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TACKLING SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

Next steps in EU and Member State policy making




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INTRODUCTION

On 28 October 2014, the Italian Presidency of the Council of the EU, together with the EU Agency for Fundamental Rights (FRA) and the General Secretariat of the Council, hosted the high-level conference “Tackling sexual orientation and gender identity discrimination: next steps in EU and Member State policy making”.

The event brought together over 400 decision makers, experts, civil society organisations, national human rights bodies and practitioners from across the EU. The key speakers included: EU Commissioner for Justice, Fundamental Rights and Citizenship, Martine Reicherts; Irish Minister of State for New Communities, Culture and Equality, Aodhán Ó Ríordáin; Italy's Undersecretary of State, Ivan Scalfarotto; Germany's Parliamentary Secretary of State, Caren Marks; Croatia's Deputy Minister of Justice, Sandra Artuković Kunšt; Permanent Representative of Italy to the EU, Ambassador Stefano Sannino; FRA Director, Morten Kjaerum; as well as representatives from equality bodies, the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, law enforcement, business and many others. Video messages were sent in by European Parliament Vice-President, Ulrike Lunacek, and performance artist and spokesperson for equality, Conchita Wurst.

The conference aimed to take stock of the achievements and challenges ahead regarding the fundamental rights situation for LGBTI persons in the EU, at the start of the new EU legislature. The debates focused on the EU and Member State level and were informed by data collected by the EU Agency for Fundamental Rights (FRA).

Conference participants agreed that LGBTI persons residing in the EU enjoy considerably more rights than they did in past decades, even though the specific situation for the various LGBTI sub-groups differs significantly, also between EU Member States. The principles of equality and non-discrimination are firmly rooted in the EU Treaties and translated into secondary law – which national legislators have sought to transpose. However, despite these clear advancements, the conference discussions pointed to a number of challenges that LGBTI people still face. Concrete steps forward in terms of legislation, policies and institutional practices were suggested.

These conclusions summarise some of the key concerns and suggestions expressed by participants. They do not represent an absolute consensus of the issues discussed.

CHALLENGES OF DISCRIMINATION AND HATE CRIME

Discrimination on the grounds of sexual orientation and gender identity takes place in many areas of life, including employment, education, and access to goods and services. As FRA's EU LGBT survey shows, one in five of those respondents who were employed and/or looked for a job in the 12 months preceding the survey felt discriminated in the past year. This figure rose to one in three for transgender respondents. Whereas a number of employers increasingly recognise diversity as a positive factor in the work environment, too few have developed targeted strategies to promote diversity and combat negative stereotyping and harassment at the workplace.

Young LGBTI persons and children are particularly affected by physical and psychological **violence** and **bullying** including in environments that should grant the highest level of protection, such as school. An overwhelming majority of respondents in the FRA LGBT survey indicated they had heard or seen negative comments or conduct because a schoolmate/peer was perceived to be LGBT during their time at school. At the conference, a testimony of a young student provided examples of how bullying at school 'works' in practice and how school management does not always know how to react to such phenomena.

There is currently too little objective information about the fundamental rights situation of **intersex persons** in the EU. Civil society initiatives have raised awareness on the need for EU Member States to step up their work in this area and FRA has initiated some legal research on this issue.

Despite the widespread occurrence of **hate crime** as reported by LGBT persons in the FRA survey, over three quarters of these crimes are not reported to the police. Lack of rights awareness, low trust in the police, fear of homophobic or transphobic reactions by the police and shame are among most frequent reasons for not reporting.

I. LEGISLATION

1. European Union level

- While the EU has an instrument to combat discrimination on the ground of sexual orientation in the area of employment, the proposed Horizontal Anti-Discrimination Directive to extend this protection to other areas, such as health, education and access to other goods and services, is still being discussed. As suggested by EU Commissioner Reicherts, one way forward could be a change of the legal basis that would allow a group of Member States to go ahead and adopt the Directive under enhanced cooperation. Participants at the conference expressed diverging views on this suggestion with some emphasising positive elements and others hesitating to embrace this idea.
- Gender identity and gender expression should be explicitly recognised as protected grounds in EU non-discrimination legislation. In this regard, it was pointed out that some of EU's secondary legislation in other areas, such as the Directive on Asylum Qualification (recast) or the Victim's Rights Directive, already mention gender identity as one of the protected grounds. Furthermore, current EU non-discrimination legislation should be extended to include transgender people who either cannot or do not want to undergo gender reassignment; under the existing EU legal framework they are currently not explicitly recognised for protection.
- The scope of the 2008 Council Framework Decision on Racism and Xenophobia does not cover crimes based on a person's sexual orientation or gender identity. Member States can close this gap in the legal protection of LGBTI persons banning this kind of hate crimes under national law.

The Union should take appropriate action to combat discrimination based on a person's sexual orientation in accordance with Article 19 TFEU.

2. Member State level

- Conference participants discussed the challenges LGBTI persons and their family members face in some EU Member States when exercising their right **to freedom of movement** within the EU. As same-sex unions are not recognised in all EU Member States, same-sex partners (including children in these families) face legal and practical obstacles when traveling within the Union.
- As the EU institutions are negotiating the Horizontal Anti-Discrimination Directive, Member States could consider extending their national anti-discrimination legislation to cover sexual orientation and gender identity as protected grounds to all areas covered in the Racial Equality Directive.
- Member States should reconsider their legal provisions concerning the procedure of **legal gender recognition** and base these on the person's self-determination. National legislation should ensure the full legal recognition of a person's preferred gender. This would include enabling changes to the first name, social security number and other gender indicators on identification documents. Civil society representatives pointed out that 13 EU Member States require non-reversible infertility and 9 Member States require the person to be unmarried or to dissolve their marriage before they will legally recognise the new gender.

II. POLICIES AND PRACTICES

Conference participants agreed that legislation in itself is not sufficient to bring about positive change. Effective implementation of the legislative framework needs to be complemented with comprehensive policy frameworks, awareness raising campaigns addressing prejudices and encouraging change in social practices. To this end:

- The European Commission will develop a **comprehensive Action plan to promote equality of LGBTI** persons across the EU. To achieve this goal, Commission representatives stressed the need to work closely with the EU Member States in drafting such an Action Plan, so that EU efforts are rooted in Member States ownership of the process, including national, regional and local initiatives.

Participants variously recommended that:

- Member States should consider establishing **national action plans** addressing prejudice, discrimination and hate crime against LGBTI persons. The successful implementation of action plans depends largely on the cooperation and coordination of different governmental and non-governmental actors as well as organisations of professionals and practitioners, such as police officers, teachers and trade unions. One particular finding from the EU LGBT survey suggests that ‘policy works’: in countries where LGBT action plans or policies exist, LGBT persons report generally a better fundamental rights situation.
- EU Institutions and Member States should continue supporting the efforts of civil society organisations and local communities in **raising awareness** and promoting equality and diversity for LGBTI persons.
- Employers, in cooperation with trade unions, should take proactive measures to **promote equality and encourage diversity in working environments**. This could be done through dedicated campaigns, diversity and equality strategies at work and other measures. Examples of ‘good practices’ were given at the conference by representatives of trade unions and employers.

- Schools should design and implement policies aimed at **discouraging bullying against LGBTI students**. Teachers and students as well as parents should engage in open discussions to raise awareness on the particular problems faced by LGBTI persons. To this end, school curricula should include objective information on sexual orientation, gender identity and gender expression. Diversity training should be mandatory for teachers and social workers, enabling them to recognise the vulnerabilities of LGBTI students and helping them to prevent bullying and harassment.
- Measures to prevent and prosecute **homophobic and transphobic crime** and tackle under-reporting and under-recording of these hate crimes are essential. Effective strategies should be put in place in order to raise awareness among law enforcement about the issues LGBTI persons face and equip police officers with practical knowledge on how to recognise and deal with related hate crime incidents. This could be done through tailored training, LGBTI focal points within the police and practical guidelines to police officers. Examples of ‘good practices’ were given by conference participants.
- Effective and independent complaint mechanisms on police conduct or hate incidents perpetrated by law enforcement officials would help to tackle institutional forms of discrimination within the law enforcement agencies, and contribute to building trust with LGBTI community.

Forthcoming FRA research on the **role of public authorities** in combating discrimination on the grounds of sexual orientation and gender identity was highlighted. It will help civil servants, police officers, teachers and health officials to be better engaged in addressing the fundamental rights of LGBTI persons. A concerted and coordinated approach across the EU and its Member States that takes into account the above-mentioned points would bring the Union a step closer to ensuring full equality and respect for all citizens, irrespective of their sexual orientation or gender identity.