

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

Maja K.Eriksson
Iain Cameron
Thomas Bull

Uppsala, Sweden
February 2008

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.

Contents

Executive summary	3
A. Implementation of Employment Directive 2000/78/EC.....	9
A.1. Employment	11
A.1.1. Goods and services	13
A.1.1.1. Case law	14
A.2. Anti-discrimination clauses in procurement contracts.....	15
A.3. Education.....	15
B. Freedom of movement.....	17
C. Asylum and subsidiary protection	18
D. Family reunification	20
E. Freedom of assembly	21
E.1. Public Order Act –Rules and Practice	22
F. Criminal law, hate speech.....	24
F.1. Hate speech.....	24
F.2. Unlawful discrimination	26
F.3. The criminal law in practice	29
G. Transgender issues	30
H. Good practices	34
Annex 1 – Case law.....	35
Annex 2 – Statistics.....	51

Executive summary

Implementation of Employment Directive 2000/78/EC

- [1]. The findings of the study lead to the conclusion that discrimination on the basis of sexual orientation still exists in practice in various forms. The current legislative proposal of consolidating the Swedish legislation against discrimination and covering most of the grounds of discrimination, *i.e.* including sexual identity and sexual orientation has the potential further to improve the legal protection of sexual identity or sexual orientation. A single comprehensive anti-discrimination legislation would provide a more effective way of remedying multiple/intersectional discrimination. In addition, there will be improvements *inter alia* with regard to the availability to obtain redress and financial compensation for the injury suffered. If the proposal¹ for a new anti-discrimination law is adopted by the Swedish Parliament it will offer a more comprehensive protection than that required by Directive 2000/78/EC.² It is expected that the new legislation will enter into force on 1 January 2009.
- [2]. Currently in Sweden, different legislative acts use different formulations for the notion of 'sexual orientation'. The proposal for the replacement of the terms 'homosexuality' and 'homosexual orientation' in existing legislation with the term 'sexual orientation' or in certain stances with 'sexual life' is also a positive development.³
- [3]. Sweden has not yet ratified Protocol No 12 to the ECHR, which lays down a general prohibition of discrimination.

¹ Lagrådets remiss "Ett starkare skydd mot diskriminering", 24 januari 2008.

² SOU 2006:22, *En sammanhållen diskrimineringslagstiftning*, Del I, p. 55.

³ *Ibid.*, p. 53.

Freedom of movement

- [4]. As regards freedom of movement, there is no discrimination between heterosexual and LGBT persons. The term “spouse” includes people who are registered partners within the meaning of chapter 3, section 1 of the Act on Registered Partnerships (SFS 1994: 1117), *i.e.* same sex partners. LGBT persons benefit from freedom of movement provisions.

Asylum and subsidiary protection

- [5]. Swedish law provides that persecution on the grounds of sexual orientation is a ground for obtaining refugee status. The definition of refugee covers non-state persecution, combined with state unwillingness, indifference or inability in fact to protect a person from non-state persecution. LGBT persons are accepted as family members in the context of asylum.

Family reunification

- [6]. Swedish law on family reunification is based upon the concept of a “reference person” within Sweden. His or her “nuclear family” members have the right to obtain residence permits on the basis of their connection to the reference person. The term “spouse” includes people who are registered partners. The term “cohabiting partner” means those who are living together in a steady relationship and who share the same household. It includes same sex partners.

Freedom of assembly

- [7]. Freedom of assembly is constitutionally protected in the 1974 Instrument of Government (IG), Chapter 2 para 1, 12 and 14. The basic constitutional rule is that any meetings of persons have constitutional protection, if it has political, educational or cultural content. No sharp distinction is drawn between a meeting (or an assembly) and a demonstration, even though the latter is characterized by its expression of a particular point of view (public

or private) and that a demonstration can be held by only one person.

- [8]. The constitutional possibility to restrict the freedom of assembly has been used by the Parliament to enact the Public Order Act (SFS 1993:1617, *Ordningslagen*).
- [9]. The Act stipulates that a permit should be given by the police-authorities before an assembly or a demonstration. The police have the possibility to give permission under certain conditions, such as the time, place and manner of the demonstration (Ch. 2 para 16 of the Public Order Act).
- [10]. The decisions of the police-authority can be appealed to the local administrative court, which has the power to decide on the legality as well as the appropriateness of that decision. In addition, the Parliamentary Ombudsman (*Justitieombudsmannen*) exercises a post hoc supervisory control of the police-authority.
- [11]. It is quite clear from reported cases, primarily from the Ombudsman, but also from the National Police Board (*Rikspolisstyrelsen, RPS*), local courts, media etc., that the police generally speaking apply the law in a strict way, not interfering with ongoing demonstrations unless the conditions for doing so are clearly at hand. No discrimination against assemblies due to the content of the demonstration can be identified.

Hate speech and criminal law

- [12]. Hate speech is forbidden in Sweden, but this is regarded as a limitation of the constitutionally protected freedom of speech, which makes any changes in the law and all application of it a partly constitutional matter, something that affects interpretation and application of the criminal law. The criminal provisions on hate speech are found in the two constitutional Freedom of Press (*Tryckfrihetsförordningen*) and Freedom of Speech (*Yttrandefrihetsgrundlagen*) Acts and in the Criminal Code Ch. 16 para 8 (*Brottsbalken* 16:8.).
- [13]. The provisions – in constitutional and criminal law – make it a crime to, in any way, disseminate a message that includes threats or disdain towards a group of people on ground of their race, colour, of skin, nationality, ethnicity, faith or sexual orientation. The penalty is a maximum of two years in prison or fines. A serious crime – consisting of very threatening acts or widespread

dissemination and attention – is subject to a minimum of six month in prison and a maximum penalty of four years imprisonment.

- [14]. In the same part of the criminal code as hate speech, Ch 16 para 9, discrimination against people on the same grounds of race, colour of skin, nationality, ethnicity, faith and homosexuality are forbidden. This prohibition is however directed to business-owners and their employees and thus only applicable in the context of public life such as access to restaurants, taxis, theaters etc. Hate-crimes are subject to harsher penalties according to special provisions on sentencing in the Criminal Code.
- [15]. The total number of hate-speech crimes reported 2006 was 754, but only 33 persons were actually convicted by a court or accepted criminal responsibility by a simplified procedure. None of these were sent to prison.
- [16]. Discrimination on the labour-market and in other areas of social life are not covered by the criminal provision. Instead special legislation, now under reform, regulates that area. The most important current laws on this area are the Act Against Discrimination in Working Life (SFS 1999:130), the Act Against Discrimination on the Basis of Sexual Preferences (SFS 1999:133), the Act on Equal Treatment of Students (SFS 2001:1296) and the Act of Prohibition of Discrimination (SFS 2003:307).
- [17]. A special note should be made of the fact that as unlawful discrimination is a criminal offence, the burden of proof is upon the prosecutor and the level of certainty demanded by the courts in relation to evidence is high. In practice this means that intentional discrimination can be very hard to prove. In 2006 only 6 people were actually convicted by a court for the crime of unlawful discrimination and no prison-sentences were handed down.

Transgender issues

- [18]. The inadequacy of the 1972 Act on sexual identity to the positive changes in Swedish society as regards attitudes towards sexual identity issues has caused lively debate in recent years and a legislative proposal for statutory adjustments is currently under review.

- [19]. Moreover, the current proposal for the introduction of a statutory protection against discrimination of all trans-persons in a uniform Swedish law prohibiting discrimination is a welcome initiative. It is the first time that the vulnerability of trans-persons has gained the much needed attention in a major context of legislation.
- [20]. In addition, the proposal contained in the final report of the Committee of inquiry (SOU 2006:22)⁴ to introduce an obligation to implement active measures to promote equality between people regardless of their sexual identity or sexual orientation will be, if adopted, a step in the right direction.

Miscellaneous

- [21]. In March 2007 a report SOU 2007:17 (*Äktenskap för par med samma kön, Vigsselfrågor*) for the amendment of the current Marriage Code and making it gender-neutral was presented. The deadline for the submission of comments by the reviewing instances was 15 January 2008.

Good practices

- [22]. The Swedish Government has expressed its support for the Yogyakarta Principles and in order to promote visibility and awareness Prof. Michael O'Flaherty, rapporteur and member of the UN Human Rights Committee was invited to Sweden in connection with a seminar on 26 November 2007 open to the public for introducing and discussing the Yogyakarta Principles.
- [23]. Of significance is also the adoption of the second National Action Plan for Human Rights 2006-2009 in March 2006 with a long-term objective of securing full respect for human rights in Sweden.⁵ A number of measures are announced in the plan with regard to improving the situation of LGBT persons and to be implemented during this period.⁶ Issues addressed in the 2001 National Action Plan against Racism, Xenophobia, Homophobia and Discrimination were followed up and included in this plan.

⁴ SOU 2006:22, p. 58.

⁵ Skr. 2005/06:95.

⁶ Skr. 2005/06:95, pp. 40-42.

- [24]. The Swedish legislation on *inter alia* freedom of movement and family reunification, providing for full equality of treatment of LGBT and other persons, can be described as a best practice.

A. Implementation of Employment Directive 2000/78/EC

- [25]. The Employment Directive 2000/78/EC has been implemented in Swedish law through several significant amendments in recent years, especially the latest ones which entered into force in 2003 ((*lag om förbud mot diskriminering*, (SFS 2003:307) Prohibition of Discrimination Act and *lag om ändring i lagen 1999:133 om förbud mot diskriminering i arbetslivet på grund av sexuell läggning* (SFS 2003:310) Act on Combating of Discrimination in Employment on the Grounds of Sexual Orientation (*lag om ändringar i lagen 1999:132 om förbud mot diskriminering i arbetslivet av personer med funktionshinder* (SFS 2003:309) Act on Combating of Discrimination in Employment on the Grounds of Disability and (*lag om ändring i lagen 1999:130 om åtgärder mot etnisk diskriminering i arbetslivet* (SFS 2003:308)) Act on Combating Discrimination in Employment on the Grounds of Ethnic Affiliation.
- [26]. The term “discrimination” in contemporary Swedish law corresponds to its meaning in EC law, *i.e.* the various forms of discrimination have been defined in the same way as in the various Directives within the relevant area. An inquiry Parliamentary Committee has proposed in a report SOU 2006:22 (*En sammanhållen diskrimineringslagstiftning*) from 24 February 2006 the introduction of a new Prohibition and other Measures against Discrimination Act which will prohibit discrimination and in other ways promoting equal rights and opportunities regardless of sex, sexual identity, ethnic background, religion or other religious belief, disability, sexual orientation or age. Of the proposed prohibited grounds sexual identity and age are new in Swedish legislation. In the Committee’s view protection should be as equal as possible for the various grounds. The Act will apply *inter alia* to working life, education, labour market policy activities, the setting-up or running of business operations, goods, services and housing, public meetings and public events, the social insurance system, health and medical care services.⁷
- [27]. In addition, the Committee suggests that the four ombudsmen against discrimination, *i.e.* the Equality Ombudsman (Sw. *JämO*), the Ombudsman against Ethnic Discrimination (Sw. *DO*), the

⁷ Dagens Juridik, *Nya diskrimineringsgrunder: Könsoverskridande identitet och ålder*, www.dagensjuridik.se; *Ny diskrimineringslag*, www.jamombud.se

Disability Ombudsman (Sw. *HO*) and the Ombudsman against Discrimination on grounds of Sexual Orientation (*HomO*) be merged into one authority (one single institution).⁸ This legislative proposal is at the time of writing, under review.

- [28]. The Office of the Ombudsman against Discrimination on grounds of Sexual Orientation (Swedish acronym - *HomO*) which was established on 1 May 1999 has been entrusted with an extensive mandate. First of all, the Ombudsman has a preventive role, *i.e.* to combat discrimination on grounds of sexual orientation in all areas of Swedish society. In addition to giving advice and support to individuals, commenting upon proposals for new legislation etc. the mandate includes litigation in the courts concerning cases of discrimination on the ground of sexual orientation.
- [29]. Summaries (including in the English language) of the outcome of selected court cases dealing with discrimination on the basis of sexual orientation may be found on the website of the Ombudsman Office (www.homo.se). According to available statistics the number of discrimination cases handled by the Ombudsman for the year 2007 was 52 formal complaints and 11 initiatives taken by the Ombudsman.⁹ The number of complaints for 2006 was 56 (45 formal complaints and 11 initiatives taken by the Ombudsman altogether). However, the total number of cases/subject matters (Sw. *ärenden*) for the year inclusive requests for guidance etc. was 907 which is an increase by about 6 per cent compared to the previous year, *i.e.* 2005 when the number of cases/subject matters (*ärenden*) was 858. In 2005 the number of the cases handled by the Ombudsman was as follows: 47 formal complaints and 15 initiatives and in 2004 there were 39 complaints and 8 initiative cases.¹⁰ Currently, there are no court cases relevant to the Employment Act.¹¹
- [30]. Complains from individuals handled by the Ombudsman (*HomO*) include among others the following issues:
- Abusive comments on websites

⁸ SOU 2006:22, p. 48.

⁹ HomO, Rapport 2007, pp. 78-79.

¹⁰ HomO, Rapport 2006, p. 77. The total number of complaints received by the Office of HomO was 28 in 2000 and 50 in 2003. See "Study on discrimination on grounds of religion and belief, age, disability and sexual orientation outside of employment, Questionnaire to Equality bodies or equivalents", p. 3 www.homo.se and email from 18 January 2008 (G.Svéd).

¹¹ See www.homo.se/o.o.i.s/3490

- A discriminatory separate opinion made in a social welfare committee in connection with an application for adoption of step-children
 - Harassment in the course of restaurant visits
 - Harassment and demeaning treatment of school pupils
 - The Swedish Migration Board's handling of accommodation for applicants for asylum
 - Several complaints of unequal treatment by travel agencies, airlines, hostels, museums were also filed with *HomO* in recent years.¹²
- [31]. The areas in which discrimination had predominantly been alleged to have occurred are as follows: transport (8), information and advice (7), education (6), health (5) and housing (4).¹³
- [32]. A great portion of the Ombudsman's' activities are educational and informational in nature.

A.1. Employment

- [33]. The purpose of the Prohibition of Discrimination in Working Life on grounds of Sexual Orientation Act, known also as the Sexual Orientation (Employment) Act (SFS 1999:133) with amendments up to year 2005 (SFS 2005:479) *lag om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*¹⁴ is to counteract discrimination in working life on grounds of sexual orientation (Sec 1).
- [34]. The bans against discrimination apply according to Section 5 to *inter alia* when the employer takes a decision to employ, makes a decision concerning promotion or chooses an employee for education that will lead to promotion, applies salary or other employment conditions, dismisses, terminates, lays off or undertakes other intrusive measures against an employee.

¹² ILGA Europe, Written Response by ILGA-Europe European Commission Consultation on New Anti-Discrimination Measures, October 2007, p. 23.

¹³ Ibid., p. 14.

¹⁴ For further information on the legislative amendments see the Government Bill: *Extended protection against sexual discrimination* 2004/05:147 which entered into force on 1 July 2005.

- [35]. The Act constitutes, furthermore, the legal basis for the actions of the Ombudsman (*HomO*) for those who have been subjected to discrimination if the individual in question agrees and the Ombudsman deems that a judgment in the dispute would be of importance as a precedent for the application of the Act or there are other special reasons for bringing the case to court (Sec 24).
- [36]. A not-for-profit association is empowered to protect the interests of its members may initiate an action for an individual dealing with the issue of discrimination, victimisation and the obligation to investigate and implement measures against harassment provided the concerned person agrees to that. This right of action is, however, subsidiary to the trade unions' rights to initiate proceedings.¹⁵
- [37]. Empowered to bring a lawsuit besides the individual personally are the organisations of employees. According to Sec 25 of the Employment Act and Ch. 4, Sec. 5 of the Labour Disputes Act (SFS 1974:371) when a trade union is entitled to bring proceedings on behalf of the individual, the Ombudsman may initiate an action only if the trade union abstains from doing so. Nevertheless, reference to the individual's position in the trial shall be applied when the Ombudsman brings a lawsuit.
- [38]. The Ombudsman seeks in the first place redress for the concerned individual who has been discriminated through a voluntary agreement, *i.e.* a kind of friendly settlement. If this option does not work out, the Ombudsman can institute court proceedings on behalf of the individual before the courts including the Swedish Labour Court (Sw. *Arbetsdomstolen*). Complaints from individuals handled by the Ombudsman (*HomO*) with regard to employment include *inter alia* the following issues:
- Harassment in the workplace
 - Refusal of employment
- [39]. There is no official explanation why the number of formal employment related complaints by individuals who have suffered discrimination received by the Ombudsman is so "strikingly" low compared to the number of requests for advice.¹⁶ Obviously this is an area that needs more thorough research. ILGA-Europe has pointed out that significant numbers of LGBT persons across the

¹⁵ SOU 2006:22, pp. 65-66. See also *Carina Bildt*, Fackmedlemmars uppfattningar om diskriminering på grund av sexuell läggning på arbetsplatsen, Stockholm 2004, p. 7.

¹⁶ HomO, Rapport 2006, p. 8.

EU are not open about their sexual orientation, often because of a fear of facing a negative attitude towards homosexuality.¹⁷

A.1.1. Goods and services

- [40]. According to Sec 5 of the Prohibition of Discrimination (Goods and Services) Act (SFS 2003: 307) (*lag om förbud mot diskriminering(varor, tjänster, bostäder, samhällsservice)*) discrimination against employees or job seekers is prohibited on the grounds among others of sexual orientation in job placement services offered by public employment offices or other organisations or parties offering employment services and in connection with other measures included in labour market policy activities, the setting up or running of business operations (Sec 6), in connection with provision of goods, services or housing (Sec 9), in services provided by the social services including social insurance and related benefits systems (Sec 10) and the unemployment insurance system (Sec 12), the health and medical care services (Sec 13) and with regard to student aid (Sec 12 a).
- [41]. Besides the individual personally empowered to initiate lawsuits are the four Swedish Ombudsmen, *i.e.* HomO, DO, JämO and HO.
- [42]. The legislative proposal for uniform discrimination legislation (SOU 2006:22) contains a new feature, *i.e.* that discrimination prohibition with respect to goods, services and housing will apply to anyone providing goods and services to the public. This means that private persons will also be subjected to these prohibitive rules even though with some restrictions linked to the protection of private life.¹⁸
- [43]. The Ombudsman against discrimination on grounds of sexual orientation (HomO) has expressed concern about the situation where issues involving sexual orientation are seldom discussed in health care training programmes. He is also concerned at the way in which structural discrimination in society has had a negative impact on the health of people because of their sexual orientation.¹⁹ The Ombudsman's Office has produced new educational materials and implemented special training initiatives targeting the health and medical sector.

¹⁷ ILGA Europe, Written Response, pp. 6, 13.

¹⁸ SOU 2006:22, pp. 47 and 56.

¹⁹ HomO, Rapport 2006, p. 95.

- [44]. Moreover, discrimination prohibitions related to *e.g.* public meetings and public events, compulsory military and compulsory civilian services, public appointments and public assignments are not at present covered by any specific prohibitive statutory rules on non-discrimination based on sexual orientation. However, the general constitutional rule requiring all public authorities to observe equality before the law and behave objectively and impartially is applicable (Instrument of Government Chapter 1, para. 9).

A.1.1.1. Case law

- [45]. Here follow a few illustrative cases related to the subject matter under review. During 2006, the Ombudsman (HomO) initiated court proceedings at the district court level (*tingsrätt*) against a dentist who had exposed a patient to a demeaning behaviour during an emergency treatment.²⁰ The dentist had posed insensitive and detailed questions to the client related to her sexual orientation (she was accompanied by her girlfriend) and the behaviour of same - sex persons in general. In the view of the Ombudsman (*HomO*) this is but a clear example of sexual orientation harassment. The dentist denied that he has acted in the alleged manner. Nevertheless, at a hearing before the Huddinge District Court a settlement was reached including 20 000 SEK in damages to be paid to the person in question.
- [46]. The District Court of Nacka ruled on 30 March 2006 that the refusal of the owner of a dog kennel to sell a dog when she found out that the prospect buyer was a lesbian constituted direct sexual orientation discrimination and in addition sexual orientation harassment. The owner of the kennel was ordered to pay 20 000 SEK in damages.²¹
- [47]. Yet, another case dealt with a discriminatory treatment of two women during a procedure for adoption of their respective registered partner's biological children. One of the members of the municipal social welfare committee wanted the rejection of the application on the grounds of the applicants' sexual orientation. The committee however supported the adoption application.²²

²⁰ Case no T3663-06, Decision of the Huddinge District Court of 25 February 2007.

²¹ Case no T439/05.

²² HomO, Rapport 2006, p. 69.

A.2. Anti-discrimination clauses in procurement contracts

- [48]. The Ordinance on Anti-Discrimination Clauses in Procurement Contracts (2006:260) which is in force since 1 July 2006 applies to some 30 state agencies. It is assumed that these regulations will counteract discrimination by a supplier in the performance of works or service contracts in Sweden. Thus, the Ordinance sets out certain requirements for how anti-discrimination clause should be worded in such contracts. The agencies are furthermore obliged to attach a sanction to the clauses in question. The office of the HomO, among others, has offered general advice on the application of the above mentioned Ordinance.

A.3. Education

- [49]. On 1 April 2006, the Discrimination and Other Degrading Treatment of Children and Pupils Act (*Lag -SFS 2006:67- om förbud mot diskriminering och annan kränkande behandling av barn och elever*) entered into force. The governing boards of the schools have been given the responsibility for compliance with the Act which requires among other things that children and pupils are not subjected to discrimination on the grounds of ethnic background, religious or other beliefs, sexual orientation, disability or gender. In case of violations the governing boards will be liable to damages. In other words, children and pupils are now guaranteed financial compensation for violations of the statutory provisions. Moreover, the 2006 Act requires schools to adopt equal treatment plans comprising specific measures for promoting the equal rights for children and pupils including LGBT persons. In addition, schools must prevent the exposure of children and pupils to harassment and other demeaning treatment. The mandate of the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation (*HomO*) includes review of the implementation of this legislation. At the time of writing there are no relevant court cases interpreting the above mentioned legislation. The Ombudsman and the National Agency for Education are empowered to bring proceedings at court.
- [50]. According to the latest report from the Ombudsman's Office several sources indicate that homophobia and harassment related

to sexual orientation are commonplace in Swedish schools.²³ The Ombudsman (*HomO*) considers that “A sort of tyranny of invisibility and silence still marks the daily lives of lesbian, gay and bisexual youth”.²⁴

- [51]. With regard to higher education, the Ombudsman monitors the obligation of university institutions to actively promote the equal rights and opportunities of all students and to prevent discrimination on the grounds of sexual orientation. The legal basis constitutes the Equal Treatment of Students at Universities Act (SFS 2001:1286) (*lag om likabehandling av studenter i högskolan*). In 2006 the Office of the Ombudsman undertook a study related to seven Swedish universities’ implementation of their equal treatment obligations.²⁵ The result shows that four of the universities did not have equal treatment plans, or their plans were not updated as well as not being observed in practice. Only three university-level institutions could present plans of satisfactory quality.

²³ See, for example, Skolverkets rapport nr 285, *I enlighet med skolans värdegrund*, 1 december 2006.

²⁴ HomO, Rapport 2006, p. 7.

²⁵ HomO, Rapport 2006, p. 97.

B. Freedom of movement

- [52]. According to the Aliens Act (SFS 2005:716) Chapter 3(a), section 2“ ‘a family member of an EEA national’ means an alien who accompanies an EEA national to Sweden or joins an EEA national in Sweden and who is the spouse or cohabiting partner of the EEA national, a direct descendant of the EEA national or of his or her spouse or cohabiting partner, if the descendant is dependent on either of them for means of support or is under 21 years of age or a direct ascendant of the EEA national or of his or her spouse or cohabiting partner, if the relative is dependent on either of them for means of support.”
- [53]. Sweden does not yet formally provide for same-sex marriage.²⁶ However, the term “spouse” includes people who are registered partners within the meaning of chapter 3, section 1 of the Act on Registered Partnerships (SFS 1994: 1117), i.e. same sex partners. The term “cohabiting partner” means those who are living together in a steady relationship and who share the same household (Cohabiting Partners Act SFS 2003:376, section 1 paragraph 1). It includes same sex partners (Cohabiting Partners Act section 1 paragraph 3). Thus, there is full equality of treatment of same sex spouses and cohabiting partners with different sex spouses and cohabiting partners. Accordingly, Sweden offers a registered partnership which enables partners of Swedish citizens to benefit from freedom of movement in other member states. The implications this equal treatment had for moving allowances etc. was the object of a case before the ECJ, C-122 and C-125/99, *D and the Kingdom of Sweden v. Council* [2001] ECR I-4319.
- [54]. The Migration Board issued residence permits for 19,387 EU/EEA-residents during 2007. In addition, there are estimated to be a few thousand other EES citizens resident in Sweden who have not registered with the Migration Board. However, the Migration Board keeps no separate statistics on the sexual orientation of the EEA national in Sweden, nor on those applications coming from same sex registered partnerships, or same sex cohabiting partners.

²⁶ See SOU 2007:117, Äktenskap för par med samma kön Vigsselfrågor.

C. Asylum and subsidiary protection

- [55]. According to the Aliens Act (SFS 2005:716) section 4, paragraph 1, “‘refugee’ means an alien who is outside the country of the alien’s nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country. This applies irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or these.”
- [56]. The express reference to persecution on the grounds of sexual orientation was added in 2005²⁷. Sexual orientation covers homosexual or bisexual orientation. Transsexuals and more generally “trans persons” are stated in the *travaux préparatoires*²⁸ to fall within the term “gender”, meaning that persecution of a person because they are a transsexual can entitle the person to refugee status, assuming the other criteria in the section are fulfilled. LGTB partners are accepted as family members in the context of asylum (see paras 53 and 63).
- [57]. Even before the present wording came into force (31 March 2006), according to legislation from 1997, LGBT persons could, and did, qualify for subsidiary protection, assuming they could show that the other requirements for this were fulfilled. In a small number of cases before the Aliens Board (*Utlänningsnämnden*, the forerunner to the Migration Courts), LGBT persons were held to qualify for refugee status on the basis that their open profession of their sexual orientation constituted in the circumstances political acts which were likely to lead to persecution.
- [58]. As regards the impact, or social reality of the above provisions, statistics are not available (see para. 60). However, it should be stressed that these provisions are followed faithfully by the Migration Authority. Having said this, it should be noted that, as the “well-grounded fear” requirement is applied, the mere fact that homosexuality, bisexuality or transsexuality is criminalized in an LGBT person’s country of origin does not per se mean that this person is qualified as a refugee. This will be the case only where

²⁷ Legislative Bill ([Prop.] 2005/06:6, Commission of Inquiry (SOU) 2004:31.

²⁸ Prop. 2005/06:6 p. 22.

there is, in practice, a likelihood of prosecution, or persecution of a different form, which is attributable to the LGBT person's sexual orientation or gender. Having said this, the position taken by the Swedish parliamentary committee in the debates on the adoption of the legislative amendment made clear that a person who has lived openly in Sweden with a homosexual or bisexual orientation cannot be expected to conceal this when he or she is returned to their country of origin. Thus, if a person openly living with a homosexual or bisexual orientation risks prosecution for this, then he or she should not be returned.²⁹

- [59]. The definition of refugee covers non-state persecution, combined with state unwillingness, indifference or inability in fact to protect a person from non-state persecution.
- [60]. The Migration Authority publishes statistics broken down on the sex and national origin of asylum seekers, and applications granted. However, it does not collate and keep separate statistics of people applying for, and being granted, refugee status on the specific grounds of sexual orientation or gender (or any of the other specific grounds for persecution). Earlier material gathered by the above mentioned official inquiry indicated that the number of people granted refugee status, or subsidiary protection on these bases was small, usually less than 10 people per year.³⁰
- [61]. During 2006, a system of appeals to specialized Migration Courts entered into force. There is, as yet, no relevant case law from the Migration Court of Appeal interpreting the requirement, as it is now worded, of persecution on the grounds of sexual orientation or gender.

²⁹ Report of the Social Affairs Committee, bet. 2005/06: SfU4 p.13.

³⁰ SOU 2004:31 p. 71.

D. Family reunification

- [62]. The Aliens Act, chapter 5, section 3 provides that: “Unless otherwise provided in Sections 17–17b, a residence permit shall be given to 1. an alien who is a spouse or cohabiting partner of someone who is resident in or has been granted a residence permit to settle in Sweden, 2. a child who is an alien, is unmarried and a) has a parent who is resident in or has been granted a residence permit to settle in Sweden or b) has a parent who is married to or cohabiting partner of someone who is resident in or has been granted a residence permit to settle in Sweden, 3. a child who is an alien, is unmarried and has been adopted or is intended for adoption by someone who at the time of the adoption decision was and who still is resident in or has been granted a residence permit to settle in Sweden, if the child is not covered by point 2 and if the adoption decision has been issued or is intended to be issued by a Swedish court, is valid in Sweden under the Act on International Legal Relations concerning Adoption (SFS 1971:796) or is valid in Sweden under the Act consequent on Sweden’s Accession to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (SFS 1997:191)”.
- [63]. The rules on family reunification are based upon the concept of a “reference person” within Sweden. His or her “nuclear family” members have the right to obtain residence permits on the basis of their connection to the reference person. The term “spouse” includes people who are registered partners within the meaning of chapter 3, section 1 of the Act on Registered Partnerships (SFS 1994: 1117), i.e. same sex partners. The term “cohabiting partner” means those who are living together in a steady relationship and who share the same household (Cohabiting Partners Act SFS 2003:376, section 1 paragraph 1). It includes same sex partners (Cohabiting Partners Act section 1 paragraph 3).
- [64]. The rules on international adoption by same sex couples were the subject of considerable debate in the last few years. The end result was that, as far as Swedish law is concerned, same sex couples are entitled to adopt on the same basis as heterosexual couples. The granting authority in the place of adoption may, however, not accept same sex couples as adopters.
- [65]. As regards the impact, or social reality of the above provisions, there is no evidence of discrimination in the application of these provisions. The Migration Authority does not collate and keep

separate statistics based on the sexual orientation of reference persons.

E. Freedom of assembly

- [66]. Freedom of Assembly is constitutionally protected in the 1974 Instrument of Government (IG), Chapter 2 para 1, 12 and 14. The basic constitutional rule is that any meeting of persons has constitutional protection, if it has political, educational or cultural content. No sharp distinction is drawn between a meeting (or an assembly) and a demonstration, even though the latter is characterized by its expression of a particular point of view (public or private) and that a demonstration can be held by only one person. It is important to note that the constitutional provisions do not make the character of the event a factor in determining whether it has constitutional protection or not. This means that demonstrations such as “Pride-festivals” have constitutional protection.
- [67]. Ch 2 para 12 of the IG stipulates that the right to assembly and demonstration can be restricted by law. This means that only the Parliament has the power to regulate the exercise of these rights. There are certain exceptions to this rule, as local authorities in situations of crisis can prohibit all meetings in public places due to the dangers to life and security of individuals (*i.e.* in the case of a nuclear accident, local authorities around the nuclear plant can ban being outdoors for safety reasons). These exceptions have so far never been used in practice.
- [68]. The paragraph provides that any restriction on the right to assembly must be acceptable in a democratic society and necessary in relation to the goals of that restriction. It must not be based only on political, religious, cultural or such convictions and it may not lead to a threat to the formation of public opinion. In practice, the most important of these constitutional limits on regulating the freedom of assembly are the demand that the Parliament should be involved and the principle of proportionality expressed by the test of necessity.
- [69]. In Ch 2 para 14 IG, further limits on the constitutional competence to regulate the freedom of assembly are laid down. A restriction of that right can only be made for certain purposes: to secure order and security at the gathering, in regard of traffic, national security and to counter epidemics. The most important part of this

provision is the way the power to regulate for protection of order and security is reduced to taking into account only such considerations *at the gathering*. This means that the restrictions in law (see below) cannot be used in order to prevent disturbances of the public order likely in the future, at places near by the gathering, etc.

- [70]. As the European Convention of Human Rights has been transposed into a Swedish law, Article 11 on the freedom of assembly is also part of Swedish law. It should also be mentioned that in respect of EU-law, the Charter of Fundamental Rights Article 12 also protects the freedom of assembly within that legal system and its impact on Swedish law.
- [71]. The constitutional possibility to restrict the freedom of assembly has been used by the Parliament to enact the Public Order Act (1993:1617, *Ordningslagen*).

E.1. Public Order Act –Rules and Practice

- [72]. The Public Order Act contains an important distinction between gatherings which involve the expression of opinion (expressive) and gatherings that are purely for the purpose of entertainment. The law makes it much more difficult for the police and other authorities to act if a meeting is considered “expressive” rather than just entertaining, This distinction felt to be a constitutional necessity – as the constitution provides that assemblies that have some expressive (political, educational and cultural) content are protected, others are not. In practice, this means that dance-halls, discos, sport-events, game-halls, etc are treated differently than live concerts, street-corner talks and theaters (live and film). The latter has constitutional protection, the others do not. In consequence, the powers the Act give the police to interfere with expressive gatherings are much more restricted than the ones conferred in relation to entertainment events.
- [73]. In practice, this distinction has caused some problems, as arrangers of entertainment-events have tried to include some activity (a talk by a local politician, a live performance, etc.) that would classify the event as expressive, and thus restricting the powers of the police to interfere. The police try to separate such gatherings in two or more “phases” and act accordingly to the “phase” the gathering is in at a given moment. Risks for misuse of powers and lessened legal certainty are the potential results of this

regulation, but it seems to be quite uncontroversial outside a small group of especially interested.

- [74]. The Act stipulates that a permit should be given by the police-authorities before an assembly or a demonstration. The police have the possibility to give permission under certain conditions, such as the time, place and manner of the demonstration (Ch. 2 para 16 of the Public Order Act). These conditions are not allowed to relate to the content or subject-matter of the demonstration, but only to objective factors like traffic, safety and the like. A demonstration to demonstrate on a high-way can be refused because of traffic-disturbances, but not because it is upsetting for onlookers.
- [75]. The decisions of the police-authority can be appealed to the local administrative court, which has the power to decide on the legality as well as the appropriateness of that decision. In addition, the Parliamentary Ombudsman (*Justitieombudsmannen*) exercises a post hoc supervisory control of the police-authority. JO devotes particular attention to how citizens' rights are observed by governmental authorities and almost every year makes critical decisions on how the freedom of assembly has been handled by governmental and local authorities.
- [76]. The police has the authority to disperse an expressive gathering (like a demonstration) if – and only if – it is an immediate threat to public order or security or a serious disturbance of traffic (Public Order Act Ch 2 paras 20-23). Less intrusive means should be tried before dispersal, if at all possible. It is particularly noteworthy that the lack of a permit does not give the police the power to intervene with an ongoing demonstration, notwithstanding the fact that arranging a demonstration without a permit is an offence in itself. Police-practice from later years suggests that the police have become more inclined to investigate for the purpose of prosecution individuals responsible for arranging assemblies without permits.
- [77]. It is quite clear from reported cases (primarily from the Ombudsman, but also from internal guidelines from the National Police Board (*Rikspolisstyrelsen, RPS*), media etc.) that the police generally speaking apply the law in a strict way, not interfering with ongoing demonstrations unless the conditions for doing so are clearly at hand. Criticism has in fact occasionally been directed towards the police for being *too passive* in situations that are upsetting for onlookers or cause milder forms of disturbances and too generous in giving permits for demonstration that are very likely to result in crimes and/or more widely felt disturbances of the public order. The typical such situation where the police have been criticized is where right-wing extremists have been, in

accordance with the law, permitted to hold legal manifestations which however provoke violence from left-wing groups.

- [78]. The police tactic in practice seems to take its starting point in that interfering with ongoing demonstrations in order to arrest a few more or less violent individuals often causes more disturbances to the public order, as resistance to arrests can provoke other demonstrators to interfere. Preserving public order is thus often best achieved by containing and controlling the assembly in a more passive way. Documentation and identification can at a later time lead to criminal charges and sanctions of offenders.
- [79]. There are several gay pride parades in the country, the largest being the Stockholm Pride festival, which started in 1998 and today is a major cultural event in the city every summer. The local authorities support the event and national political leaders, prominent cultural figures etc. hold speeches and hosts events. These events have had permits and have been held with no real disturbances. As far as the reporter knows, no gay organization have had any problems getting permits etc. for holding meetings and demonstrations. The ongoing supervision of police-authorities by the Ombudsman should have contained such information if it so was the case.

F. Criminal law, hate speech

F.1. Hate speech

- [80]. Hate speech is forbidden in Sweden, but this is regarded as a limitation of the constitutionally protected freedom of speech, which makes any changes in the law and all application of it a partly constitutional matter, something that affects interpretation and application of the law. The criminal provisions on hate speech are found in the two constitutional Freedom of Press (*Tryckfrihetsförordningen*) and Freedom of Speech (*Yttrandefrihetsgrundlagen*) Acts and in the Criminal Code Chapter 16 para 8 (*Brottsbalken* 16:8.).
- [81]. The constitutional Acts cover dissemination of messages by certain technical means such as printed materials or TV and radio or computer databases and they contain special provisions on the procedure and scope of criminal responsibility that make it

difficult to get convictions. The trial is before a jury, only the Chancellor of Justice (*Justitiekanslern*) can prosecute, formal rules of criminal responsibility ensure that only one person can be held responsible for any crime and the time of limitations is very short. All of the requirements are made in order to make successful prosecutions difficult, thus ensuring strong protection for freedom of speech in the media. Trials on the basis of the constitutional provisions are unusual, no more than a handful a year. Other forms of utterances not in the media (*e.g.* defamation by word of mouth) are covered by the criminal code. The criminal law requirements for proving such speech crimes are the same, however, the above special procedural requirements do not apply.

- [82]. The provisions – in constitutional and criminal law – make it a crime to, in any way, disseminate a message that includes threats or disdain towards a group of people on ground of their race, colour, of skin, nationality, ethnicity, faith or sexual inclination. The last portion of the regulation, on sexual inclination, was included in 2002, after some rather extensive debate that mainly related to how the criminal provision should be applied in religious contexts.
- [83]. The penalty is a maximum of two years in prison or fines. A serious crime – consisting of very threatening acts or widespread dissemination and attention – is subject to a minimum of six months in prison and a maximum penalty of four years imprisonment.
- [84]. It must first be noted that not only word, written or spoken, are included, but also symbols, actions (*e.g.* the “Heil Hitler” salute) and clothes can be said to convey a “message” in the meaning of the law (See Supreme Court case NJA 1996 s. 577).
- [85]. The message must have been “disseminated” in one way or another, which precludes criminal responsibility for wholly private conversation between two or a few persons. It is however not any longer so that any message must be made public, it is enough that a more undetermined group of people directly or indirectly receives it. Utterances at a private meeting with a group of more than a few persons attending will generally be covered. It is also worthy of notice that it is not required that the message actually was received by anyone, it is enough that there was a typical risk for such an effect (see for example RH 1998:77).
- [86]. A problematic part of the regulation in practice has been the criminalization of “disdain”, as this leaves a lot of interpretive space for the police, prosecutors and courts. The courts have, in

accordance with the intentions of the Parliament, taken a rather extensive view on what behavior and what expressions that can be said to express disdain on such grounds. (See for example Supreme Court cases NJA 1982 s. 128, NJA 1996 s. 577 and NJA 2006 s. 467) This has resulted in a second problem for the courts, as in some cases the European Convention on Human Rights (ECHR) Article 10 on freedom of speech has been interpreted as placing obstacles in the way for convictions that would be in accordance with Swedish law.

- [87]. A particularly debated case was the Supreme Courts decision in NJA 2005 s. 805 regarding a clergy-man who during a sermon spoke of the bible and the views expressed therein on homosexuality (the case of Åke Green). The Supreme Court found that the criminal code had to be interpreted in the light of the ECHR Article 9 and 10, that the situation was such that it was likely that the European Court of Human Rights would find a conviction to be a violation of the ECHR and therefore the court acquitted the accused.
- [88]. This case has had some follow-ups during 2006 and 2007, which goes in the same direction. It seems that the Supreme Court will convict persons that are rather clearly speaking out of a extreme right-wing perspective (as these groups, generally speaking, according to the case-law of the ECtHR will be not be protected by the ECHR). The Supreme Court for example, confirmed the convictions of two people who had distributed literature insulting to homosexuals in a school. On the other hand, the Supreme Court will be very careful to convict intolerant expressions made in a religious context. This practice is consistent with the approach of the Chancellor of Justice in regard of complaints of expressions in religious papers, radio-shows, etc., according to the constitutional provisions in the Freedom of Press and Freedom of Speech Acts.
- [89]. It should also be mentioned that the Criminal Code contains special provisions on aggravated penalties in cases of hate-based crimes, Ch 29 § 2. In 2002, crimes based on hate on the grounds of sexual orientation were added to the list in the paragraph.

F.2. Unlawful discrimination

- [90]. In the same part of the criminal code as hate speech, Chapter 16 para 9, discrimination against people on the same grounds of race, colour of skin, nationality, ethnicity, faith and homosexuality are forbidden. This prohibition is however directed to business-owners

and their employees and thus only applicable in the context of public life such as access to restaurants, taxis, theaters etc. Even if the concept of “business-owner” is interpreted widely in practice, it is a restriction of the protection against discrimination. People acting in the service of the (national or local) government, or on behalf of it, are also subject to criminal responsibility. From the preparatory works it is clear that this is mainly intended for services provided by the government that resemble commercial services, but the wording of the law is not totally clear on this and a certain uncertainty exists on the matter of the statute’s reach (see Övre Norrland Court of Appeal, case T 441-07, decided on 9 January 2008). In the second part of the paragraph, arrangers of public gatherings are included in the group covered by criminal liability.

- [91]. Discrimination on the labour-market and in other areas of social life is not covered by the criminal provision. Instead special legislation, now under reform, regulates that area. The most important current laws on this area are the Act Against Discrimination in Working Life (1999:130), the Act Against Discrimination on the Basis of Sexual Preferences (1999:133), the Act on Equal Treatment of Students (2001:1296) and the Act of Prohibition of Discrimination (2003:307). Notable differences between these later acts and the criminal regulation of unlawful discrimination are that the sanctions are private-law damages and that the criminal law only protects homosexuals, while the other regulation covers sexual orientation instead. This area of law is, as can be gathered by this short overview complex and not very easily understood by individuals. The whole area is therefore currently under reform.
- [92]. Criminal responsibility is conditioned on whether there has been any differential treatment between “ordinary” customers and the alleged victims of discrimination. This treatment can consist of acts as well as omissions. Typical cases are refusal to enter restaurants or other premises, or to order goods or services, obliging individuals to leave premises, etc. Conditions that on the surface seem neutral can be unlawful, if for example their primary effect is to exclude a certain group of people on the basis of race, etc. In NJA 1999 s. 556 the Supreme Court held that a prohibition on wearing long skirts in a supermarket was indirectly discriminatory of women of the Roma minority.
- [93]. Special note should be made on the fact that as unlawful discrimination is a criminal offence, the burden of proof is upon the prosecutor and the level of certainty demanded by the courts in relation to evidence is high. In practice this means that intentional

discrimination can be very hard to prove, even if the particular circumstances of a case give strong indications that one of the covered grounds could have influenced the decision (not to sell, rent, etc.) under trial. The Supreme Court in NJA 1996 s. 768 did not find it proven beyond reasonable doubt that a “bouncer” discriminated persons seeking entrance to a restaurant. There could have been other explanations for the refusal to admit three black men, according to the Court. In the Supreme Courts decision in NJA 1999 s. 639, other factors, such as private economy, could explain the refusal to rent a flat to a woman of foreign origin and in a Svea Court of Appeal case (B 8426-06, decided 8 November 2007) a mistake regarding a person’s sobriety could explain a bouncers’ refusal to admit a person into a restaurant.

[94]. Two more recent cases are also of interest in this context. In the first, a conviction in a local court was overturned by the Court of Appeal (case B 3145-05, decided 22 December 2006 by Skåne and Blekinge Court of Appeal). The Court of Appeal was not convinced that there was no other possible (and lawful) explanation for the selective admittance-policy in that case. Svea Court of Appeal (case B 2292-04, decided 15 November 2005) has also found that the prosecutor had not proven that the proprietor of a restaurant who had asked two women who had been kissing to leave had been guilty of discrimination on the basis of sexual orientation. As the higher courts seem to take a very strict view on the level of proof, the law seems to be somewhat ineffective.

[95]. A rather fresh case is of special interest in this regard. It is the judgement of the Gothenburg local court (case B 5893.06, decided 19 March 2007), where a law-student organized four groups of young men which sought entrance to several restaurants and clubs in town. Two groups consisted of “Swedish-looking” men and two with “foreign-looking” men. They then taped various attempts to enter popular places and at several of these the “foreign-looking” groups were not admitted, ostensibly due to lack of room, that they were not on special guests-lists, etc. The “Swedish-looking” groups however, were admitted to the very same places. The court had no problem in finding that the difference in treatment was related to ethnic factors- other explanations being unconvincing – and convicted the accused. It is of course unusual that the evidence is as clear as in this case. If this case will stand in the higher courts, it might be the signal of a somewhat less strict view on the level of evidence.

F.3. The criminal law in practice

- [96]. Statistics under this heading are reported in the Swedish National Council for Crime Prevention (*Brottsförebyggande rådet*) yearly reports on criminal activities, police and court practice. According to the number of crimes relating to reported (not solved) hate crimes in the year of 2006 was 3 259, of which 2 189 could be identified as related to ethnic groups and minorities. It should be stressed that the statistics does not contain any detailed information on hate-crimes based on homophobia and that it does not give specific information on the different grounds of hate-crimes. The numbers here given are a short summary, compensating for the lack of relevant information in Annex 2.
- [97]. The total number of hate-speech crimes reported 2006 was 754, but only 33 persons were actually convicted by a court or accepted criminal responsibility by a simplified procedure. None of these were sent to prison.
- [98]. Homophobia as a motive for crime could be identified in 684 reported crimes. In only 25 % of these reported cases/instances was the victim of the About 50 % of the accused and/or suspected persons in such cases were under 20 years old (Brå rapport 2007:17). The most usual crimes are unlawful threats and harassment (*olaga hot, ofredanade*) followed by violent crimes and slander. The numbers of crimes in each category is so few that there are large differences between studied years. It is thus hard to say anything statistically certain about trends etc., but it can be noted that in 2006, hate speech was the crime with the largest increase in reported cases, up 57 % from 2005, while unlawful discrimination on the grounds of sexual preferences declined by 27 %. In 2006 only 6 persons were actually convicted by a court for the crime of unlawful discrimination and no prison-sentences were handed down.
- [99]. From the statistics of 2006, it seems that the politically motivated hate-crimes being reported are declining (340 in 2004, 328 in 2005 and 304 in 2006). About 10 % of these instances concerns crimes on the basis of homophobia, the dominant type being race-related crimes. The numbers for these crimes alone are not declining as much as the rest, but the figures are too small to draw any more certain conclusions.

G. Transgender issues

[100]. Currently, in Sweden transsexuality is considered as an issue related to gender/sex identity and not to sexual orientation.³¹ It falls within the jurisdiction of the Equal Opportunities Ombudsman (JämO).³² In other words, transsexual persons were covered mainly through the prohibited discrimination ground “sex” in Swedish legislation, *i.e.* the notion ‘sexual orientation’ does not comprise the category of trans-persons.³³ However, only transsexual persons (*i.e.* not all kinds of trans-persons were included) were, for example, covered by the antidiscrimination clause of the Equality legislation (*jämställdhetslagen* (SFS 1991:433)). The notion ‘trans-persons’ comprises in the Swedish legal context those who are or who are perceived to be transsexuals, transvestites, intergenders, intersexuals, transgenderists, drag kings or drag queens. Trans-persons have been described as “individuals who at times or always have been perceived to have or express or be perceived as expressing a sexual identity that at times or always differs from the norm for the sex that is registered for them at birth.”³⁴

[101]. In order to modernise the Swedish legislation a Commission of Inquiry was set up by the Government and it has proposed in its final report SOU 2006:22 (*En sammanhållen diskrimineringslagstiftning*) that discrimination should be prohibited also on the grounds of sexual identity. This term has been described by the Committee as follows: “ ‘sexual identity’ refers to a person’s identity, appearance or behaviour as regards sex, regardless of whether the identity, appearance or behaviour differs from what is traditionally deemed to constitute the norm for men and women respectively”. In addition, the notion ‘sex’ as a ground of discrimination is understood as “the biological sex as registered for a person at birth or the sex that is later determined for her or him”.³⁵ It is assumed that through the discrimination grounds ‘sex’ and ‘sexual identity’ the proposed discrimination legislation will cover the whole group of trans-persons.³⁶ The above mentioned legislative initiative is at the time of writing under review.

³¹ Skr. 2005/06:95, p. 41. See also www.rfsu.se/transsexualism.asp and www.rfsl.se/?p=115

³² Ny diskrimineringslag, 19-03-2008, www.jamombud.se

³³ According to Sec 2 of the 1999 Employment Act the term ‘sexual orientation’ means a homosexual, bisexual or heterosexual orientation.

³⁴ SOU 2006:22, p. 52.

³⁵ SOU 2006:22, p. 52.

³⁶ *Ibid.*, p. 42.

- [102]. To total number of applications of persons who wanted to change their gender/sex between 1972 and 2006 was 590.³⁷ During 2006 approximately 60 persons applied for sexual reassignment surgery in Sweden.³⁸ It is the present Swedish 1972 Act on the establishment of sex identity (sexual designation) (*lag om fastställelse av könstillhörighet (SFS 1972:119)*) which sets down the conditions for change of sex - medically and legally. The 1972 Act requires *inter alia* that the applicant is adult, i.e. has attained 18 years of age, has been sterilised or omits reproductive ability otherwise (*i.e.* is sterile) in order to be considered for the change of sexual designation.
- [103]. Moreover, the Act allows transsexuals who have undergone gender reassignment surgery to get their personal documents reflecting the “new” gender (see also *folkbokföringslagen (SFS 1991:481)*). The new Act on secrecy (*sekretesslagen*) which is in force since 1 October 2006 also covers the relevant information about changes in sexual designation.
- [104]. Nevertheless, the 1972 Act, which was the first legislation in the world of its kind, has been heavily criticised by Swedish NGO:s as well as within academia as being old-fashioned³⁹ and even generating discriminatory attitudes and practice.⁴⁰ This law was promulgated during a time period in Swedish history when the eugenics debate still was vibrant. Transsexuality and sex identity disturbance is at present classified as a mental illness. NGO such as *Patientföreningen Benjamin* has pointed out that according to the transsexual persons themselves transsexuality is a biological variation and the medical/health care should be based on neurological basis instead.⁴¹ Mention should be made here of the fact that homosexuality is since 1979 no longer classified as a disease by the National Board of Health and Welfare.
- [105]. A government appointed Commission submitted a report containing a number of proposals for necessary legislative changes in March 2007 (SOU 2007:16, *Ändrad könstillhörighet- förslag till ny lag*). Among the generally positively received proposals are: firstly that the current requirement of being unmarried or divorced as a prerequisite for authorisation for change of sex shall be

³⁷ See *Transitionsstatistik*, www.rfsl.se/?p=2404 See also below Annex to Chapter G.

³⁸ SOU 2007:16, p. 11.

³⁹ See SOU 2007:16, pp. 96-102; Uppsala Universitet, Juridiska fakulteten, Remiss “*Ändrad könstillhörighet-förslag till ny lag (SOU 2007:16)*”, Dnr JURFAK 2007/38, 15 november 2007, p. 1; RFSL, *Yttrande över Ändrad könstillhörighet - förslag till ny lag (SOU 2007:16)*, Stockholm 8 november 2007, p. 2.

⁴⁰ www.rfsu.org/sou_2007_16asp ; www.foreningenbenjamin.se

⁴¹ SOU 2007:16, p. 97.

omitted (§ 4 in the proposed law) and secondly the introduction of a possibility to freeze gametes for future use for reproductive purpose. However, the requirement contained in the proposal for permitting a change of sexual designation to have the sex glands (Sw. *könskörtlarna*) removed without any exception has been considered by the reviewing instances as a potential violation of the concerned individual's self determination and the right to personal integrity.⁴²

- [106]. In Sweden the right to a name is governed by the Names Act of 1982 (*namnlagen* SFS 1982:670) with the latest amendments as of 2003 and it shall be registered at the national registration authority - the Swedish Tax Agency (*skatteverket*).⁴³ The legislation contains a provision (Sec 34) aimed at preventing the adoption of inappropriate forenames. In other words, approval shall be withheld when a name is considered offensive or it might be expected to cause embarrassment to the bearer or when a name for some other reasons is manifestly unsuitable as a forename. This provision has been interpreted that a man may not have a woman's name and *vice versa*. On the other hand, this would be no obstacle where the new sex of a person has been legally recognised.⁴⁴ However, the requirement that the first name corresponds to the person's sex in order to register a change of a name has been strongly criticised by the Swedish federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL) as being out-of-date and that one should be able to choose what ever name.⁴⁵ Of some relevance to the issue is that the Swedish Patent and Registration Office (*Patent- och Registreringsverket*) has produced a list of gender neutral names⁴⁶ which may be useful in situations when change of a name is desired.
- [107]. Finally, there is a gap in current Swedish anti-discrimination legislation in that sex is not a ground for a discrimination prohibition as regards the social services, health and medical care services.⁴⁷
- [108]. Recent research has shown that the resources for providing help in cases of domestic violence differ among heterosexual and other

⁴² RFSL, *ibid.*, pp. 2, 6-9.

⁴³ www.skatteverket.se/folkbokforing/namn.4.1.18e

⁴⁴ SOU 2007:16, p. 63. There are no statistics available with regard to the number of persons who have changed their names because of change of sex (telephone conversation with the Tax Authority on 18 January 2008).

⁴⁵ RFSL, *Yttrande över Ändrad könstillhörighet-förslag till ny lag* (SOU 2007:16), pp. 3, 17 and 23. See also RFSL, *Att byta namn*, www.rfsl.se/?p=3690

⁴⁶ www.prv.se/personnamn/konsneutrala_namn.html

⁴⁷ SOU 2006:22, p. 55.

kind relationships. In practice, there have been situations where lesbian victims of domestic abuse were not accepted by many women's shelters and a transgender person had nowhere to turn.⁴⁸

- [109]. Presently, the Swedish Equality Ombudsman Office (*JämO*) does not have at its disposal segregated statistics of cases involving discrimination with regard to transgender issues.⁴⁹

⁴⁸ G.Granström, *Challenging the Heteronormativity of Law*, in *Exploring the Limits of Law*, Å.Gunnarsson et al (eds.), Aldershot 2007, p. 131.

⁴⁹ Telephone conversation JämO (M.Jacobsson) on 25 March 2008. Efforts to locate statistics and case-law of relevance have not been successful, among others, Statistiska centralbyrån (CSB) (telephon call on 17 January 2008, email to the Swedish Section of AI (7 Januari 2008) and email to the Migrationcourt (migrationsöverdomstolen) (7 Januari 2008).

H. Good practices

- [110]. The Yogyakarta Principles have received a positive feedback by Swedish authorities as groundbreaking and the Swedish delegation made positive intervention in this regard, *i.e.* on sexual orientation and gender identity issues during the latest session of the UN Human Rights Council.
- [111]. The seminar in November 2007 attracted broad interest from government employees as well as from NGO attendance and civil society representatives.

Annex 1 – Case law

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

Case title	Dossier no 611-2007
Decision date	6 December 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Settlement –HomO
Key facts of the case (max. 500 chars)	A woman complained that she was dismissed from her job on grounds of her sexual orientation (bisexual)
Main reasoning/argumentation (max. 500 chars)	Dismissal on grounds of sexual orientation constitutes discrimination
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Discrimination on grounds of sexual orientation -dismissal
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	125 000 SEK were paid to the woman by the employer

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.

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

Case title	Case no T 3663-06
Decision date	25 February 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Huddinge District Court (tingsrätt)
Key facts of the case (max. 500 chars)	A lesbian patient has been exposed to a demeaning behaviour during emergency treatment
Main reasoning/argumentation (max. 500 chars)	Posing insensitive and detailed questions related to the person's sexual orientation and relations constitutes harassment on the grounds of sexual orientation
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	harassment
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Settlement, including 20 000 SEK in damages to the victim

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

Case title	Case no T439/05
Decision date	30 March 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	District Court of Nacka (tingsrätt)
Key facts of the case (max. 500 chars)	Sexual orientation discrimination
Main reasoning/argumentation (max. 500 chars)	The denial of the owner of a dog kennel to sell a dog to a lesbian woman constitutes direct discrimination on the grounds of sexual orientation and harassment
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Harassment and discrimination on the grounds of sexual orientation
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The owner of the kennel paid 20 000 SEK in damages

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

Case title	Case no T2100-05
Decision date	28 March 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	The Supreme Court of Sweden (Högsta domstolen)
Key facts of the case (max. 500 chars)	A lesbian couple was turned away from a restaurant for kissing and hugging on its premises
Main reasoning/argumentation (max. 500 chars)	In the view of the court the restaurant has not proved that there were legitimate reasons regardless of sexual orientation for turning the couple away
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Direct discrimination on the grounds of sexual orientation
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	15 000 SEK compensation

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

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

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

Case title	C-122 and C-125/99, <i>D and the Kingdom of Sweden v. Council</i> [2001] ECR I-4319
Decision date	2001
Reference details (type and title of court/body; in original language and English [official translation, if available])	European Court of Justice
Key facts of the case (max. 500 chars)	D who was in a registered partnership, had taken up employment with the Council and sought a EU staff household allowance for an accompanying partner
Main reasoning/argumentation (max. 500 chars)	Applicant, joined by Kingdom of Sweden, argued that the applicant was entitled to receive the allowance on a position of equality with a heterosexual marriage. Council rejected this.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Freedom of movement, discrimination, equal-treatment, respect for private and family life
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Council refusal to recognize a Swedish employee's registered partnership with a same sex partner was not in violation of discrimination rules in EC treaty

[copy template for next four cases]

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

Case title	No relevant cases
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

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

Case title	No relevant cases
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

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

Case title	No relevant cases
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

Chapter E, Freedom of assembly, case 1

Case title	No relevant cases
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

Chapter F, Hate speech, case 1

Case title	NJA 2005 p. 805
Decision date	2005-11-29
Reference details (type and title of court/body; in original language and English [official translation, if available])	Högsta domstolen [The Supreme Court]
Key facts of the case (max. 500 chars)	Preacher holding sermon and saying that homosexuality is against God, etc. the worst sentence including that homosexuality is “a cancer” in society.
Main reasoning/argumentation (max. 500 chars)	The Court finds the accused not guilty, mainly because of the impact of the European Convention of Human Rights and the protection of freedom of expression and freedom of religion contained therein.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The range of criminal responsibility for hate-crimes in religious context clarified.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	-

Case title	NJA 2006 p. 467
Decision date	2006-07-06

Reference details (type and title of court/body; in original language and English [official translation, if available])	Högsta domstolen [The Supreme Court]
Key facts of the case (max. 500 chars)	Young men handing out leaflets with right-wing propaganda at school, containing among other things statements about homosexuality as a disease, etc.
Main reasoning/argumentation (max. 500 chars)	The Court finds the accused guilty, mainly because the lack of any “serious” content of the leaflets and the special context of a school.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The range of criminal responsibility for hate-crimes in educational contexts clarified.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Accused (4 persons) convicted to prison by suspended sentence.

Chapter F, Hate crimes, case 1

Case title	No cases of special interest since 1996, i.e. outside the scope of this report.
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

Chapter G, Applicability of legislation on trans gender issues, case 1

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

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

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

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

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

[copy template for next four cases]

Annex 2 – Statistics

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

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	-	-	-	-	47	62	56	63
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
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.)								

Chapter B, Freedom of movement of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of LGBT partners who claimed their right to residence but were denied this right	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Chapter D, LGBT partners benefiting family reunification

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of demonstrations against tolerance of LGBT people.	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Range of sanctions issued for homophobic hate speech	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of non-criminal court cases initiated for homophobic statements	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Chapter F, Homophobic motivation of crimes as aggravating factor

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

Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender	-	-	-	-	-	-	-	-
Number of persons who changed their gender/sex in your country under the applicable legislation	22	27	38	27	35	49	58	-

Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation [presentation according to the templates above]