroep Travestie en Transseksualiteit*. Demonstrations/manifestations in favour of tolerance of transgender include the *Transfusion Festival*, which took place on 11 November 2007 in Amsterdam¹⁰⁷, and the Netherlands Transgender Film Festival (NTGF). The latter has been organised biannually since 2001 and shows film and video productions that contribute to understanding and generate discussions on transgender issues.¹⁰⁸ In addition, on 18 November 2007 a transgender remembrance day was held in Amsterdam to remember all those people

¹⁰⁴ For example, 's-Gravenhage Regional Court, location Amsterdam 22.01.2004, *LJN*: AO3931.

¹⁰⁵ *Parliamentary Documents of the Dutch Lower Chamber of the States-General 2006-2007*, nr 29 484, p. 1.

¹⁰⁶ See www.zra.nl.

¹⁰⁷ See www.transfusion.nl, last accessed 28.01.2008.

¹⁰⁸ See www.transgenderfilmfestival.com, last accessed 28.01.2008.

who have been violently attacked or murdered because of their being different.¹⁰⁹

G.5. Transgender and criminal law

[127]. Defamation on the grounds of sex is not penalised by the Penal Code. As discrimination on the grounds of transsexuality is regarded as discrimination on the grounds of sex, defamation against transgender people will not be prosecuted on the basis of Article 137c of the Penal Code, as illustrated by the case law discussed below. Public incitement of hatred on the basis of sex (thus including transsexuality), however, is outlawed by Articles 137d, 137e and 137f of the Penal Code.

[128]. In 1995 a report was made to the police of defamation and incitement of hatred against transsexuals by a Dutch singer who wrote the song '*Hij is een transseksueel*' ['He is a transsexual']. The public prosecutor dropped the case against the writer of the song. An appeal against the non-prosecution before the Court of Appeal was dismissed. The Court ruled that, although the statements in the lyrics of the song were insulting for transsexuals as a group, Article 137c of the Penal Code (the defamation clause) does not include transsexuality as a discrimination ground. With regard to legislative history, the Court considered that the description of the offence was explicitly limited to the grounds mentioned. Furthermore, the Court was of the opinion that the lyrics of the song did not incite hatred (within the meaning of Article 137d) against transsexuals. The author of the song was not prosecuted.¹¹⁰

¹⁰⁹ See the website of the Vereniging Landelijke Kontaktgroep Travestie en Transseksualiteit (the Dutch interest group for transvestism and transsexuality), www.lkgtent.nl, last accessed 23.01.2008 and <http://www.gender.org/remember/day>, last accessed 28.01.2008.

¹¹⁰ Leeuwarden Court of Appeal, 13.01.1995, *NJ* 1995/243.

H. Miscellaneous

H.1. Violence against LGBT people

- [129]. In recent years the Dutch media has reported an increase in violence against LGBT people. There were some incidents that attracted great (international) media attention, including the assault of a gay American tourist attending the Dutch Queen's Day party in 2005 and the violent attacks on gay visitors to the 2007 We Are Amsterdam Gay Pride (see Chapter E.5. Disturbances at demonstrations in the Netherlands). These news reports create the impression that physical, homophobic violence has increased in the Netherlands in recent years. This has led to several Parliamentary Questions.¹¹¹
- [130]. However, there are no precise figures for violent attacks on LGBT people in the Netherlands. In May 2005 the Mayor of Amsterdam estimated the incidents of violence against LGBT people in his city at a minimum of 10-20 per year. Other sources confirm this estimate.¹¹²
- [131]. Furthermore it may be noted that the number of incidents of homophobic discrimination reported to anti-discrimination offices has risen from 127 in 2002 (3 per cent of the total number of complaints of discrimination), to 158 in 2005 (4 per cent of the total number of complaints of discrimination).¹¹³ However, it seems difficult to draw firm conclusions from these statistics, since not all victims report their case to the police. On the other hand, greater publicity of the anti-discrimination offices may have led to a higher number of reports.¹¹⁴
- [132]. The aforementioned greater media attention towards violence against LGBT people has led to several initiatives by the police which will be explored below in Chapter I. Good practices.

¹¹¹ For example, *Proceedings of the Dutch Lower House of the States-General*, Appendix, 2003-2004, nr.951, pp. 2015-2016; *Proceedings of the Dutch Lower House of the States-General*, Appendix, 2007-2008, nr. 130 (*herdruk*), pp. 279-280; *Proceedings of the Dutch Lower House of the States-General*, Appendix, 2007-2008, nr. 754, pp. 1617-1618.

¹¹² Gemeente Amsterdam, *Quickscan geweld tegen homoseksuelen*, 13.02.2006, www.eenveiligamsterdam.nl, last accessed 30.01.2008.

¹¹³ In 2001, 260 complaints on grounds of sexual orientation (6.7 per cent of all complaints) were filed. This relatively high number can be partly contributed to controversial statements made by imam El-Moumni that year. Emancipatienota 'Gewoon homo zijn', *Parliamentary Papers II* 2007-2008, 27017, no.3, p. 10. and J. de Boom and M. Van San, *Geweld tegen homoseksuelen*, Rotterdam, RISBO, 2006, pp. 28-29.

¹¹⁴ *Proceedings of the Dutch Lower House of the States-General*, Appendix, 2007-2008, nr. 130 (*herdruk*), pp. 279-280

[133]. In 2006 the Social and Cultural Planning Bureau (SCP)¹¹⁵ carried out research into social acceptance of homosexuality in the Netherlands. The researchers concluded that homosexuality is widely accepted, but still needs special attention and policy. Several groups (young people, religious people and immigrants) tend to adopt a negative attitude towards homosexuality. According to the SCP, homosexuality remains a private matter: people expect more ‘reserved behaviour’ from homosexuals than from heterosexuals in public places.¹¹⁶

¹¹⁵ The Social and Cultural Planning Office of the Netherlands (SCP) was established by Royal Decree of 30.03.1973. As Coordinating Minister for social and cultural welfare, the Minister for Health, Welfare and Sport is responsible for the policies pursued by the Social and Cultural Planning Office.

¹¹⁶ The English translation of this research was published in 2007: S. Keuzenkamp and D. Bos (2007), *Out in the Netherlands, Acceptance of homosexuality in the Netherlands*, The Hague: The Netherlands Institute for Social Research/ SCP. See Holtmaat, 2006, p. 77.

I. Good practices

I.1. Gender neutrality

- [134]. One of the most important achievements in tackling discrimination on grounds of sexual orientation in Dutch law is the gender neutrality of marriage, most parental rights, registered partnership and rules on *de facto* cohabitation. In fact ‘same-sex marriage’ does not exist in Dutch law; the law simply recognises one type of marriage, open to people (couples) of all gender combinations. The same goes for registered partnership, *de facto* cohabitation and most parental rights. This gender-neutrality indisputably advances the emancipation of LGBT people.

I.2. The Equal Treatment Commission

- [135]. The Dutch Equal Treatment Commission as such, its existence and functioning, can be regarded as good practice. The legal protection against discrimination on grounds of sexual orientation is adequate, extensive and easily accessible. The ETC has developed a highly sophisticated case law and it may be regarded as one of the leading bodies in this field in Europe.

I.3. General policy on LGBT

- [136]. In November 2007 the Dutch government issued a policy paper on ‘homosexual emancipation policy’ (*homo emancipatiebeleid*) for the period 2008-2011.¹¹⁷ The main purpose of this policy is the advancement of social acceptance of LGBT people in the Netherlands. In the policy paper the government announced that it has five goals for the aforementioned period: (a) to ensure that homosexuality can be a topic of discussion in all population groups; (b) to tackle the problem of violence and harassment against LGBT people; (c) to stimulate the setting up of civil society organisations, at both local and national level; (d) to contribute to an LGBT-friendly environment in schools, in the workplace and in sport; and (d) to fulfil an active role in the international and European field.

¹¹⁷ Emancipatienota ‘Gewoon homo zijn’, *Parliamentary Papers II* 2007-2008, 27017, no.3. The first version of this policy paper dates back to 1988: *Overheidsbeleid en homoseksualiteit. Beleidsbrief van het ministerie van wvc, Kamerstuk* 19504 nr. 11. Rijswijk: Sdu.

I.4. Police

- [137]. In response to the lack of willingness among homosexuals to report homophobic offences, the police established the *Roze in blauw* [Pink in Blue] network, of which about 70 lesbian, gay and bisexual (LGB) police officers are members. The network represents the interests of LGB people within and outside the police. Victims of homophobic offences can call a specific telephone number to report violence against LGB people. If so desired the police communication rooms bring the victim into contact with a member of the Pink in Blue network to report the offence.¹¹⁸
- [138]. In order to get a better overview of the level of homophobic aggression in the Netherlands, the police and the National Expertise Centre for Diversity (LECD) of the Public Prosecution Service developed a system to improve the registration of offences and crimes with a discriminatory aspect. Moreover, the Public Prosecution Service introduced a new information management system that provides for the option to specify the grounds of discrimination involved in an offence or crime.¹¹⁹

I.5. Education

- [139]. One of the goals of the policy paper on ‘homosexual emancipation policy’ is to contribute to an LGBT-friendly environment in schools. Although it is part of the mandate of the Education Inspectorate to ask for a school policy for LGBT students and staff, schools are not legally obliged to pursue a security policy (‘veiligheidsbeleid’) specifically focused on LGBT people.¹²⁰ However, the General Teachers’ Union, calls for specific policy on homosexuality in secondary schools.¹²¹
- [140]. In addition, the organisations, *COC Nederland* and *Art.1*, have developed teaching materials aimed at making homosexuality a subject for discussion in secondary education. These teaching packs were warmly welcomed by local government. For instance, in January 2008 a pilot with the teaching pack ‘*Spreek je uit!*’ [‘Speak out!’] started in The Hague and, in the

¹¹⁸ www.art1.nl; <http://www.politie-amsterdam-amstelland.nl/frameset/get.cfm?id=586>;
M. van San and J. de Boom (2006), *Geweld tegen homoseksuelen*, Rotterdam RISBO Contact Research BV, p. 24.

¹¹⁹ *Parliamentary Documents of the Dutch Lower House of General-States*, 2007-2008, nr. 130 (herdruk), pp. 279-280.

¹²⁰ Equal Treatment Commission 27.01.2006, CGB oordeel 2006-13.

¹²¹ www.gayandschool.nl and the website of the Dutch General Union of Educational Personnel www.aob.nl, last accessed 31.01.2008.

province of Limburg, the campaign ‘*Vrolijke Scholen*’ was launched, which aims to inform schools about how to be more gay-friendly.¹²²

¹²² www.art1.nl, last accessed 30.01.2008 and www.coc.nl, last accessed 30.01.2008.

Annex 1 – Case law

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

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

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 (max. 500 chars.)

The ETC concluded that the respondent had discriminated against the applicant on the grounds of his sexual orientation.

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

Case title	Breaking off negotiations.
Decision date	17.08.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 2004-104.
Key facts of the case (max. 500 chars.)	The applicant owned an architectural firm, as did the respondent. The applicant and respondent entered into negotiations on a cooperation agreement. The progress of these negotiations was confirmed in writing. In one of the six meetings that took place, the respondent asked the applicant whether he lived together with a man with whom he had a homosexual relationship. The applicant gave an affirmative answer to this question. A few days later, he received a fax notifying him of the fact that, due to an insufficient basis for trust, the respondent wished to break off negotiations.
Main reasoning/argumentation (max. 500 chars.)	The ETC considered that the short time span between the confirmation of his homosexual relationship by the applicant and the breaking off of the negotiations, as well as the fact that the applicant could reasonably have assumed that the respondent was favourable to the cooperation agreement, were good reasons to suspect discrimination on the grounds of sexual orientation. Furthermore, the ETC considered that there can be no correlation between the professional (un)suitability of the applicant and his (non-) openness about his sexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	The respondent had argued that the GETA was not applicable (and thus the ETC not competent) as the two firms were to merge. However, the ETC ruled that the motion for a merger, had the negotiations continued, would most probably have resulted in an employment agreement or another type of work relationship, with a certain authority relationship between the respondent and the applicant. Therefore, in the ETC's opinion, the negotiations were to be considered as advertisements for job vacancies and procedures leading to the filling of vacancies within the meaning of Article 5(1) of the GETA.

Results (sanctions) and key consequences or implications of the case (max. 500 chars.)

Held: breach.

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

Case title	Determination of a pension premium.
Decision date	30.03.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 2006-56.
Key facts of the case (max. 500 chars.)	The applicant applied for a survivor's pension on behalf of his male partner. It was not contested that the respondent (the insurance company) did not make use of different tables for male-male and female-female relationships. When determining the premium the respondent used the male-female relationship as a starting point.
Main reasoning/argumentation (max. 500 chars.)	The ETC was of the opinion that because the respondent took the sex of the beneficiary of the pension into account in the calculation of the premium and the fact that the respondent used a different sex than that of the beneficiary as a starting point, the respondent had made a direct distinction on the grounds of the sexual orientation of the applicant.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The applicant requested the ETC to arrange that the respondent would determine the premium on the basis of a different table. Furthermore, the applicant requested reimbursement of the (in his view) surplus of the paid premium. However, the ETC reiterated that its mandate is restricted to judging the question of whether or not the determination of the premium was discriminatory.

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

Case title	Exclusion from participation in a dancing competition.
Decision date	26.07.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>President van de Rechtbank Den Haag</i> [President of Den Haag Regional Court], <i>LJN</i> : AY5005.
Key facts of the case (max. 500 chars.)	Two homosexual applicants were excluded from participation in a dancing competition organised by the Dutch General Dance Sport Federation.
Main reasoning/argumentation (max. 500 chars.)	In a <i>Kort Geding</i> (fast civil court procedure for urgent matters), the President of the Court ruled that the Dutch General Dance Sport Federation did not unlawfully exclude a homosexual couple from participation in national dancing contests. Although this constituted direct sex discrimination, it was justified under the clause in Article 2(2) of the GETA which allows for 'gender-specific requirements'.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	In the case of sporting competitions, a gender-specific requirement could be, on the basis of a decree by the government, the fact that there is a relevant difference in physical strength between men and women. The Court ruled that it had not been sufficiently established that the distinction was made on grounds of sexual orientation (although the ETC had previously held that it was (see below)). In this respect the Court noted that homosexual people can participate in dancing contests, provided that they are prepared to dance with a partner of the opposite sex.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Court held: no breach. Earlier, the Equal Treatment Commission had held that the exclusion of this couple was direct discrimination on the grounds of sex, as well as direct discrimination on the grounds of sexual orientation, for which there was no legally acceptable justification (Opinion 2004-116 of 21.09.2004).

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	Exclusion of homosexual staff from a privately-run educational institution.
Decision date	15.06.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 2007-100.
Key facts of the case (max. 500 chars.)	A privately-run educational institution publicly stated that its personnel policy was that homosexuality did not correspond with the principles of the school and that overtly gay teachers would not be employed by the school. One aspect of the principles of the school was the conviction that an intimate, sexual relationship is reserved for a husband and wife in a monogamous marriage. The <i>Stichting Meldpunt Discriminatie Amsterdam</i> [Amsterdam Anti-discrimination Bureau] lodged a complaint against the school.
Main reasoning/argumentation (max. 500 chars.)	The ETC held that, through its personnel policy and the explanations given, the school made a direct distinction on the grounds of homosexual orientation. The exception in law for privately-run educational institutions was not applicable in this case, since the school made a distinction on the grounds of the <i>sole fact</i> of homosexual orientation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	Held: breach In addition, the ETC ordered the respondent to formulate policy principles for the purpose of concrete situations and also to present these policy principles or the proposed application thereof in a concrete situation to the Commission.

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

Case title	Dutch same-sex marriage not recognised in Germany.
Decision date	09.09.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Germany/Verwaltungsgericht [Administrative Court]/Aktenzeichen AZ 2 K 1420/03, available at www.lsvd.de/bund/lpartg/vgkarlsruhe.de , <i>NIPR</i> 2005, pp. 138-142.
Key facts of the case (max. 500 chars.)	A Dutch man and a Chinese citizen of the same sex married in the Netherlands in 2001. The Dutch man was employed in Germany and therefore had a residence permit for an indefinite period. His spouse had lived and studied in Germany since 1986 and was therefore repeatedly granted a student residence permit for a period of two years. Soon after the marriage, the student residence permit was to expire; the Chinese spouse submitted an application for the issuing of an <i>Aufenthaltserlaubnis-EG</i> [EU residence permit] for spouses of EU citizens for a period of five years. But as the Dutch marriage was not recognised, the permit was not granted.
Main reasoning/argumentation (max. 500 chars.)	The German court ruled that Dutch marriage between same-sex partners is not a lawful German marriage. Referring to the judgment of the European Court of Justice in the <i>Reed</i> case (ECJ 17 april 1986, C-59-86) the Court ruled that only a general, Europe-wide societal change could justify the extension of the term 'spouse'. In the Court's opinion the sole fact that the Netherlands and Belgium introduced same-sex marriage could not be regarded as such a societal change. The German court upheld the refusal to issue the residence permit.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The German court upheld the refusal to issue the residence permit.

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

Case title	Sexual orientation can be grounds for asylum.
Decision date	13.08.1981
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Afdeling Rechtspraak Raad van State</i> [Judicial Division of the Council of State], no. A-2.1113, <i>RV</i> 1981, 5.
Key facts of the case (max. 500 chars.)	The appellant was a homosexual Polish national whose asylum application was rejected by the State Secretary of Justice in 1980. The reason for this decision was that the appellant had no well-founded fear of persecution, since official reports had proved that homosexuality was not criminalised in Poland. The State Secretary acknowledged that gay people were victims of discrimination in Poland but did not consider this to be an act of persecution.
Main reasoning/argumentation (max. 500 chars.)	In appeal the Judicial Division of the Council of State ruled that it was sufficiently plausible that the appellant was exposed to discrimination by the authorities in his country of origin. However, in the court's opinion these discriminatory measures were not of such a serious nature that they could constitute persecution within the meaning of Article 1A of the UN Convention relating to the Status of Refugees.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	In this judgment the court ruled for the first time that the definition of being persecuted for reasons of membership of a particular social group in Article 1A of the UN Convention relating to the Status of Refugees includes being persecuted for reasons of sexual orientation.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	This ruling was incorporated into the <i>Vreemdelingencirculaire</i> [Aliens Circular] C1/4.2.10.2.

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

Case title	Sexual orientation accepted as a new fact in asylum procedure.
Decision date	03.10.2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Afdeling Bestuursrechtspraak van de Raad van State</i> [Administrative Judicial Division of the Council of State], no. 200305027/1, <i>JV</i> 2004/3.
Key facts of the case (max. 500 chars.)	In previous admission procedures the appellant had been represented by his mother. As a result, the account of the reasons for his request for asylum merged into those of his mother. In July 2003, however, the appellant requested asylum in his own name, thereby putting forward his own account of the reasons for his request, including his personal fear of problems in his country of origin because of his homosexual orientation. The Regional Court considered this to be a repeat application and rejected his appeal.
Main reasoning/argumentation (max. 500 chars.)	The Administrative Judicial Division of the Council of State ruled that the Regional Court had failed to recognise that the grounds put forward by the appellant when requesting asylum in 2003 were sufficiently specific, were pre-eminently related to the personality of the appellant and had so far not been judged upon, either in previous decision-making or in court. The Judicial Division ruled that the appellant's homosexual orientation was a new fact that had emerged or a changed circumstance in the sense of Article 4:6(1) of the General Administrative Law Act.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Administrative Judicial Division of the Council of State allowed the appeal, overturned the judgment of the Aliens Division of 's-Hertogenbosch Regional Court and referred the case back to the Regional Court.

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

Case title	No investigation of the real risk in asylum procedure.
Decision date	12.10.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Vreemdelingenkamer Rechtbank 's-Gravenhage</i> [Aliens Division of 's-Gravenhage Regional Court], location 's-Hertogenbosch, AWB 02/3863, <i>LJN</i> : AR6786.
Key facts of the case (max. 500 chars.)	A Somali asylum seeker stated in his application for asylum that the reason for fleeing his country of origin was his homosexual orientation. The Minister for Alien Affairs and Integration confined herself to the conclusion that there had not appeared to be a real risk of the applicant's being subjected to treatment in breach of Article 3 of the European Convention on Human Rights on his return to Somalia. However, this conclusion was not substantiated. The asylum seeker lodged an appeal.
Main reasoning/argumentation (max. 500 chars.)	The Court ruled that there was no evidence that the Minister had investigated whether homosexuality was criminalised in Somalia or whether actions against homosexuals took place. The fact that the Minister considered the account of the reasons for the appellant's request for asylum implausible, did not affect the foregoing conclusion, since the Minister did not question the appellant's homosexual orientation as such.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The appeal was allowed.

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

Case title	Sexual orientation not accepted as a new fact in asylum procedure.
Decision date	14.04.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Afdeling Bestuursrechtspraak van de Raad van State</i> [Administrative Judicial Division of the Council of State], no. 200601113/1.
Key facts of the case (max. 500 chars.)	In this appeal to the Administrative Judicial Division of the Council of State the Minister for Alien Affairs and Integration stated that the court in interlocutory proceedings erroneously considered the sexual orientation of the asylum seeker underlying his application for asylum a new fact that had emerged or a changed circumstance in the sense of Article 4:6(1) of the General Administrative Law Act.
Main reasoning/argumentation (max. 500 chars.)	The Administrative Judicial Division of the Council of State ruled that the asylum seeker concerned could and should have put forward his sexual orientation in his first request for asylum, given the relevance of that information to the assessment of his application as well as the fact that he later declared that he had always been aware of his homosexual orientation. In the Court's opinion this conclusion was not affected by the fact that the asylum seeker concerned only engaged in a homosexual relationship after several years of residence in the Netherlands.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Court upheld the appeal by the Minister and overturned the judgment of the court in interlocutory proceedings.

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

No relevant case law available.

Chapter D, Family reunification, case law relevant to Article 4/3 of the Council Directive 2003/86/EC, case 1

No relevant case law available.

Chapter E, Freedom of assembly, case 1

Case title	Demonstration against statements by a bishop.
Decision date	11.04.1979
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Voorzitter Afdeling Rechtspraak Raad van State</i> [President of the Judicial Division of the Council of State] <i>Weekoverzicht RvS, R.737.</i>
Key facts of the case (max. 500 chars.)	The appellants lodged an objection with the Mayor of Roermond against a planned demonstration. The aim of this demonstration was to protest against public statements against homosexuality previously made by the Bishop of Roermond. The appellants stated that the decision to grant the permit for the demonstration hampered them in the course of their profession of pastor. The mayor rejected the application.
Main reasoning/argumentation (max. 500 chars.)	The President considered that the mayor had guaranteed the scrupulousness of the decision-making process. In the President's opinion the mayor had justifiably considered that neither the aim of the demonstration (to protest against public statements against homosexuality previously made by the Bishop of Roermond) nor the appellants' expectation that as a result of the demonstration public order would be disturbed, could give cause to refuse the permit for the purpose of maintenance of public order.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	The President ruled furthermore that the suggestion that the demonstration might appear shocking could also not be grounds for refusing the permit, as allowance of such a ground would violate the right to the freedom of expression.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	Appeal rejected.

Chapter E, Freedom of assembly, case 2

Case title	Gay demonstration and encampment in Amersfoort.
Decision date	27.05.1982
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Voorzitter Afdeling Rechtspraak Raad van State</i> [President of the Judicial Division of the Council of State], <i>AB</i> 1983/62.
Key facts of the case (max. 500 chars.)	The Mayor of Amersfoort had refused to grant a permit for the third demonstration in a row in favour of tolerance of gay people and an accompanying encampment on municipal territory. The mayor grounded this refusal in fear of intolerant behaviour by third parties.
Main reasoning/argumentation (max. 500 chars.)	The court ruled that, although the planned demonstrations and the accompanying encampment would lay a heavy burden upon the police and although it was plausible that traffic would be severely disrupted by the demonstration, the mere fear that intolerant behaviour by third parties towards the demonstrators would disturb public order could justify neither the refusal to grant a permit for a demonstration, nor the refusal to grant the encampment permit. The Court ruled that the decision was disproportionate.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The President made provisional arrangements, ordering the granting of a permit for both the third demonstration and the encampment.

Chapter F, Hate speech, case 1

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

Chapter F, Hate speech, case 2

Case title	Insulting character of a term depends on context in which it was used.
Decision date	06.01.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Hoge Raad</i> [Supreme Court], no. 01019/03, <i>LJN</i> : AN8498.
Key facts of the case (max. 500 chars.)	After being called to account for urinating in public, the defendant had called a police officer ' <i>homofiel</i> ' ('homosexual') during the lawful discharge/execution of his duties.
Main reasoning/argumentation (max. 500 chars.)	The Court ruled that an apparently neutral term such as ' <i>homofiel</i> ' ('homosexual') can be insulting if used in a certain context as a term of abuse and with the intention to insult . The police officer might reasonably take offence at the term, since no person can be required to accept, in this way and under these circumstances, statements concerning issues that belong to the very core of personal integrity, intimacy and privacy. According to the Court, in the given circumstance the purpose of the term ' <i>homofiel</i> ' ('homosexual') was to injure the police officer's reputation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	This judgement gives a further specification of the term 'context' as introduced in the Supreme Court judgment of 19.12.2000 (no. 01926/99, <i>LJN</i> : AA9745, <i>NJ</i> 2001/101). In that earlier case the court had ruled that the terms ' <i>vuile homo's</i> ' ('dirty fags') and ' <i>vieze smerissen</i> ' ('dirty fuzz') were insulting given the context in which the terms were used <i>and</i> the combination of the words used.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	On the basis of Article 266 of the Penal Code, the defendant was sentenced to a fine of 50 Euro, with an alternative imprisonment of one day. In a recent case the Regional Court of 's-Hertogenbosch ruled that, given the lack of a special context, the use of the term ' <i>homo</i> ' ('gay') in a remark to a police officer during the lawful discharge/execution of his duties did not have an insulting (thus deserving of punishment) character. (Regional Court 's-Hertogenbosch 21.08.2007, no. 01-000504-07, <i>LJN</i> : BB2083)

Chapter F, Hate speech, case 3

Case title	Statements by imam El Moumni.
Decision date	18-11-2002
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Gerechtshof 's-Gravenhage</i> [’s-Gravenhage Court of Appeal], no. 2200359302, <i>LJN: AF0667</i> .
Key facts of the case (max. 500 chars.)	In an interview in a television programme an imam stated the following (translation into English of remarks previously translated into Dutch): - homosexuality is harmful to Dutch society - homosexuality is a contagious disease (or abnormality); the translation of the word ‘ <i>marat</i> ’ was contested). The defendant was prosecuted for defamation and incitement of hatred.
Main reasoning/argumentation (max. 500 chars.)	The Court of Appeal ruled that the statements were to be judged in connection with the content and purpose of the interview as a whole. In the Court’s opinion that context and the resulting manifest intention took away the possible insulting character of the excerpts of the interview. In this context the Court considered it to be important that the contested excerpts served the purpose of indicating the defendant’s view (firmly rooted in Islamic religious conviction) of the sinful nature of the homosexual way of life.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	The Court ruled that, on the basis of the freedom of religion, the defendant had the right to propagate his views on homosexuality based on his religious beliefs. In the Court’s opinion the manner in which the defendant had propagated his views did not exceed the limits of acceptability. In this respect the Court attached weight to the contested translation of the word ‘ <i>marat</i> ’ and the fact that the defendant had stated in an extract from the interview that was not broadcasted that a Muslim must be respectful to every person.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	Acquittal of the charge.

Chapter F, Hate speech, case 4

Case title	Homosexual compared with thief by member of parliament.
Decision date	09.01.2001
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Hoge Raad</i> [Supreme Court], no. 00945/99, <i>LJN</i> : AA9368.
Key facts of the case (max. 500 chars.)	In a written interview in a magazine the defendant, a member of parliament for a Christian party, had posed the rhetorical question: ‘Why would a practising homosexual be classed above a thief?’ (<i>‘Ja, waarom zou een praktiserend homoseksueel beter zijn dan een dief??’</i>). The Court of Appeal had acquitted the defendant. The Advocate-General appealed in cassation.
Main reasoning/argumentation (max. 500 chars.)	The Court of Appeal had ruled that the challenged passage in itself could be regarded as an insulting remark in the meaning of Article 137c of the Penal Code. However, in the Court’s opinion the context and the resulting intention took away the insulting character of the passage, as the context showed that the defendant, on the basis of his religious conviction, condemns homosexual practice as being sinful and in contravention of the biblical commandments. In that context the challenged passage does not affect the dignity of practising homosexuals.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	In the opinion of the Court of Appeal the challenged passage was merely used by way of illustration of the religious conviction of the defendant, which takes away the insulting character of the remark. As the manner in which the defendant propagated his views did not exceed the limits of acceptability, the defendant could successfully rely on his right to freedom of religion and expression. The Supreme Court ruled that the Court of Appeal had not made an incorrect interpretation of the law.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Supreme Court barred the prosecution in its appeal against the acquittal of the charge as ruled by the Court of Appeal.

Chapter F, Hate crimes, case 1

Case title	Assault and battery of gay people at a public 'gay cruising area'.
Decision date	14.04.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Rechtbank Gravenhage</i> [Gravenhage Regional Court], no. 09/926059-05, <i>LJN</i> : AX9566.
Key facts of the case (max. 500 chars.)	The defendant was part of a group of young people hanging around a skate ramp in a park. When a man passed the group, several members of the group called the man 'gay'. The defendant and another person threw beer bottles at the man and some of the group, including the defendant, ran after the man. Subsequently, the defendant stabbed the man in his back with a knife.
Main reasoning/argumentation (max. 500 chars.)	In the Court's opinion it counted strongly against the defendant and his co-perpetrators that the unsuspecting victim had to fear for his life and suffered severe pain and that the incident caused feelings of insecurity. Furthermore, a great cause for concern for the Court was the fact that the simple assumption that an individual was gay was the probable cause for the defendant and his co-perpetrators resorting to violence. Precisely because of the discriminating character of that violence, the Court saw reason to express in the sentence that was imposed that this and other such behaviour is not tolerated.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The defendant was convicted for complicity in attempted homicide and sentenced to one year in prison, of which six months suspended, with an operational period of two years.

Chapter F, Hate crimes, case 2

Case title	' <i>Flikker tikken</i> ' ['Poof slapping'] Brunsummerheide.
Decision date	08.05.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/700602-, <i>LJN</i> : BA4620; <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/703577-06 <i>LJN</i> : BA4628; <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/703579-06, <i>LJN</i> : BA4623; <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/703580-06, <i>LJN</i> : BB0424 and <i>Rechtbank Maastricht</i> [Maastricht Regional Court], no. 03/700754-06, <i>LJN</i> : BB0326.
Key facts of the case (max. 500 chars.)	These five cases concern the prosecution and conviction of five people for a jointly committed offence. The group conceived a plan to go ' <i>flikker tikken</i> '. This literally means 'poof slapping', in practice it meant the robbery of gay people at a car park known to the public as a 'gay cruising area'.
Main reasoning/argumentation (max. 500 chars.)	With regard to the sentence to be imposed, the Court attached weight to the fact that, by endeavouring to rob gay men at a remote, dark place, the defendants had shown themselves not to have even the slightest respect for a vulnerable group of people in society.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The five defendants were sentenced respectively to: A) Two months' juvenile detention, with an operational period of two years, 180 hours' community service and a 20-hour training order; B) Eighteen months' imprisonment of which six months suspended, with an operational period of two years; C) Thirty months' imprisonment of which six months suspended, with an operational period of two years; D) Eighteen months' imprisonment of which six months suspended, with an operational period of two years; E) Twenty-four months' imprisonment of which six months suspended, with an operational period of two years.

Chapter F, Hate crimes, case 3

Case title	Discrimination on the grounds of homosexuality as motive for violence not proved.
Decision date	16.10.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Rechtbank Amsterdam</i> [Amsterdam Regional Court], no. 13/420862-07, <i>LJN</i> : BB5743 and <i>Rechtbank Amsterdam</i> [Amsterdam Regional Court], no. 13/420863-07, <i>LJN</i> : BB5734.
Key facts of the case (max. 500 chars.)	These two cases concern the participation of two defendants in a violent offence. The Court found that both defendants committed an act of violence in a public place, by punching the victim in the face.
Main reasoning/argumentation (max. 500 chars.)	In the Court's opinion the suggestion that the act of violence was the result of discrimination on the grounds of the sexual orientation of the victim and his friends was not sufficiently confirmed by the facts. It was true that the defendants used the words 'fag' and 'gay' and the Court considered it conceivable that these words were badly received by the victim and his friends. However, according to the Court this did not alter the fact that it was insufficiently proven that the defendants used the words with any other intention than they consistently declared to have had for the use of the words.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	Both defendants had stated that they did not use the words to insult the victim or his friends, but to express their surprise at the fact that the victim was wearing a so-called 'dog-tag' although he was not a soldier. The defendants considered this to be odd. Furthermore, the Court considered to be important the fact that there were no grounds to question the statement of the defendants that they only had knowledge of the fact that the victim and his friends were gay after the police had informed them following the incident.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Court was of the opinion that there was no reason to differ from the punishment demanded by the public prosecutor, partly due to the fact that the incident had no discriminatory background. The defendants were sentenced to 45 days' imprisonment, respectively five months imprisonment and the payment of compensation of an amount of €6,089.22.

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

Case title	Redeployment after giving notice of change of sex.
Decision date	17.02.1998
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 1998-12.
Key facts of the case (max. 500 chars.)	The applicant was employed by the respondent as an information desk assistant. In 1981 she changed sex. In 1994 she made this known to her work, leading to problems with some colleagues as a consequence. Subsequently, the respondent started a work reassignment procedure for the applicant.
Main reasoning/argumentation (max. 500 chars.)	The ETC considered that, as the applicant's change of sex played a part in the decision to redeploy the applicant, the respondent was responsible for the continuation of the discriminating behaviour of colleagues towards the applicant. By doing so, the respondent discriminated against the applicant on grounds of sex
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	Held: breach

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

Case title	Suspension of transsexual; not discrimination.
Decision date	17.11.2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 2003-139.
Key facts of the case (max. 500 chars.)	The applicant was employed by the respondent. It was not contested that the applicant functioned properly for years, until the moment she presented herself as a woman. However, at a certain point the applicant was less productive due to a hormone treatment. It was also not contested that the specifically female presentation of the applicant played part in her suspension. The respondent went to great lengths to adjust the applicant's working environment to the transformation process.
Main reasoning/argumentation (max. 500 chars.)	In the ETC's opinion, on the basis of the facts there were good reasons to suspect discrimination against the applicant by the respondent. However, with regard to the low level of productivity by the applicant, the respondent made a plausible case that this would not be accepted from any employee, because of the resulting negative influence on the team. Furthermore, with regard to the fact that the applicant stressed her femininity, the respondent had shown that the applicant held a representative post for which this would not have been acceptable from any employee.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The ETC concluded that the respondent refuted the suspicion of discrimination and did not discriminate against the applicant on the grounds of sex. Held: no breach.

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

Case title	Request for asylum by Romanian transsexual.
Decision date	22.01.2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Rechtbank 's-Gravenhage</i> ['s-Gravenhage Regional Court], location Amsterdam, <i>AWB 02/94109</i> , <i>LJN: AO3931</i> .
Key facts of the case (max. 500 chars.)	The applicant was a Romanian national seeking asylum in the Netherlands in 2002. The Court considered that the account of the reasons for the applicant's request for asylum provided a basis for the conclusion that the applicant had suffered several serious incidents on a systematic basis, even caused by police officers. In the Court's opinion this led to the conclusion that the applicant was the victim of a great number of discriminating acts that were related to the applicant's transsexuality.
Main reasoning/argumentation (max. 500 chars.)	Given the incidents the applicant had suffered, the Court ruled that it was not possible to uphold the respondent's conclusion that, as no information about the position of transsexuals in Romania was available, one could assume that this group did not suffer. The Court was of the opinion that, since the credibility of the applicant's statements was not contested, it could not simply be demanded of a person in a marginalised position to call upon the (higher) authorities for protection.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The appeal was allowed. The Court nullified the respondent's decision and ruled that the respondent should make a new order in respect of the appellant's application for asylum, with due observance of the present judgment.

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

Case title	Termination of employment after notice given of gender reassignment surgery.
Decision date	09.03.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 2006-33.
Key facts of the case (max. 500 chars.)	The applicant changed sex in 2004. She complained that since she had announced her gender reassignment surgery, she was no longer treated respectfully by her employer, the respondent. The respondent stated that the applicant did not perform in accordance with the set requirements which gave cause to the termination of the employment. According to the respondent, this had nothing to do with the applicant's transsexuality.
Main reasoning/argumentation (max. 500 chars.)	During the 4.5 years of employment, the parties held one performance interview with a positive outcome for applicant. Furthermore, several meetings with an unclear status took place, in which transsexuality came up for discussion. In addition, when requesting the competent district court to set aside the employment contract, the respondent referred to the transsexuality and the appearance of the applicant.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The ETC concluded that the respondent discriminated against the applicant and that the applicant's transsexuality inevitably played a part in the decision to terminate the employment contract. Held: breach.

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

Case title	Hotel cancels reservation of a room where a party for transvestites was to take place.
Decision date	15.11.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Commissie Gelijke Behandeling</i> [Equal Treatment Commission], <i>Oordeel</i> [opinion] 2007-201.
Key facts of the case (max. 500 chars.)	The applicant (<i>Stichting Meldpunt Discriminatie Amsterdam</i> [Amsterdam Anti-discrimination Bureau]) filed a complaint against a hotel. According to the applicant, the hotel cancelled the reservation of a room after it was discovered that the room would be used for a party for transvestites.
Main reasoning/argumentation (max. 500 chars.)	In the ETC's opinion discrimination on the grounds of sex includes discrimination on the grounds of transvestism. Given the fact that the respondent could not refute the suspicion of discrimination to which the facts gave cause, the ETC concluded that the respondent had discriminated on the grounds of sex when cancelling the reservation of the room.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	Held: breach.

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

Case title	Request for crossing out sex in birth certificate rejected.
Decision date	30.03.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Hoge Raad</i> [Supreme Court], <i>LJN</i> : AZ5686.
Key facts of the case (max. 500 chars.)	The appellant felt inter- or asexual, neither male nor female, and requested that his sex be crossed out in his birth certificate. For his the claim appellant relied upon Article 1:24 of the Civil Code which provides for the possibility of supplementing incompleteness or correcting an error in a person's birth certificate.
Main reasoning/argumentation (max. 500 chars.)	The Supreme Court dismissed the appellant's claim, ruling that it comes within the <i>margin of appreciation</i> of national states under Article 8 of the ECHR to rule that a person's sex in his/her birth certificate is either male or female, but not gender-neutral. According to the court, the general interest outweighed the individual interest in this respect. Furthermore, the Court remarked that it was true that intersexuality was receiving increasing public attention. However, in the Court's opinion, no trend towards legal recognition of a neutral gender identity could be discerned.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Court dismissed the appellant's appeal.

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

Case title	Change of sex not sufficiently completed.
Decision date	22.05.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Gerechtshof 's-Hertogenbosch</i> ['s-Hertogenbosch Court of Appeal], <i>LJN</i> : BA5428
Key facts of the case (max. 500 chars.)	The appellant requested that his sex be changed in his birth certificate and subsequently that his name be changed. The Regional Court had dismissed his claim.
Main reasoning/argumentation (max. 500 chars.)	The Court ruled that the physical change of sex of the applicant was not yet sufficiently completed for a change of sex in his birth certificate to be granted within the meaning of Article 1:28 of the Civil Code. The court based its decision upon the finding that hormonal treatments had only started in September 2006 and surgery was yet to take place.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	Although the appellant presented himself as a woman in daily practice and bore a female forename, the Court ruled that his request for the change of name was rejected, as his sex in the birth certificate remained male. The Court considered the requested female names undesirable and also inappropriate within the meaning of Article 1:4 (2) of the Civil Code.
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Court rejected the appeal and upheld the judgment of the Regional Court.

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

Case title	Change of sex and names of Luxembourg national.
Decision date	14 October 2002
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Rechtbank Den Haag</i> [Den Haag Regional Court], <i>LJN</i> : AF4586 and R. A. Lawson, 'In de schaduw van Goodwin', in: <i>NJCM-Bulletin</i> 2003, pp. 313-317
Key facts of the case (max. 500 chars.)	The applicant was a Luxembourg national who had resided in the Netherlands since 1990 where he changed sex. In 2001 the applicant appealed to the Regional Court of The Hague for a change of sex and names.
Main reasoning/argumentation (max. 500 chars.)	The Court granted the request for change of sex under Dutch law. The change of names was problematic due to the fact that the applicant did not have Dutch nationality. However, the court ruled that a change of sex is a change of status within the meaning of Article 1 of the Convention on the recording of surnames and forenames in civil status registers (Istanbul 1958) of the <i>Commission Internationale de l'Etat Civil (CIEC)</i> [International Commission on Civil Status (ICCS)] and ordered the change of applicant's names.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars.)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars.)	The Court ordered the change of applicant's sex and names.

**Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the grounds of sexual orientation,
case 1**

No relevant case law available.

Annex 2 – Statistics

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

Equal Treatment Commission	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the grounds of sexual orientation	5	4	6	6	5	3	10	6
employment	2	2	1	2	1	0	7	2
education	0	0	0	2	0	0	0	0
housing	0	0	0	0	0	0	0	0
goods and services	3	2	5	2	4	3	3	4
Total finding of discrimination confirmed	2	0	2	2	3	3	4	3
employment	0	0	0	1	1	0	4	2

education	0	0	0	0	0	0	0	0
housing	0	0	0	0	0	0	0	0
goods and services	2	0	2	1	2	3	0	1
National number of sanctions/compensation payments issued (Compliance measures taken by defendant, known by the Equal Treatment Commission)¹²³	1	1	1	1	0	1	3	3
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.)	-	-	-	-	-	-	-	-
Courts								
Total complaints of discrimination on the grounds of sexual orientation	0	0	1	0	0	0	1	0
goods and services	0	0	1	0	0	0	1	0
Total finding of discrimination confirmed	0	0	0	0	0	0	0	0

¹²³ This information is obtained from the ETC. The ETC explicitly remarked that this is not an exhaustive overview.

The authors of this report submitted an official request (in writing, 16.01.2008) to the Ministry of Justice to provide the information as requested in the guidelines under Chapters B, C and D. The authors received a letter (dated 06.02.2008) from the Information and Analysis Centre of the Immigration and Naturalisation Service (INDIAC) stating that no such information was available, due to the simple fact that the Dutch authorities currently do not record this information. However, INDIAC notified the authors of the current preparation of evaluation research into the effects of the gender-related policy (including the LGBT policy) of the Immigration and Naturalisation Service. This research is expected to be finalised by the end of May 2008.

Chapter E, LGBT people enjoyment of freedom of assembly

Please note: This table includes the demonstrations in favour/ against tolerance of transgender people

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

The authors of this report submitted an official request (in writing, 18.01.2008 and 22.01.2008) to the Ministry of Justice to provide the information as requested in the guidelines under Chapters E, F and G. The authors received a letter (dated 01.02.2008) from the director of the Information Service of the Ministry of Justice acknowledging receipt of these requests. However, by 14.02.2008 no further information from the Ministry had been received.

Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation

No relevant statistics available.