



**A UK GUIDE TO LESBIAN, GAY, BISEXUAL AND  
TRANSGENDER PEOPLE AND THEIR RIGHTS**

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*[Adapted from the Foreign and Commonwealth Office (FCO) LGBT Toolkit and translated with the assistance of the British Embassy Warsaw]*

### **Who are LGBT people?**

Lesbians and gay men are homosexuals, people whose sexual orientation is towards the same gender. Bisexuals are people whose sexual orientation is towards both genders. Transgender is the state of one's "gender identity" (self-identification as male, female, both or neither) not matching one's "assigned gender" (identification by others as male or female based on physical gender). "Transgender" does not imply any specific form of sexual orientation.<sup>1</sup>

Sexual orientation is distinct from sexual activity. Sexual orientation is a sexual attraction towards others that may or may not involve sexual activity. Some people engage in sexual activity with others of the same gender without identifying themselves as being homosexual or bisexual.

LGBT people are found among all peoples. But among many peoples there are social, cultural, religious, legal or traditional restrictions on people being able to realise their sexual orientation or gender identity where this differs from the majority. This prevents LGBT people from living their lives openly and without discrimination, and from enjoying their human rights.

### **Introduction to LGBT rights**

Human rights treaties do not specifically mention sexual orientation. However, the adjudicator bodies for the UN International Covenant on Civil and Political Rights and the European Convention on Human Rights have both determined that discrimination on the grounds of sexual orientation is contrary to their respective treaties.

EU laws and policies include equality and non-discrimination on the grounds of sexual orientation. This involves working for this objective as part of the common foreign and security policy.

Governments have an obligation to promote equality in the enjoyment of human rights, as well as not to discriminate in their application. Frequently there is discrimination in the enjoyment of key rights, even in countries where the criminal laws are neutral. Tackling this would require the building up of local coalitions of non-state actors to elaborate action plans for each country, as well as working locally with like-minded states. This would not just apply to issues like the state of the

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<sup>1</sup> These terms were devised in Western States and are not used everywhere. But they are used for convenience in this document.

criminal law, but also to freedom of association and assembly, freedom of expression and privacy.

LGBT activists are often targets for persecution. But others (activists, politicians, lawyers, trades unionists etc) are sometimes targeted if they help promote or defend LGBT rights or are themselves “accused” of being gay in order to discredit them. This is particularly true where the issues involve freedom of expression, association and assembly, with governments banning public and media discussion of homosexuality, as well as LGBT Pride marches and events.

### **What are the human rights that concern LGBT people?**

All human rights treaties (and many national constitutions) contain lists of protected rights. States are prohibited from violating these rights, as well as required to ensure that rights are given real effect, e.g. through national laws and administrative practices. All human rights treaties include a general prohibition on discrimination in their enjoyment, similar to that mentioned in Article 2 of the Universal Declaration of Human Rights. This states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The UK position is that, just like all other human beings, LGBT people are entitled to enjoy the full range of human rights, without discrimination. But this attitude is not universally shared.

### **What specific human rights involving LGBT people are at stake?**

While all human rights apply to LGBT people, some are of particular importance. The right to life is violated when LGBT people are murdered with impunity either by or with the connivance of the police or other security officials, as happens in a number of countries. LGBT people who are detained are sometimes subjected to torture, cruel, inhuman or degrading treatment. Freedom of expression is essential for LGBT people to argue in favour of ending discrimination in the content and application of the law.

Freedom of information is necessary both to obtain information from others about how to organise and campaign for equality, as well as medical and sociological information to enable people to protect themselves. Freedom of Association and Assembly are necessary for LGBT people to form organisations that work for self-help and equality, including through public manifestations, such as gay pride marches. The right to privacy is necessary to enable transsexuals to have their new gender recognised by law.

Religious belief is often used by some to justify discrimination, but freedom of religion guarantees to individuals the right to manifest their beliefs only to the extent that this does not violate the rights of others. Nothing in human rights treaties can be relied upon to deny others the equal enjoyment of their human rights.

Article 2 of the Convention on the Rights of the Child requires States to ensure that children do not suffer discrimination because of the status of their parents.

The right to work is essential to enable people to meet their basic needs and to lead a fulfilling life.

In 2006, a meeting of 29 human rights experts from 25 countries developed a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations. These are known as The Yogyakarta Principles<sup>2</sup>. The UK welcomed these as an important contribution to increasing understanding of these issues, but some of the Principles exceed current UK positions on human rights

### **How are the rights of LGBT people interpreted under international human rights law?**

- a) In recent years, several of the international bodies responsible for monitoring and adjudicating international human rights treaties have interpreted the non-discrimination clause in these treaties to include sexual orientation.
- b) In 1994, the **UN Human Rights Committee** (established under the International Convention on Civil and Political Rights) examined the law of Tasmania forbidding male homosexual acts for its compatibility with Article 17 of the ICCPR. This forbids "arbitrary or unlawful interference" with privacy. The Committee decided that this law was "arbitrary", as it did not meet the test of reasonableness. More importantly, it held that the term "sex" in Article 26 ICCPR, which requires equality and non-discrimination in the law, "is to be taken as including sexual orientation."<sup>3</sup>
- c) The Committee now regularly scrutinises States Parties compliance reports in the light of this interpretation, which has also been increasingly followed by other UN bodies such as the UN Committee on Torture and the UN Working Group on Arbitrary Detention.
- d) In taking this decision, the Committee followed the jurisprudence of the **European Court of Human Rights**. In 1981, the Court ruled that the law in Northern Ireland criminalising male homosexual acts was an unreasonable interference in private life. It stated that hostility on moral grounds towards male homosexuality was not a sufficient ground to justify prohibition, as tolerance and broadmindedness are characteristics of a democratic society to which it had to have regard.<sup>4</sup> In subsequent years, it has ruled against discrimination in the age of consent to sexual activity, discharging people from the armed forces because of their sexual orientation, refusing child custody to a father because of his sexual orientation, and refusing to allow a same sex partner to inherit a tenancy in circumstances where an opposite sex partner could do so.

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<sup>2</sup> Available at [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org)

<sup>3</sup> Nicholas Toonen v. Australia, Opinion of 4 April 1994

<sup>4</sup> Jeffrey Dudgeon v. UK Judgment of 22 October 1981

- e) In 2002, the Court ruled that a transgender person who had undergone gender reassignment was entitled to have this change recorded in her birth certificate, and was entitled to marry in her new gender.<sup>5</sup>
- f) There are no decided cases under the **American Convention on Human Rights** or **African Charter on Human and Peoples' Rights** relating to discrimination on the grounds of sexual orientation at present.
- g) The **International Labour Organisation** (ILO) in 1998 agreed a Declaration on Fundamental Principles and Rights at Work. Principle four requires ILO members to promote and realise the elimination of discrimination in respect of employment and occupation. The ILO includes discrimination on the ground of sexual orientation in this principle.  
**Can discrimination on the grounds of sexual orientation ever be justified under international human rights law?**

- h) For discrimination (i.e. a difference in treatment) to be permitted by law, it has to be based on "reasonable and objective criteria". What such criteria might cover is still evolving under international human rights law, which is a living instrument that is constantly being developed by judicial bodies. Courts have repeatedly stated that where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment.
- i) In 2003, the **UN Human Rights Committee** decided<sup>6</sup> that the law restricting an army pension to a heterosexual spouse or a heterosexual couple living as partners, and which excluded homosexual couples, violated Article 26 ICCPR as it had no objective and reasonable justification. The State did not attempt to justify the difference in treatment. In 2007, the Committee followed this decision in another case<sup>7</sup> by deciding that a provision in Colombian law that did not permit the transfer of pension benefits between homosexual partners (unlike heterosexual partners) also violated Article 26. The Committee rejected the State's argument that it was trying to protect heterosexual unions rather than to discriminate against other types of union.
- j) The **UN Special Rapporteurs** have increasingly included specific reference to the human rights of LGBT people in their reports. In 1999, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Asma Jahangir, was the first to include individual cases of severe persecution of sexual minorities in her reports to the UN Commission on Human Rights. In consequence, some members of the Commission accused her of going beyond her mandate. She has continued to investigate violations of the right to life of sexual minorities in her reports and missions to various countries. Ms Jahangir has studied issues such as the climate of impunity surrounding crimes against LGBT people, laws prescribing capital punishment for homosexual relationships, and the link between violence and the criminalisation of matters involving sexual orientation.

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<sup>5</sup> Christine Goodwin v. UK Judgment of 11 July 2002

<sup>6</sup> Young v. Australia, Communication no. 941/2000;

<sup>7</sup> X v. Colombia, Communication no. 1361/2005

k) In 2001, the Special Rapporteur on Freedom of Expression, Abid Hussain, held a groundbreaking meeting with transgender activists while on an official mission to Argentina. In November, 2001, the Special Representative on Human Rights Defenders, Hina Jilani, met with Colombian LGBT organisations working with members of sexual minorities, people living with HIV/AIDS and sex workers during her stay in the country. Also in November 2001, the then Special Rapporteur on Torture, Sir Nigel Rodley, raised the issue of torture and discrimination against sexual minorities for the first time before the UN General Assembly in New York. The Special Rapporteur on the Right to Health, Paul Hunt has also explored the issue of sexual orientation discrimination in some of his annual reports (notably the 2004 Report to the UN Commission on Human Rights<sup>8</sup>). Although the reports of UN Special Rapporteurs do not carry the same weight as decisions of the UN Human Rights Committee or Courts, they are nonetheless useful as tools to interpret human rights standards.

### **Approaches to "discrimination" within regional human rights bodies**

- l) In Europe, in applying the reasonable and objective test, the **European Court of Human Rights** has condemned discrimination on the grounds of sexual orientation usually when considering the right to respect for private life<sup>9</sup>, but not when considering the right to respect for family life<sup>10</sup>.
- m) Within the **European Union**, there is a general prohibition on discrimination on the grounds of sexual orientation in employment<sup>11</sup>. Article 21 of the 2000 **Charter of Fundamental Rights of the European Union** calls for the prohibition of any discrimination, including on the ground of sexual orientation. But this Charter is not yet binding on member states. As regards the legal recognition of same sex partnerships, the situation within the EU is still evolving. Three member states have the right to marry (Belgium, the Netherlands, Spain). Nine member states have legal partnerships that mirror marriage (Czech Republic, Denmark, Finland, Germany, Hungary, Portugal, Slovenia, Sweden, UK). Two member states have civil contracts (France, Luxembourg). The remaining thirteen member states have no legal provisions.

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<sup>8</sup> E/CN.4/2004/49

<sup>9</sup> Discrimination in the age of consent for male sexual acts - Sutherland v. UK (1996)  
Discharging homosexuals from the armed forces - Lustig-Prean & Beckett v UK (1999)  
Refusing child custody to a father because of his sexual orientation - Salgueiro Da Silva Mouta v. Portugal (1999)  
Refusing to recognise the gender status of transsexuals - Goodwin v. UK (2002)  
Refusing to recognise a surviving same-sex partner as a "life companion", akin to a spouse, who could inherit a tenancy - Karner v. Austria (2003).

<sup>10</sup> Refusing recognition of a female-to-male transsexual as the legal "father" of his partner's child conceived by AID - X, Y & Z v. UK (1997); Refusing to allow a gay man to adopt a child - Frette v. France (2002), although where domestic law does allow single parent adoption, an adverse decision based on sexual orientation would violate Article 8 – EB v. France (2008). This issue is the subject of a case pending (May 2008) before the Court – Schalk & Kopf v. Austria.

<sup>11</sup> Council Directive 2000/78/EC. In the Maruko case, the European Court of Justice ruled that this directive required that any benefits connected with employment had to apply equally to homosexual as to heterosexual couples where there is legal recognition of such couples in a member state – judgment of 1 April 2008.

- n) Under the American Convention of Human Rights, the **Inter-American Commission of Human Rights** declared admissible a complaint against Colombia about prison rules that allowed conjugal visits for unmarried heterosexual couples but not homosexual ones.<sup>12</sup> But the case did not go on to a full hearing as the Supreme Court of Colombia overturned the prohibition on homosexual conjugal visits in October 2001 on the ground that it was unlawful discrimination.
- o) This brief survey demonstrates that laws that impose a blanket prohibition on consensual homosexual activity are not compatible with international human rights law. Where legal discrimination exists, the onus is on the State to prove that it is reasonable and objective. This is an evolving area of law but the trend is to limit the scope of discrimination.

### Questions and Answers

Q. Why should we allow homosexuality here, as it is a Western practice?

A. Homosexuality exists among all people and has done so since the start of recorded history. It was not something invented, or is only practised, in Western countries.

Q. Our culture and traditions do not accept homosexuality.

A. Customs and traditions are constantly changing with time, in the light of new knowledge and understanding. This happens everywhere. Once women were treated as inferior to men in every culture and tradition, but very few have that attitude nowadays. Culture and tradition cannot justify denying people their human rights.

Q. Our laws are based on traditional beliefs and should continue to reflect these.

A. Governments should lead their people and not simply follow public opinion. For example, many countries once tolerated female circumcision, but nowadays all governments are leading their people to reject this - by making it illegal, by educating them and by publicity. International human rights treaties provide for the equal treatment under the law of people who have different characteristics – such as race, gender, ethnic origin, and so on. This includes sexual orientation. So human rights provisions require that States work to end legal discrimination on the grounds of sexual orientation.

Q. If we accept these changes, we will open the door to immorality.

A. Human rights do not depend on - and are not subject to – different interpretations of morality. In any event, immorality is a changing concept. For example, slavery was once considered to be morally acceptable and was lawful in most countries, including the UK. But nowadays all countries regard slavery as totally immoral and have outlawed it.

Q. If we allow homosexuality, we will be encouraging the spread of HIV/AIDS.

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<sup>12</sup> Marta Lucia Alvarez Giraldo v. Colombia Report 71/99

A. HIV is transmitted in several different ways. In many parts of the world, for example, transmission of the virus is overwhelmingly through heterosexual sex. The evidence from medical experts, accepted by the UN WHO, is that it is more difficult to prevent the spread of HIV if people who are at risk - including gay and bisexual men who do not practise "safe sex" - are deterred from getting tested if their relationships are outlawed. Legally banning gay sex won't stop it happening, but it will increase the risk of people not hearing the message about safe sex.

Q. Our religion forbids homosexuality/bisexuality/ transgenderism, and our laws reflect our religion.

A. Religions require their own adherents to do or refrain from specific things, but these requirements do not apply to people of other faiths or of no faith. The law should guarantee the same rights to everyone in the territory. Your State has committed itself to guarantee human rights to everyone. If people of any religion choose not to exercise their rights, that is their business. But if LGBT people— including those of your religion – wish to exercise their rights they should be able to do so.

Q. Accepting this will undermine marriage, which is the cornerstone of our society.

A. Recognising the human rights of one group of people does nothing to undermine the human rights of others. The right of people to marry will not be affected in any way, so it is difficult to see how marriage can be undermined in such circumstances. No one should be pressurised into unwanted marriage; that is not likely to lead to a successful marriage.