

FRA

Legal Study on Homophobia and
Discrimination on Grounds of Sexual
Orientation - Austria

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Executive summary

Implementation of Employment Directive 2000/78/EC

- [1]. As a result of the Austrian federal structure, the Directive had to be implemented at federal as well as at provincial level. All the acts implementing the Directive entered into force after December 2, 2003. The acts can be downloaded from the website of the *Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern (KlaV)* [Litigation Association of NGOs against discrimination (LitA)].¹
- [2]. The federal legislation provides protection from discrimination on grounds of sexual orientation only in the area of employment, whilst seven of the nine provinces (Burgenland, Carinthia, Salzburg, Styria, Upper Austria, the Tyrol and Vienna) expanded the scope of protection to the field of goods and services. In Lower Austria and Vorarlberg, protection from sexual orientation discrimination is restricted to employment.
- [3]. While the legislation adheres to the standards of the Directive, there are hardly any cases brought to the equality bodies and/or courts. This is best illustrated by the fact that there is only one court ruling. Some decisions have been delivered by equal treatment commissions but they are not enforceable.
- [4]. The low number of complaints and proceedings can probably be traced back to the ‘invisibility’ of the equality bodies. The new rights have only been promoted modestly and it is hard to find contact information for the equality bodies.

Freedom of movement

- [5]. By law, freedom of movement is guaranteed to EEA and Swiss citizens and to third-country national partners of EEA and Swiss citizens. Due to the lack of official data it is impossible to judge the number of same-sex partners of EEA/Swiss citizens residing in Austria.

¹ <http://www.klagsverband.at/recht.php> (08.02.2008).

Asylum and subsidiary protection

- [6]. A number of persons have been granted asylum due to their homosexuality or transsexuality, as can be deduced from decisions of the *Unabhängiger Bundesasylsenat (UVS)* [Independent Federal Asylum Review Board], published on the *Rechtsinformationssystem des Bundes (RIS)* [Federal Database for Legal Information] at <http://www.ris2.bka.gv.at>. Official statistics do not exist.

Family reunification

- [7]. Family reunification regulations are not applicable to same-sex partners of third-country nationals – unless they are married. The law does not explicitly state if marriages by same sex couples of countries where this is permitted are accepted in Austria.

Freedom of assembly

- [8]. The banning of pro and contra LGBT demonstrations is only possible if they infringe criminal law, public safety or the public well-being.
- [9]. There are regular assemblies promoting tolerance in favour of LGBT people. According to the Ministry of the Interior there are no statistical data on public demonstrations in favour of and/or against LGBT people in Austria.

Hate speech and criminal law

- [10]. Hate speech is not a separate category of law in Austria. It would be subsumed under Section 33 para. 1 (aggravating factors) or Section 283 (incitement to hatred) of the *Strafgesetzbuch* [Criminal Code]. Sexual orientation is definitely not included in Section 283, but could arguably be subsumed under ‘other specifically condemnable reasons’, even though there are as yet no judicial decisions providing such an interpretation.
- [11]. Still, homophobic hate speech may qualify as libel.
- [12]. Section 209 of the Criminal Code – setting the minimum age for sexual relations between men at 18, compared to 14 for sexual relations between heterosexuals and between women – was annulled

by the *Verfassungsgerichtshof* [Constitutional Court] in 2002. As a consequence, the new amended regulations prohibit acts of a sexual nature with persons under the age of 16 years in general. So far, however, they have only been applied to men in homosexual relations.

- [13]. In 2008, a Vienna court declared that a gay activist must accept being called a 'professional poof' – this judgment is not yet final.

Transgender issues

- [14]. In Austria, there is currently no specific legislation on changing sex/gender and changing names after a change of sex/gender. In 2006, the *Transsexuellen-Erlass* [Transsexual Order] that prohibited married persons from changing their name after a change of sex/gender was annulled by the Constitutional Court. New legislation is not expected before late 2009.

- [15]. The government coalition agreement (*Regierungsabkommen*) states on page 147 that 'the legal situation of transgender persons should be improved'.

Miscellaneous

- [16]. A draft act on registered partnerships ('*eingetragene Partnerschaft*') was presented on 24.10.2007. It has been in discussion ever since. At the moment, it is not known if and when it will enter into force.

Good practices

- [17]. A number of organisations, such as the *Österreichischer Gewerkschaftsbund (ÖGB)* [Austrian Trade Union Federation] have begun actively to promote LGBT interests.

A. Implementation of Employment Directive 2000/78/EC

- [18]. Due to Austria's federal structure, Directive 2000/78/EC (Employment Equality Directive) had to be implemented at both federal and provincial levels.
- [19]. While the implementation of the Employment Equality Directive regarding sexual orientation does not go beyond the minimum requirements regarding private labour contracts and the federal civil service regulated by federal law, provincial legislation in seven of the nine provinces covers employment and occupation, but also access to and supply of goods and services.
- [20]. At federal level, the principle of equal treatment irrespective of ethnic origin, religion or belief, age and sexual orientation is laid down in Part 2 of the *Gleichbehandlungsgesetz* [Equal Treatment Act (ETA)] under the heading 'Anti-discrimination'.²
- [21]. The ETA contains no statutory definition of sexual orientation. The explanatory notes state that sexual orientation is to be understood broadly. Protection against discrimination should apply to bisexual and homosexual employees, as well as to heterosexuals and bisexuals in a homosexually dominated working environment. Homosexual partnerships must not be discriminated against as compared to heterosexual partnerships.³ Nevertheless, fringe benefits can be restricted to married couples,⁴ although only heterosexual partners are eligible to marry.
- [22]. Currently, Section 17 para. 1 of ETA prohibits direct and indirect discrimination in the employment sphere on grounds of sexual orientation. Section 21 para. 1 provides that harassment shall be deemed to be discriminatory if a person is harassed (1) by the employer, (2) due to the employer culpably neglecting the duties imposed on him/her by statutes, collective agreements or individual contract to protect the person from discrimination, (3) by a third person in connection with his/her employment and (4) by third

² *Gleichbehandlungsgesetz* [Equal Treatment Act], Austria/BGBl I 66/2004, last amended by BGBl I 82/2005 (10.08.2005).

³ M. Windisch-Graetz (2004) 'Das Diskriminierungsverbot aufgrund der sexuellen Orientierung', in: ZAS, 2004, p. 11.

⁴ *Erläuterungen* [Explanatory notes] to Sec. 12 of the draft of the Equal Treatment Act, available on http://www.parlament.gv.at/PG/DE/XXII/ME/ME_00070/fname_000000.pdf (04.02.2008)

persons outside a specific employment relationship (this would cover, in particular, harassment by customers). Section 17 para. 3 provides that instruction to discriminate against a person shall also be deemed to be discriminatory.

- [23]. There is only one court ruling on discrimination on the ground of sexual orientation falling within the scope of the Equal Treatment Act (see Annex 1). In this case, the *Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern* [Litigation Association of NGOs against Discrimination] supported the plaintiff via intervention by a third party (see below). Two complaints have been decided by the ETC (see annex).
- [24]. The public institutions to promote equal treatment and anti-discrimination at federal level are the *Gleichbehandlungskommission (GBK)* [Equal Treatment Commission (ETC)] – consisting of three Senates⁵ – and the *Gleichbehandlungsanwaltschaft (GAW)* [Ombud for Equal Treatment (OET)] – consisting of three ombudspersons with equivalent areas of responsibility.⁶ Victims of discrimination on grounds of sexual orientation can decide freely if they want to file a court claim, or an application with the ETC, or to make use of the counselling services of the OET.
- [25]. Sexual orientation discrimination in private employment falling under the scope of the ETA is dealt with by Senate II of the ETC and the *Anwältin für Gleichbehandlung in der Arbeitswelt (GAW II)* [Ombud for Equal Treatment in employment irrespective of ethnic belonging, religion or belief, age or sexual orientation (OET II)].
- [26]. The ETC is an independent public body and consists of members of ministries and social partners.⁷ The procedure before the Commission is free of charge and applicants do not necessarily have to be represented by a legal counsel registered with the bar. Applicants can be represented by the OET, NGO representatives or any other person. During the ETC proceedings the parties involved do not confront each other face to face. The parties are interviewed individually by the members of the ETC. At the end of the proceedings the ETC delivers

⁵ Senate I is responsible for equal treatment between men and women in the employment area, Senate II is responsible for equal treatment irrespective of ethnic belonging, religion, belief, age and sexual orientation in employment, Senate III is responsible for equal treatment irrespective of ethnic belonging in other areas (the non-employment scope).

⁶ OET I is responsible for equal treatment between men and women in the employment area, OET II is responsible for equal treatment irrespective of ethnic belonging, religion, belief, age and sexual orientation in employment, OET III is responsible for equal treatment irrespective of ethnic belonging in other areas (the non-employment scope).

⁷ *Arbeiterkammer (AK)* [Chamber of Labour], *Wirtschaftskammer Österreich (WKÖ)* [Austrian Federal Economic Chamber].

an *Einzelfallprüfungsergebnis* (decision) stating if discrimination has occurred or not. If discrimination is established by a Senate of the ETC the decisions merely constitute non-enforceable recommendations rather than effective sanctions.⁸

- [27]. In cases of multiple discrimination falling under the scope of the ETA that include both gender discrimination and discrimination on the grounds of sexual orientation, Senate I of the ETC is competent. Correspondingly, the *Anwältin für die Gleichbehandlung von Frauen und Männern in der Arbeitswelt (GAW I)* [Ombud for Equal Treatment between men and women in employment (OET I)] is competent in cases of multiple discrimination.⁹
- [28]. If someone feels discriminated against on grounds of both his/her sexual orientation and of his/her disability, the person must first seek to reach a *Schlichtung* (settlement) with the *Bundesamt für Soziales und Behindertenwesen (BSB)* [Federal Office for Social and Disability Issues]. Only if the Federal Office declares that no settlement could be achieved can the person file a claim before a court.¹⁰
- [29]. The members of the Senates of the ETC and the OET can apply for a *Gutachten* (general opinion) of the Equal Treatment Commission in matters of general interest regarding discrimination. So far, no such general opinion has been adopted on sexual orientation.
- [30]. The Ombud for Equal Treatment is a public authority competent for all of Austria. It is located in Vienna. For gender issues (covering transgender) there are branch offices in Graz, Innsbruck, Klagenfurt and Linz. In cases of discrimination on the ground of sexual orientation, only the central office in Vienna is competent.
- [31]. The OET offers its services free of charge and confidentially. The body gives legal advice, supports victims of discrimination by

⁸ *Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft* [Act on the Equal Treatment Commission and the Ombud for Equal Treatment], Austria/BGBI I 108/1979 as amended by BGBI I 66/2004 last amended by BGBI I 82/2005 (10.08.2005).

⁹ For procedural matters concerning multiple discrimination see M. Windisch-Graetz (2005) 'Probleme der Mehrfachdiskriminierung', in: *DRdA* 2005, p. 238; A. Kletecka (2005) 'Durchsetzung der Diskriminierungsverbote', in: T. Tomandl, W. Schrammel (eds.) *Arbeitsrechtliche Diskriminierungsverbote*, Vienna: Braumueller, p. 93.

¹⁰ This procedure is laid down in Sec. 29 para. 4 ETA and Secs 7k, 7n and 7o of the *Behinderteneinstellungsgesetz* [Act on the employment of persons with a disability], Austria/BGBI 22/1970 as last amended by BGBI I 82/2005, (10.08.2005). For details see H. Hofer, W. Iser, K. Miller-Fahringer, M. Rubisch (2006) *Behindertengleichstellungsrecht*, Vienna Graz: n.w.v.

addressing potential discriminating parties and represents individuals in proceedings before the Equal Treatment Commission.¹¹

- [32]. So far, the ETC has delivered two decisions with regard to sexual orientation discrimination (see Annex 1). In one case a man was discriminated against by two fellow workers and sued them. A Labour Court awarded damages of 400 Euro from each for long-term harassment on the ground of sexual orientation and sexual harassment. In the other case, the Equal Treatment Commission denied that the dismissal of a lesbian couple – who were both employed by the same enterprise – was discriminatory.
- [33]. The ETA provides in sec 62 that the *Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern* [Litigation Association of NGOs against Discrimination] can support plaintiffs upon their request via *Nebenintervention* [intervention by a third party]. According to the sec 19 para 2 *Zivilprozessordnung* [Civil Procedure Code]¹² the intervener can offer evidence and act as long as his/her motions are not contrary to the motions of the plaintiff.
- [34]. The prohibition of discrimination on the ground of sexual orientation in employment with federal public bodies is laid down in Part 2 of the *Bundes-Gleichbehandlungsgesetz* [Federal Equal Treatment Act].¹³
- [35]. Individuals who feel discriminated against on the ground of sexual orientation can file an application with the *Bundes-Gleichbehandlungskommission (B-GBK)* [Federal Equal Treatment Commission]¹⁴ or file a court suit.
- [36]. There has only been one case of discrimination on the ground of sexual orientation within the police where the Federal Equal Treatment Commission found the procedures taken by the supervisors of the policeman involved to be discriminatory. There has not been a court decision as yet.
- [37]. Each of the nine federal provinces is responsible for the Directive's transposition into provincial law, in regard to the equal treatment of civil servants in provincial and communal administrations, and regarding the access to and supply of goods and services offered by the provinces and communities including social protection, social

¹¹ Act on the Equal Treatment Commission and the Ombud for Equal Treatment, Austria/BGBI I 108/1979 as amended by BGBI I 66/2004 last amended by BGBI I 82/2005 (10.08.2005).

¹² Austria/BGBI I 113/1895 last amended by BGBI I 7/2006 (13.01.2006).

¹³ Austria/BGBI I 100/1993 as last amended by BGBI I 96/2007, (28.12.2007).

¹⁴ Secs 22-24 *Bundes-Gleichbehandlungsgesetz* [Federal Equal Treatment Act], Austria/BGBI I 100/1993 as last amended by BGBI I 96/2007, (28.12.2007).

advantages, education and self employment. Seven provinces (Burgenland, Carinthia, Salzburg, Styria, the Tyrol, Upper Austria and Vienna) have provisions prohibiting discrimination on grounds of sexual orientation with regard to the access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment. Two provinces (Lower Austria and Vorarlberg) did not expand the scope of protection to the field of goods and services. There are no court decisions or binding administrative rulings within the scope of the Directive at provincial level.

- [38]. Generally, the specialised institutions of the provinces are very similar. On the one hand there are Equal Treatment Commissions that publish *Gutachten* (opinions) on individual discrimination cases. On the other hand, Equal Treatment/Anti-discrimination Contact Points or Equal Treatment/Anti-discrimination Commissioners operate in order to support individuals. It should be noted that Commissions, unlike Contact Points or Commissioners, are in general only competent in relation to civil service issues, i.e. discrimination in the provincial and communal administrations.
- [39]. According to information provided by the equality bodies at provincial level, no lawsuits regarding sexual orientation have yet been filed under any provincial laws.
- [40]. In the following chapters, the provincial legislation and equality bodies shall be briefly outlined to give an idea of the fragmentation and complexity of Austrian anti-discrimination legislation.

A.1.1. Burgenland

- [41]. The prohibition of discrimination on the ground of sexual orientation is laid down in the *Burgenländisches Antidiskriminierungsgesetz* [Anti-discrimination Act of Burgenland].¹⁵ The scope of protection encompasses the employment area (civil service) as well as the access to and supply of goods and services including social protection, social advantages, education and self employment.
- [42]. According to the *Antidiskriminierungsbeauftragter in Burgenland* [Commissioner for Anti-discrimination in Burgenland] there has been

¹⁵ Burgenland/LGBl 84/2005, (05.10.2005)

no complaint on the ground of sexual orientation and no court decision.¹⁶

A.1.2. Carinthia

- [43]. The prohibition of discrimination on the ground of sexual orientation is laid down in the *Kärntner Antidiskriminierungsgesetz* [Anti-discrimination Act of Carinthia].¹⁷ The act covers both areas, the employment as well as the access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment.
- [44]. According to the *Kärntner Antidiskriminierungsstelle* [Anti-discrimination Contact Point in Carinthia], there have been two complaints so far.¹⁸ In both cases a solution could be found through mediation. One of these cases concerned the civil service. In the other case, a lesbian couple argued that the income of the Austrian partner should be added to her partner's income for the purpose of determining eligibility to residence in Austria.

A.1.3. Lower Austria

- [45]. According to the *Niederösterreichisches Gleichbehandlungsgesetz* [Equal Treatment Act of Lower Austria] discrimination on grounds of sexual orientation is prohibited in civil service.¹⁹ The *Niederösterreichisches Antidiskriminierungsgesetz* [Anti-discrimination Act of Lower Austria] prohibits discrimination on the ground of sexual orientation with respect to access to self employment, professional advice, professional education and professional associations (Sec. 11).²⁰ Protection against discrimination concerning goods and services is restricted to grounds of ethnic origin.

¹⁶ Information provided upon request by telephone, Anti-discrimination Contact Point, (23.01.2008).

¹⁷ Carinthia/LGBI 63/2004, (28.12.2004)

¹⁸ Information provided upon request by email, Anti-discrimination Contact Point, (23.01.2008 and 24.01.2008).

¹⁹ Lower Austria/LGBI 69/1997, last amended by LGBI 40/2005 (29.04.2005).

²⁰ Lower Austria/LGBI 45/2005 (29.04.2005).

[46]. According to the *Gleichbehandlungsbeauftragte* [Commissioner for Equal Treatment] there has been no complaint concerning discrimination on the ground of sexual orientation so far.²¹

A.1.4. Salzburg

[47]. The *Salzburger Gleichbehandlungsgesetz* [Equal Treatment Act of Salzburg] provides protection against discrimination on the ground of sexual orientation with regard to civil service (Secs 4-11) and the access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment (Secs 28-29).²²

[48]. Public servants or individuals seeking employment within the Salzburg public administration who feel discriminated against, *inter alia*, on the ground of sexual orientation can submit an application to one of the Equal Treatment Commissions. The Commissions subsequently publish an opinion stating whether discrimination has occurred or not.

[49]. Five Equal Treatment Commissions operate within the public administration of the province of Salzburg:

- for the province of Salzburg,
- for provincial teachers,
- for the municipalities of the province of Salzburg (except the municipality of Salzburg),
- for provincial hospitals and
- for the municipality of Salzburg.

The Equal Treatment Commissions for the province of Salzburg,²³ for provincial teachers,²⁴ for provincial hospitals²⁵ and for municipalities²⁶ have had

²¹ Information provided upon request by email, Anti-discrimination Contact Point, Lower Austria, (24.01.2008).

²² Salzburg/LGBl 31/2006 (31.03.2006).

²³ Information provided upon request by telephone, President of the Commission (06.02.2008).

²⁴ Information provided upon request by telephone, President of the Commission (06.02.2008).

²⁵ Information provided upon request by telephone, President of the Commission (28.01.2008, 29.01.2008, 05.02.2008, 07.02.2008, 08.02. 2008).

²⁶ Information provided upon request by telephone (11.01.2008).

no sexual orientation discrimination complaints yet. The president of the Commission for the municipality of Salzburg could not be reached.²⁷

A.1.5. Styria

[50]. In Styria, the prohibition of discrimination in the civil service and regarding access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment is laid down in the *Steirisches Gleichbehandlungsgesetz* [Equal Treatment Act of Styria].²⁸ Sexual orientation is covered in both employment in the provincial and communal administrations and the access to and supply of goods and services offered by the provinces and communities including social protection, social advantages, education and self employment.

[51]. Two institutions are operating, the *Gleichbehandlungskommission* [Equal Treatment Commission] and the *Gleichbehandlungsbeauftragte* [Equal Treatment Commissioner]. The Commissioner gives advice to individuals. The Commission publishes *Gutachten* (opinions) on individual and group requests and applications.

[52]. Four complaints have been forwarded to the Commissioner, one in 2005 and three in 2007.²⁹ The Commissioner did not provide information on these cases.³⁰

A.1.6. The Tyrol

[53]. In the Tyrol, discrimination on the ground of sexual orientation in the civil service is prohibited by the *Tiroler Landes-Gleichbehandlungsgesetz* [Equal Treatment Act]³¹ and the *Gemeinde-Gleichbehandlungsgesetz* [Municipal Equal Treatment Act].³² Moreover, there are specific regulations for agricultural employees and teachers. The *Tiroler Antidiskriminierungsgesetz* [Anti-discrimination Act of the Tyrol]³³ regulates discrimination with regard

²⁷ Email request (23.01.2008) and several telephone calls (28.01.2008, 29.01.2008, 30.01.2008, 04.02.2008, 05.02.2008, 07.02.2008 and 08.02.2008).

²⁸ Styria/LGBI 66/2004 (28.10.2004).

²⁹ Information provided upon request via email, Equal Treatment Commissioner (07.02.2008).

³⁰ Email request (23.01.2008).

³¹ Tyrol/LGBI 1/2005 (11.01.2005).

³² Tyrol/LGBI 2/2005 (11.01.2005).

³³ Tyrol/LGBI 25/2005, (01.02.2005).

to the access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment.

- [54]. The Tyrolean *Antidiskriminierungsbeauftragte* [Anti-discrimination Commissioner] received one request in 2006 with regard to sexual orientation. It was settled without the use of legal remedies.³⁴

A.1.7. Upper Austria

- [55]. In Upper Austria, the prohibition of discrimination on the ground of sexual orientation in the civil service and with regard to goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment, is laid down in the *Oberösterreichisches Antidiskriminierungsgesetz* [Anti-discrimination Act of Upper Austria].³⁵

- [56]. Section 14 of the Anti-discrimination Act establishes an Anti-discrimination Contact Point. There have been four complaints with regard to discrimination on the ground of sexual orientation, three in 2006 and one in 2007.³⁶

A.1.8. Vienna

- [57]. In Vienna, discrimination on grounds of sexual orientation in the civil service is prohibited according to Sections 18a-18c and 67b-j of the *Wiener Dienstordnung* [Civil Servants Act of Vienna]³⁷ and in Sections 4a-4d and 54a-54i of the *Wiener Vertragsbedienstetenordnung* [Act on Contract Employees of Vienna].³⁸ The prohibition of discrimination with regard to access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment, is laid down in the *Wiener Antidiskriminierungsgesetz* [Anti-discrimination Act of Vienna].³⁹

- [58]. The Viennese *Antidiskriminierungsstelle* [Anti-discrimination Contact Point] is, *inter alia*, competent to advise and support all individuals

³⁴ Information provided upon request by email, Anti-discrimination Commissioner (24.01.2008).

³⁵ Upper Austria/LGBI 50/2005 (06.05.2005).

³⁶ Information provided upon request by email, Anti-discrimination Contact Point (24.01.2008).

³⁷ Vienna/LGBI 56/1994, last amended by LGBI 36/2004 (10.09.2004).

³⁸ Vienna/LGBI 50/1995, last amended by LGBI 36/2004 (10.09.2004).

³⁹ Vienna/LGBI 35/2004 (08.09.2004).

that feel discriminated against on the ground of sexual orientation. So far, two complaints have been forwarded to the Contact Point – one in 2006, the other in 2007.⁴⁰

- [59]. The *Wiener Antidiskriminierungsstelle für gleichgeschlechtliche Lebensweisen* [Anti-discrimination Contact Point for Lesbian, Gay and Transgender Lifestyles], located within the Vienna municipal administration, offers advice in a broad, primarily non-legal, sense. There are approximately 150 requests each year.⁴¹ Apart from responding to any such requests, the Contact Point is responsible for projects to promote tolerance for LGBT people.

A.1.9. Vorarlberg

- [60]. In Vorarlberg, discrimination on the ground of sexual orientation is prohibited in employment by the *Gesetz über das Verbot der Diskriminierung* [Act Prohibiting Discrimination].⁴² On 08.02.2008, a draft proposal to implement Council Directive 2004/113/EC was put forward.⁴³ No improvements for LGB persons are to be expected, whereas the scope of protection for transgender persons will be expanded to the access to and the supply of goods and services.
- [61]. According to Section 11 of the Act Prohibiting Discrimination, the *Landesvolksanwalt – Antidiskriminierungsstelle* [Ombud of the Province of Vorarlberg – Anti-discrimination Contact Point] is responsible for equal treatment issues.⁴⁴
- [62]. A compilation of the acts and equality bodies at federal as well as at provincial level can be downloaded from the website of the *Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern (KlaV)* [Litigation Association of NGOs against discrimination (LitA)].⁴⁵

⁴⁰ Information provided upon request by email, Viennese Anti-discrimination Contact Point (07.02.2008).

⁴¹ Information provided upon request by telephone, Anti-discrimination Contact Point for Lesbian, Gay and Transgender Lifestyles, Vienna municipal administration (07.02.2008).

⁴² Vorarlberg/ LGBl 17/2005 (28.05.2005).

⁴³ *Begutachtungsentwurf, Gesetz über eine Änderung des Antidiskriminierungsgesetzes* [Draft proposal , Act on an amendment of the Anti-discrimination Act] available at: http://www.vorarlberg.gv.at/vorarlberg/land_politik/land/gesetzgebung/weitereinformationen/newsletter/begutachtungsentwuerfe.htm (14.02.2008).

⁴⁴ The Ombud did not provide information. Telephone and email request (24.01.2008).

⁴⁵ See: <http://www.klagsverband.at/recht.php>, (14.02.2008).

B. Freedom of movement⁴⁶

- [63]. On 01.01.2006, the so-called *Fremdenrechtspaket 2005* [Aliens' Rights Package 2005]⁴⁷ entered into force.⁴⁸ It consists of the *Fremdenpolizeigesetz* [Aliens Police Act], the *Niederlassungs- und Aufenthaltsgesetz* [Settlement and Residence Act] and the *Asylgesetz* [Asylum Act]. Only the regulations relevant to same-sex couples are presented in this study.
- [64]. The *Niederlassungs- und Aufenthaltsgesetz* [Settlement and Residence Act]⁴⁹ makes a distinction between partners of EEA citizens who are EEA/Swiss citizens and those who are third country nationals.
- [65]. Sec 2 para 1 no 9 Settlement and Residence Act defines *Familienangehörige* (family members) as spouses or unmarried minor children. Therefore unmarried partners do not qualify as family members. It is not clear if authorities accept marriages of same sex couples of countries where this is permitted as it is not explicitly regulated in the law. A search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] shows no case law. Also, competent authorities who were contacted on this issue could not provide relevant information.⁵⁰
- [66]. For purposes of family reunification, lesbian and gay couples are considered *Lebenspartner* (partners) if they can prove a stable relationship in their country of origin and received *Unterhalt* (subsistence). If they originate from a country where there is a registered partnership for same-sex couples, they can prove this via this registration. Otherwise, the existence of such a partnership can be proved in other ways, e.g. by providing witnesses, documents, photos or a registration card. There is no legal minimum period of time for which the 'stable partnership' must have lasted in the country of origin. It is essential that the partners intend to have and maintain a partnership.

⁴⁶ See S. Schuhmacher, J. Peyerl (2006) *Fremdenrecht*, second edition, Vienna: OeGB Verlag, pp. 100-104.

⁴⁷ *Fremdenrechtspaket 2005* [Aliens' Rights Package], Austria / BGBl 100/2005, (16.08.2005).

⁴⁸ The most comprehensive textbook on the Aliens' Rights Package: R. Bruckner, H. Doszokil, T. Marth, W. Taucher, M. Vogl (2008) *Fremdenrechtspaket*, third revised edition, Vienna: nww.

⁴⁹ Austria/BGBl I 157/2005, last amended by BGBl I 4/2008 (04.01.2008).

⁵⁰ Information provided upon request by a representative of the Municipal Department 35 of the City of Vienna, by e-mail (26.03.2008).

- [67]. There are no official figures on how many LGBT partners of EEA citizens reside in Austria.⁵¹
- [68]. Partners of EEA/Swiss citizens who are EEA/Swiss citizens themselves are entitled to settlement in Austria. In many cases they will have an original right to settlement themselves.⁵² The right to residence is attributed primarily by EC law and there is no need to apply to the Austrian authorities. They can receive an *Anmeldebescheinigung* (registration certificate) if they possess a passport, health insurance and sufficient money. Unlike third country nationals, no minimum amount of money must be demanded by the authorities.
- [69]. According to Section 56 of the Settlement and Residence Act, third country national partners of EEA/Swiss citizens can obtain a quota-free *Niederlassungsbewilligung – Angehöriger* (Settlement Permit – Family Member). The EEA/Swiss partner has to prove the necessary *Unterhalt* (subsistence) and to make a *Haftungserklärung* (Declaration of Liability), in which she or he commits her or himself to cover all relevant costs.
- [70]. The Settlement Permit – Family Member is issued for a period of twelve months. The holder of this permit can apply for a *Niederlassungsbewilligung – beschränkt* (Settlement Permit – Restricted), which guarantees an original right of settlement. Therefore the general requirements must be fulfilled and the person must possess a *Sicherungsbescheinigung* (Certificate of intent to grant a work permit) in accordance with Section 11 of the *Ausländerbeschäftigungsgesetz* [Aliens Employment Act].⁵³ As mentioned above, it is not clear whether authorities accept marriages of same sex couples of countries where this is permitted.
- [71].

⁵¹ Information provided upon request via email by a representative of the Ministry of the Interior, department III/4 (06.02.2008).

⁵² Secs 52, 53, 57 *Niederlassungs- und Aufenthaltsgesetz* [Settlement and Residence Act], Austria / BGBl I 157/2005, last amended by BGBl I 4/2008 (04.01.2008).

⁵³ *Ausländerbeschäftigungsgesetz* [Aliens Employment Act], Austria/BGBl 218/1975, last amended by BGBl I 78/2007, (13.11.2007).

C. Asylum and subsidiary protection

- [72]. No official data are available either on the number of persons who were granted asylum or subsidiary protection because of persecution on the ground of sexual orientation, or on family members of such persons.⁵⁴
- [73]. In Austria, asylum law is laid down in the *Asylgesetz 2005* [Asylum Act 2005].⁵⁵ LGBT people are considered to be a particular social group by the dominant doctrine⁵⁶ and practice⁵⁷ and are therefore protected by the Geneva Refugee Convention.
- [74]. A search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] shows a number of decisions by the *Bundesasylamt* (BAA) [Federal Asylum Office] and the *Unabhängiger Bundesasylsenat* (UBAS) [Independent Federal Asylum Tribunal] in favour of LGBT asylum seekers. Moreover, there are two negative decisions, i.e. denying the claim to asylum, from the *Verwaltungsgerichtshof* (VwGH) [High Administrative Court] but none from the *Verfassungsgerichtshof* (VfGH) [Constitutional Court].
- [75]. Decisions mostly concern Iranian, Afghan and Ukrainian LGBT persons, the most recent decision dating from 2006, where a transsexual Iranian person was recognised as a refugee because of judicial prosecution due to her transsexuality (see Annex 1).
- [76]. Family reunification of refugees is only possible under the regime of the Settlement and Residence Act. Only spouses and minor children are entitled to apply for a *Niederlassungsbewilligung – unbeschränkt* [Settlement Permit – Unrestricted]. Therefore, family reunification of same-sex partners – unless they are married – is not possible.
- [77]. A search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] does not show any decisions on family reunification under the Settlement and Residence Act.

⁵⁴ Information provided upon request by email, Ministry of the Interior, department III/5 (24.01.2008).

⁵⁵ Austria/BGBl I 2005/100, last amended by BGBl 2008/4 (14.01.2008).

⁵⁶ S. Schuhmacher, J. Peyrl (2006): *Fremdenrecht*, second edition, Vienna: ÖGB Verlag, pp. 176-177.

⁵⁷ See decision described in Annex 1 and Austria/Unabhängiger Bundesasylsenat/240.479/0-VIII/22/03, (10.05.2004); Austria/Unabhängiger Bundesasylsenat/261.132/4-VIII/40/05, (14.07.2005); Austria/Unabhängiger Bundesasylsenat/234.179/0-IV/44/03, (03.12.2004).

D. Family reunification

- [78]. According to Sections 46, 50 and 69 of the Settlement and Residence Act⁵⁸ family reunification is restricted to spouses and unmarried minor children. Therefore, family reunification of third country national partners with third country nationals residing in Austria is only possible if they are married.
- [79]. A search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] does not show any decisions on family reunification of LGBT partners and unmarried minor children under Settlement and Residence Act.
- [80]. There are no relevant legal literature and interpretation by authorities available with regard to same sex couples married in a country of origin where same sex marriage is permitted⁵⁹.
- [81]. No statistics are available⁶⁰.

⁵⁸ Settlement and Residence Act, Austria/BGBl I 157/2005, last amended by BGBl I 4/2008 (04.01.2008).

⁵⁹ Information provided upon request by a representative of the Municipal Department 35 of the City of Vienna, via e-mail (26.03.2008).

⁶⁰ Information provided upon request via email by a representative of the Ministry of the Interior, department III/4 (06.02.2008).

E. Freedom of assembly

- [82]. The principle of freedom of assembly is laid down in two constitutional statutes, namely Article 12 of the *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* [Constitutional Law on General Rights of Citizens]⁶¹ for citizens only, and Article 11 of the *Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten* [European Convention for the Protection of Human Rights and Fundamental Freedoms]⁶² irrespective of nationality. The *Versammlungsgesetz 1953* [Assembly Act 1953]⁶³ sets out in more detail the requirements regarding notification (Sec. 1) and the prohibition of assemblies that violate criminal law or public order (Sec. 6). Moreover, foreigners are not allowed to act as organisers of an assembly, and it is forbidden to hide the face or to use instruments that prevent persons from being identified (Sec 9). However, no special regulations exist for assemblies of LGBT persons.
- [83]. According to Section 2 of the Assembly Act 1953, assemblies open to the public have to be notified to the police or the *Bezirksverwaltungsbehörde* (BH) [District Administration Authority] at least 24 hours in advance.
- [84]. Section 6 of the Assembly Act 1953 provides that the public authorities have to ban demonstration infringing criminal law, public security and the public well-being. General demonstrations in favour of LGBT persons are therefore legal.
- [85]. Demonstrations against LGBT persons are legal under the same conditions.
- [86]. A search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] shows no case law.
- [87]. In Austria, several public events are organised in favour of tolerance of LGBT people. The best known example is the annual *Regenbogenparade* [Rainbow Parade] in Vienna. Local associations and individuals hold numerous comparable events. However, no

⁶¹ Austria/RGBl 1867/142 (21.12.1867).

⁶² Austria/BGBl 1958/210, last amended by BGBl III 2002/179 (06.08.2002).

⁶³ Austria/BGBl 1953/98, last amended by BGBl I 2002/127 (13.08.2002).

official statistics exist on events either in favour of, or against, LGBT people in Austria.⁶⁴

⁶⁴ No information has been provided by the Ministry of the Interior or the Bundespolizeidirektion Wien (BPD Wien) [Vienna Federal Police Bureau] upon request via telephone and email (22.01.2008).

F. Criminal law

- [88]. Hate speech and hate crimes are not commonly used terms in Austrian (criminal) law. Special provisions in criminal law on homophobic crimes do not exist, and statistics on homophobic crimes are not available.
- [89]. Nevertheless, a number of related terms can be found in the *Strafgesetzbuch* [Criminal Code].⁶⁵ Section 283 of the Criminal Code prohibits incitement to hate directed against churches or persons on the grounds of their religion, race, ethnic group or state of origin. LGBT persons are not protected.
- [90]. Section 33 para. 1 of the Criminal Code states that ‘racist, xenophobic or other specifically condemnable reasons’ are an aggravating factor in the determination of penalties. Homophobic reasons could therefore be considered as aggravating factors. Nevertheless, it should be mentioned that this interpretation cannot be based on legal literature or court decisions.
- [91]. Recently, Gery Keszler, organiser of the annual pro-LGBT ‘Life Ball’ was called a ‘*Berufsschwuchtel*’ (‘professional poof’) in an article in the right-wing weekly magazine *Zur Zeit*.⁶⁶ The element *Beleidigung* (libel) is regulated in Section 115 of the Criminal Code⁶⁷ and is – according to Section 117 of the Criminal Code – a so-called *Privatanklagedelikt*⁶⁸ (crime subject to private prosecution). On 15.01.2008, the *Straflandesgericht Wien* [Vienna Regional Criminal Court] found the author not guilty. According to a newspaper article,⁶⁹ the judge argued that the remark could constitute libel, but a public figure such as Mr Keszler should be expected to be subject to such a level of public criticism. Due to the appeal filed by Mr Keszler, the decision is not yet final. It has not been published.
- [92]. Therefore, homophobic hate speech may qualify as libel (sec 115 Criminal Code) but is not covered by incitement to hate (sec 283 Criminal Code).

⁶⁵ Austria/BGBI1974/60, last amended by BGBI I 2007/112 (28.12.2007)

⁶⁶ *Zur Zeit* magazine, available at: <http://www.zurzeit.at> (07.02.2008).

⁶⁷ C. Bertel, K. Schwaighofer (2008) *Oesterreichisches Strafrecht: Besonderer Teil §§ 75 bis 168b StGB*, Vienna New York: Springer, pp. 139-143.

⁶⁸ C. Bertel, K. Schwaighofer (2008) *Oesterreichisches Strafrecht: Besonderer Teil §§ 75 bis 168b StGB*, Vienna New York: Springer, pp. 144-147.

⁶⁹ *diestandard.at* (16.01.2008), ‘Gery Keszler als “Berufsschwuchtel” bezeichnet: Klage abgewiesen’, available at: <http://diestandard.at/?id=1200408517742> (14.02.2008).

- [93]. Moreover, homophobic hate speech is covered by the ETA as Belästigung [harassment] in employment.
- [94]. Ehrenbeleidigung [Insult] is laid down in sect. 1330 Allgemeines Bürgerliches Gesetzbuch (Civil Code). It covers all kinds of violations of human dignity by verbal abuse, hurt or mockery⁷⁰. Homophobic hate speech can be qualified as insult. Still, a search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] does not show any decisions.
- [95]. Until 2002, the most severe form of discrimination against gay people in Austria could be found in Section 209 of the Criminal Code. While there was a general minimum age of 14 years for sexual relations among heterosexuals or between two women, Section 209 prohibited male persons who had attained the age of 19 years from ‘fornicating’ with a person of the same sex who had attained the age of 14 years but not the age of 18 years. In 2002, upon a request for review made by the *Straflandesgericht Innsbruck* [Innsbruck Regional Criminal Court], the Constitutional Court found that Section 209 of the Criminal Code was unconstitutional. This decision was the consequence of a number of judgements delivered by the European Court of Human Rights that established different age limits for men and women for sexual relations to be in breach of Articles 8 and 14 of the European Convention on Human Rights.⁷¹ Subsequently, more neutral clauses were introduced into the Criminal Code, setting the age at 16 years for all sexual relations.⁷² Even now that the law is apparently neutral, experience shows that these sections are mainly targeted at gay men. Court cases relying upon the new regulations that were initiated in 2002 only concerned male homosexual relations.⁷³ In the first half of 2003, half of the criminal court proceedings initiated still concerned male-male relations.⁷⁴ This discriminatory application

⁷⁰ H. Koziol, R. Welsner (2008) *Grundriss des bürgerlichen Rechts. Band II*, Vienna. Manz, p. 349.

⁷¹ *S.L. vs. Austria*, 9 January 2003; *L. and V. vs Austria*, 9 January 2003; *R.H. vs. Austria*, 19 January 2006; *Wolfmeyer vs. Austria*, 12 May 2005.

⁷² Secs 207a and 208 Criminal Code.

⁷³ Austria / Bundesministerium für Justiz, *Anfragebeantwortung durch den Bundesminister für Justiz Dr. Dieter Böhmdorfer zu der schriftlichen Anfrage (91/J) der Abgeordneten Dr. Caspar Einem, Kolleginnen und Kollegen an den Bundesminister für Justiz betreffend strafrechtliche Verfolgung homo- und bisexueller Männer (§ 209 StGB)* (04.04.2003), available at: http://www.parlament.gv.at/PG/DE/XXII/AB/AB_00091/fname_002664.pdf (20.02.2008).

⁷⁴ Austria / Bundesministerium für Justiz, *Anfragebeantwortung durch den Bundesminister für Justiz Dr. Dieter Böhmdorfer zu der schriftlichen Anfrage (656/J) der Abgeordneten Mag. Melitta Trunk, Kolleginnen und Kollegen an den Bundesminister für Justiz betreffend ausschließliche Anwendung des §207b StGB gegen homosexuelle Männer*, (05.09.2003), available at: http://www.parlament.gv.at/PG/DE/XXII/AB/AB_00660/fname_007871.pdf (20.02.2008).

of Section 207a of the Criminal Code even triggered the European Parliament to call upon Austria to apply the new regulations in a non-discriminatory manner.⁷⁵ However, persons who had been convicted under Section 209 of the Criminal Code have not been compensated. Moreover, the nationwide retention of records of convictions under Section 209 in the *Strafregister* [Registry of Convictions] is still being upheld, as this practice was confirmed by the Constitutional Court in 2006.⁷⁶

⁷⁵ For details see: H. Graupner (2004) 'Austria', in: Report of the European Group of Experts on Combating Sexual Orientation Discrimination (2004), *Combating Sexual Orientation Discrimination in Employment, legislation in 15 EU member states*, p. 54, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/sexorfull_a.pdf (20.02.2008).

⁷⁶ Austria/Verfassungsgerichtshof/B0742/06 (04.10.2006).

G. Transgender Issues

- [96]. The ETA does not make explicit reference to transgender issues. However, transgender-specific issues, including sexual identity and transsexuality, are considered by legal doctrine to be covered by the discrimination ground of gender⁷⁷, a position which corresponds to that of the government (see below). Consequently, transgender issues should fall within the scope of Part 1 of the Equal Treatment Act, headed 'Equal treatment of men and women in the employment area'.⁷⁸
- [97]. In the course of 2008, Council Directive 2004/113/EC prohibiting discrimination between men and women in access to and supply of goods and services will be transposed into national law. The respective provisions will be incorporated into the Equal Treatment Act. According to the explanatory notes to the government bill, transgender people will be protected from discrimination in the field of goods and services, as this is considered as discrimination on grounds of gender.⁷⁹ However, the new provisions will not apply to lesbians, gay men and bisexuals.
- [98]. In Austria, no specific legislation on transgender issues is so far in place. If transgender persons feel discriminated against, their complaint is filed under the discrimination ground of gender in accordance with the applicable Equal Treatment Acts and Anti-discrimination Acts.
- [99]. The legal basis for a change of name can be found in the *Personenstandsgesetz* [Personal Status Act]⁸⁰ and the *Namensrechtsänderungsgesetz* [Change of Name Act].⁸¹
- [100]. No statistics exist on how many persons have changed their sex/gender, or how many name changes have been effected due to changes of gender.
- [101]. The Personal Status Act stipulates that the authorities keep *Personenstandbücher* [Personal Status Registers] that hold the names, birth dates, dates of marriages and dates of death of individuals.

⁷⁷ N. Bei (1997) 'Diskriminierung transsexueller Personen', in: *DRdA* 1997, p. 245

⁷⁸ M. Windisch-Graetz (2005) '§ 17', in: R. Rebhahn (ed.) *GIBG – Gleichbehandlungsgesetz Kommentar*, Wien New York: Springer, p. 446.

⁷⁹ Austria / *Erläuterungen* [Explanatory Notes]/ RV 415dB XXIII. GP, available at: http://www.parlament.gv.at/PG/DE/XXIII/I/I_00415/fname_096505.pdf (08.01.2008).

⁸⁰ Austria/BGBI 1983/60, last amended by BGBI I 2005/100 (16.08.2005).

⁸¹ Austria/BGBI 1988/195, last amended by BGBI 1995/25 (05.01.1995).

Section 16 reads as follows: ‘The Personal Status Authority has to change a registration if it has become incorrect.’

- [102]. Section 2 para. 2 no 3 of the Change of Name Act provides that forenames can be changed if ‘the forename is not in accordance with the holder’s sex’.
- [103]. In 1996, the Ministry of the Interior (MoI) issued an *Erlass* (internal order), the so-called *Transsexuellen-Erlass* [Transsexual Order],⁸² stating that after a change of gender a name can only be changed (to another name typical for the other sex) if the person (a) provides a medical opinion on several physical and medical prerequisites (2.2) and (b) has changed the notification of his/her sex in the *Geburtenregister* [Register of Births] (3). The change of notification in the Register of Births could only be effected if the person was not married (2.4).
- [104]. The Constitutional Court annulled this order due to formal publication deficiencies (it had not been published as a formal decree but as an internal order only). Moreover, the Court ruled that there is no legally valid reason to restrict the correction of incorrect data in public registers to unmarried persons.⁸³
- [105]. The government coalition agreement states on page 147 that ‘the legal situation of transgender persons should be improved’.
- [106]. According to the Constitutional Court decision of 2006, after a change of sex, persons can rectify their names in the Register of Births and subsequently change their name. Nevertheless, there is still no explicit legal basis, and specific legislation on the change of name is expected no earlier than late 2009.⁸⁴
- [107]. A search on the *Rechtsinformationssystem des Bundes* (RIS) [Federal Legal Information Service] does not show any decisions.

⁸² BMI Zahl: 36.250/66-IV/4/9 (27.11.1996).

⁸³ Austria/Verfassungsgerichtshof/B947/05 (21.06.2006).

⁸⁴ Information provided upon telephone request by the Ministry of the Interior, department III/2 (22.01.2008).

H. Miscellaneous

[108]. On 24.10.2007, the Austrian Minister of Justice presented a draft *Gesetz über die Eingetragene Lebenspartnerschaft* [Law on Registered Partnerships].⁸⁵ It is not foreseeable at the moment if and when this draft will be discussed in parliament. At present, there are ongoing discussions on various details (where and how the partnership can be contracted,⁸⁶ what the exact rights and duties that emerge from such a partnership are, what possibilities there are for adoption,⁸⁷ what the distinctions are from regular forms of marriage,⁸⁸ etc.).

⁸⁵ Justizressort, Bundesministerium für Inneres [Justice Department, Ministry of the Interior], 'Berger präsentiert Gesetzesentwurf zu eingetragenen Partnerschaften' (24.10.2007), available at: <http://www.bmj.gv.at/service/content.php?nav=66&id=386> (14.02.2008).

⁸⁶ *derstandard.at*, (21.11.2007) 'ÖVP gegen Zeremonie und für längere Trennungsfrist', available at: <http://derstandard.at/?url=/?id=3118469> (14.02.2008).

⁸⁷ *Wiener Zeitung*, (17.10.2007) 'Quasi-Ehe für Homosexuelle kommt', available at: <http://www.wienerzeitung.at/DesktopDefault.aspx?TabID=4103&Alias=wzo&cob=307827> (14.02.2008).

⁸⁸ *ots.at*, (28.11.2007) 'Donnerbauer: Für eingetragene gleichgeschlechtliche Partnerschaft aber gegen Adoptionsrecht', available at: http://www.ots.at/presseaussendung.php?schluessel=OTS_20071128_OTSO262 (14.02.2008).

I. Good practices

- [109]. Only very few persons and organisations in Austria – apart from LGBT associations – promote the rights of LGBT people. Lately, the president of the *Österreichischer Gewerkschaftsbund (ÖGB)* [Austrian Trade Union Federation] asked for the adoption of Collective Agreements⁸⁹ in order to combat discrimination against LGBT people.
- [110]. In February 2008, one male officer of the Austrian army returned to his post after a change of gender⁹⁰. The Austrian army accepted his decision. This case was broadly discussed in the media. Still – as women can serve as officers in the Austrian army -, it should not be mentioned as “good practice” because the army only behaved according to the law.

⁸⁹ *ots.at*, (28.10.2007) ‘Hundstorfer: Diskriminierung Homosexueller hat am Arbeitsplatz nichts zu suchen’, available at:
http://www.ots.at/presseaussendung.php?schluessel=OTS_20071028_OT0011&ch=politik
(14.02.2008).

⁹⁰ <http://steiermark.orf.at/stories/254822/forum/?page=10> (19.03.2008)

Annex 1 – Case law

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

Case title	Lorry driver
Decision date	14.07.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Landesgericht Salzburg</i> [Regional Court of Salzburg], 18Cga120/05t
Key facts of the case (max. 500 chars)	The plaintiff is a lorry driver. He has been harassed and sexually harassed since before the entry into force of the Equal Treatment Act prohibiting discrimination on ground of sexual orientation in employment and occupation. The defendants were two of more persons making discriminatory, obscene and humiliating remarks connected to his sexual orientation. The remarks continued although his employer instructed them to refrain from such behaviour. Supported by the Litigation Association of NGOs against Discrimination ⁹¹ and represented by a barrister the plaintiff sued two persons for 400 Euro each.
Main reasoning/argumentation (max. 500 chars)	The plaintiff only intended to obtain a symbolic amount of money, knowing that the minimum sum for sexual harassment is 720 Euro (400 Euro for harassment). The court had no doubt that harassment and sexual harassment in the sphere of employment under the Directive and the Equal Treatment Act had taken place. The decision argues in detail that harassment can be committed in a variety of ways – spoken word, exclusion and physical violation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Concept of harassment and sexual harassment, involvement of NGOs (<i>Nebenintervention</i>) to support victims of discrimination in court actions under the Equal Treatment Act, shifting of the burden of proof.

⁹¹ *Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern* – <http://www.klagsverband.at>

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

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The defendants were sentenced to pay the plaintiff 400 Euro each for harassment and sexual harassment. Due to the fact that the plaintiff only sued for the minimum amount for harassment (and even less than the minimum for sexual harassment) this decision cannot have any consequences with respect to clarifying how to measure immaterial damages.
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Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	Discriminatory transfer to another police unit
Decision date	No date
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Senat II der Gleichbehandlungskommission des Bundes</i> [Senate II of the Federal Equal Treatment Commission], 7. Gutachten 2006 http://www.frauen.bka.gv.at/DocView.axd?CobId=20675
Key facts of the case (max. 500 chars)	The applicant is a policeman. After announcing his (homo)sexual orientation he was subjected to discrimination by his supervisors. He was transferred from a special unit to another post. The other colleagues involved in this incident stayed in the special unit without facing consequences.
Main reasoning/argumentation (max. 500 chars)	The Commission decided that the applicant had been discriminated against on the ground of his sexual orientation, as the defendant could not bring forward any facts indicating that the applicant had been treated equally to his colleagues. Moreover, the Commission refused the supervisors' justification that he was transferred to another unit to protect him against possible harassment. Such 'protection' must not be introduced against the will of the person.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The decision clarified that the burden of proof is clearly shifted to the defendant.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Senate recommended that the applicant should be transferred back to the special unit again.

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

Case title	No discriminatory dismissal of two employees
Decision date	No date
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Senat II der Gleichbehandlungskommission</i> [Senate II of the Equal Treatment Commission] http://www.frauen.bka.gv.at/DocView.axd?CobId=24553
Key facts of the case (max. 500 chars)	The two applicants were employed by the same employer. Both of them were dismissed. They considered themselves discriminated against on ground of their sexual orientation.
Main reasoning/argumentation (max. 500 chars)	The applicants argued that they were dismissed after it became known to other colleagues that they lived together as a homosexual couple. The employer produced evidence that their homosexuality had been known of for a longer period, and that their negligence in fulfilling their duties led to their dismissal.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	In this case, the shifting of the burden of proof was at stake. It was incumbent upon the employer to prove that discrimination did not take place.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	No discrimination was established by Senate II of the Equal Treatment Commission.

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

Case title	Asylum for transsexual Iranian
Decision date	28.03.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Unabhängiger Bundesasylsenat</i> [Federal Independent Asylum Tribunal], 244.745/0-VIII/22/03
Key facts of the case (max. 500 chars)	Ms H. applied for asylum because she claimed to be prosecuted by the Iranian authorities due to her transsexuality and religion. A change of sex/gender is forbidden in Iran.
Main reasoning/argumentation (max. 500 chars)	Prosecution because of transsexuality is sufficient reason for the recognition of the status of refugee.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Transgender persons are a particular social group protected by the Geneva Convention 1951.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The applicant was granted refugee status.

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

Case title	Annulment of <i>Transsexuellen-Erlass</i> [Transsexual Order]
Decision date	08.06.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	<i>Verfassungsgerichtshof</i> [Constitutional Court], V 4-06/7
Key facts of the case (max. 500 chars)	A married man had undergone a gender changing operation and wanted to have his name changed. The Transsexual Order provided that this notification required that he be divorced from his wife, since a change of name is only authorised for non-married persons.
Main reasoning/argumentation (max. 500 chars)	The Court argued that the Transsexual Order should have been published as a government decree, not as an internal order, and subsequently annulled the order. Moreover, the Court stated that such a regulation was unlawful as it lacked a legal basis. The Court did not discuss whether such a regulation (no possibility of changing the name of married persons after changing their sex/gender) constituted a breach of Art. 8, ECHR, alone or in combination with Art. 14, ECHR.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Marriage as an institution for heterosexuals only, administrative hurdles for changing names.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The changing of names after a change of sex/gender cannot be refused after this ruling. The changing of names of married persons cannot be refused.

Annex 2 – Statistics

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation⁹²

	2000	2001	2002	2003	2004	2005	2006	2007
Total number of complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	0	0	0	0	0	40	53	45
Total number of findings of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	0	0	0	0	0	1	1	0
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.)	0	0	0	0	0		1	0
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	0	0	0	0	0		1	0

⁹² The sources are mentioned in Chapter A. The numbers are the total, taking both the federal and provincial levels into account.

Chapter A, Complaints in the provinces

	2000	2001	2002	2003	2004	2005	2006	2007
Burgenland	0	0	0	0	0	0	0	0
Carinthia	0	0	0	0	0	0	0	2 (one employment, one access to goods and services)
Lower Austria	0	0	0	0	0	0	0	0
Salzburg	0	0	0	0	0	0	0	0
Styria	0	0	0	0	0	1	0	1 (no details provided)
Tyrol	0	0	0	0	0	0	1	0
Upper Austria	0	0	0	0	0	0	3	1
Vienna	0	0	0	0	0	1	1	0
Vorarlberg ⁹³	--	--	--	--	--	--	--	--

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)	-	-	-	-	-	-	-	-
Number of LGBT partners who claimed their right to residence but were denied this right.	-	-	-	-	-	-	-	-

⁹³ No information provided upon email request (24.01.2008)

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation⁹⁴

	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.	-	-	1 ⁹⁵	1 ⁹⁶	4 ⁹⁷	2 ⁹⁸	1 ⁹⁹	0
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.	2 ¹⁰⁰	-	-	-	-	-	-	1 ¹⁰¹

Chapter C, Asylum and subsidiary protection, protection of LGBT partners¹⁰²

	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	-	-	-	-	-	-	-	-
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partners.	-	-	-	-	-	-	-	-

⁹⁴ No official statistics or data from private sources available. The decisions presented in this table were found via the Federal Legal Information System (Rechtsinformationssystem des Bundes) by using the keywords Homosexualität (homosexuality), homosexuell (homosexual), sexuelle Orientierung (sexual orientation), Transsexualität (transsexuality) and transsexuell (transsexual).

⁹⁵ Austria/Unabhängiger Bundesasylsenat/215.214/0-VIII/22/02 (24.10.2002).

⁹⁶ Austria/Unabhängiger Bundesasylsenat/228.027/0-VI/17/02 (/ 19.03.2003).

⁹⁷ Austria/Unabhängiger Bundesasylsenat/ 240.479/0-VIII/22/03 (10.05.2004); 234.015/12-VIII/40/04 (02.06.2004); 239.930/0-XI/38/03 (09.08.2004); 234.179/0-IV/44/03 (03.12.2004).

⁹⁸ Austria/ Unabhängiger Bundesasylsenat/ 238.353/5-VIII/22/03 (05.08.2005); 261.132/4-VIII/40/05 (14.07.2005).

⁹⁹ Austria/ Unabhängiger Bundesasylsenat/ 244.745/0-VIII/22/03 (28.03.2006).

¹⁰⁰ Austria/Verwaltungsgerichtshof/ 2000/01/0141 (11.10.2000); 2000/20/0356 (30.11.2000).

¹⁰¹ Austria/ Unabhängiger Bundesasylsenat/ 306.704-C1/4E-IV/44/06 (05.02.2007).

¹⁰² No official statistics or data from private sources available.

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.	-	-	-	-	-	-	-	-
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification	-	-	-	-	-	-	-	-

Chapter E, LGBT persons' enjoyment of freedom of assembly¹⁰³

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

Chapter F, Homophobic hate speech¹⁰⁴

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

¹⁰³ No official statistics or data from private sources available.

¹⁰⁴ No official statistics or data from private sources available.

Number of non-criminal court cases initiated for homophobic statements	-	-	-	-	-	-	-	-
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)	-	-	-	-	-	-	-	-

Chapter F, Homophobic motivation of crimes as aggravating factor¹⁰⁵

	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	-	-	-	-	-	-	-	-

Chapter G, Transgender issues¹⁰⁶

	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	-	-	-	-	-	-	-	-

¹⁰⁵ No official statistics or data from private sources available.

¹⁰⁶ No official statistics or data from private sources available.