

# ‘Sexual orientation’ and ‘gender identity’ at the UN

From obscurity to primacy in ten years

Paul Coleman<sup>1</sup>

## Abstract

This article examines the significant changes that have occurred at the United Nations in the past decade in regard to the so-called “sexual orientation” and “gender identity” movement. After examining the events that have taken place in the past decade, this article will consider the implications for religious liberty. The recent experiences of several Western nations indicate that a worldwide push for “sexual orientation” and “gender identity” laws could lead to significant restrictions on freedom of religion.

**Key Words** Sexual orientation, gender identity, United Nations, religious liberty.

On 26 July 2013 in Cape Town, South Africa, the United Nations Office of the High Commissioner for Human Rights (OHCHR) launched an “unprecedented United Nations global public education campaign for lesbian, gay, bisexual and transgender (LGBT) equality.”<sup>2</sup> The campaign is the latest effort in the so-called “sexual orientation” and “gender identity” (SOGI) movement<sup>3</sup> – a movement that has gained tremendous ground at the United Nations (UN) in the past decade.

Prior to 2003 “sexual orientation” and “gender identity” was not considered a topic of concern for the UN General Assembly or its intergovernmental bodies, nor was it being treated as a priority of UN member states’ foreign policy. While the UN Human Rights Committee expressed the view in *Toonen v. Australia* (1994)<sup>4</sup> that laws criminalizing homosexual behaviour were in breach of the International

<sup>1</sup> Paul Coleman LL.M (\*1985) is Research Associate at the Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of the Free State, Bloemfontein, South Africa. Coleman serves as legal counsel for Alliance Defending Freedom at its European office in Vienna, Austria. He is a solicitor of the Senior Courts of England and Wales and obtained his Bachelor of Law (First Class) from Newcastle University and his LL.M. (Distinction) from the University of Northumbria. He is the author of *Censored: How European “Hate Speech” Laws are Threatening Freedom of Speech* (Kairos Publications 2012). The author would like to thank Blackstone Fellow, Karlo Resler LL.M, for his research assistance. Article received: 24 July 2013; Accepted: 14 Sept. 2013. Contact: Alliance Defending Freedom, Landesgerichtsstraße 18/10, 1010 Wien, Austria, Tel: +43 1 904 95 55, Email: pcoleman@alliancedefendingfreedom.org.

<sup>2</sup> <[www.unfe.org/en/about](http://www.unfe.org/en/about)>.

<sup>3</sup> As both “sexual orientation” and “gender identity” are highly disputed terms that are far from having settled definitions, I shall use quotation marks when referring to them.

<sup>4</sup> UN. Doc. CCPR/C/50/D/488/1992.

Covenant on Civil and Political Rights, the interpretation of the Committee did not create an immediate impact beyond the treaty monitoring bodies and the UN “independent experts.”<sup>5</sup> However, in just ten short years the issue has gone from relative obscurity to human rights primacy.

In the past decade dozens of speeches have been made in support of the SOGI movement by senior UN officials such as the UN Secretary-General, Ban Ki-moon, and the High Commissioner on Human Rights, Navi Pillay,<sup>6</sup> and various UN entities have incorporated “sexual orientation” and “gender identity” issues into their work.<sup>7</sup> The US has declared that “advancing the Human Rights of Lesbian, Gay, Bisexual and Transgender Persons” (LGBT) worldwide is an “Obama Administration foreign policy priority,”<sup>8</sup> the British government has indicated that foreign aid will be withheld from countries that do not advance LGBT issues<sup>9</sup> and the European Union has recently produced extensive guidelines explaining how it will promote “LGBTI rights” around the world.<sup>10</sup> Additionally, high profile and well-funded non-governmental organizations (NGOs) such as Amnesty International and the International Commission of Jurists have made the SOGI movement a centrepiece of their work.<sup>11</sup>

Thus, despite there being no mention of “sexual orientation” or “gender identity” in a single UN treaty, despite the on-going contention about the terms themselves and despite the fact that nearly half the UN Member States have criminal bans

---

<sup>5</sup> Despite claims to the contrary, the UN treaty monitoring bodies such as the Human Rights Committee cannot impose obligations on UN Member States. As Michael O’Flaherty, a former HRC committee member and significant figure in the SOGI movement has explained: “Treaty bodies do not have judicial powers and in no case have they been empowered to determine violations of the treaties by the state parties.” See Piero A. Tozzi, J.D. *In Belize, Global “Gay” Movement’s Legal Roadshow Comes to Town*, Turtle Bay and Beyond (May 20, 2013).

<sup>6</sup> See <[www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTspeechesandstatements.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTspeechesandstatements.aspx)>.

<sup>7</sup> E.g. Office of the United Nations High Commissioner for Human Rights, United Nations Development Programme, United Nations Children’s Fund, United Nations Educational, Scientific and Cultural Organization, the Office of the United Nations High Commissioner for Refugees, International Labour Organization, World Health Organization, United Nations Population Fund and Joint United Nations Programme on HIV/AIDS. See ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity,’ OHCHR (A/HRC/19/41), 3.

<sup>8</sup> *Advancing the Human Rights of Lesbian, Gay, Bisexual and Transgender Persons Worldwide: A State Department Priority*, Bureau of Public Affairs (June 28, 2013).

<sup>9</sup> *Cameron threat to dock some UK aid to anti-gay nations*, BBC News (October 30, 2011).

<sup>10</sup> *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, Council Of The European Union (June 24, 2013).

<sup>11</sup> Amnesty International champions same-sex “marriage” around the world and argues it is “enshrined in international human rights standards” <[www.amnestyusa.org/our-work/issues/lgbt-rights](http://www.amnestyusa.org/our-work/issues/lgbt-rights)> . The International Commission of Jurists lists “Sexual Orientation and Gender Identity” as one of its top six priorities alongside issues such as the independence of the judiciary and the rule of law <[www.icj.org/themes/](http://www.icj.org/themes/)>.

on homosexual behaviour, a radical shift has taken place within several UN entities, leading to the first ever resolution being adopted on “sexual orientation” and “gender identity” in 2011. The resolution was quickly followed by a flurry of activity and there will undoubtedly be much more to follow in the near future.

This article will outline the events that have taken place at the UN in the past decade before considering how religious liberty will be affected by a growing acceptance and promotion of the SOGI movement in the future.

## **1. A timeline of events: 2003 to 2013**

### **1.1 The failed Brazil Resolution (17 April 2003)**

With almost no indication that such an event was about to take place, the first SOGI resolution was brought to the UN in April 2003.<sup>12</sup> The draft resolution was introduced by Brazil before the then-Commission on Human Rights and was supported by several European countries and Canada. The draft resolution was relatively modest in its reach but did not come close to succeeding. The tabling of 55 amendments by Saudi Arabia, Pakistan, Egypt, Libya and Malaysia ensured that consideration of the resolution was postponed to the following year and in 2004 neither Brazil nor any of the other co-sponsors attempted to bring the resolution forward for a vote.<sup>13</sup>

The Brazil resolution has since been labelled a “debacle” and as a result of its failure “the conventional wisdom was that a voted resolution would never succeed.”<sup>14</sup> Lobbying efforts instead turned to joint statements that could be delivered at the UN by Member States without the need for backing by other countries.

### **1.2 The New Zealand Joint Statement (15 April 2005)**

Exactly two years after the failed Brazil resolution, during the 61st Session of the then-Commission on Human Rights, New Zealand successfully delivered the first joint statement on “Sexual Orientation and Human Rights.”<sup>15</sup> The statement was supported by 32 countries, predominantly from Europe, and stated, *inter alia*, that “Sexual orientation is a fundamental aspect of every individual’s identity and an immutable part of self. It is contrary to human dignity to force an individual to change their sexual orientation, or to discriminate against them on this basis.”

In 2006 the discredited Commission on Human Rights was replaced by the Human Rights Council, and further joint statements were initiated at the new UN body.

---

<sup>12</sup> E/CN.4/2003/L.92.

<sup>13</sup> E/CN.4/2003/L.106-110.

<sup>14</sup> Alli Jernow, *What Western Gay Rights Agenda?*, IntLawGrrls (February 7, 2012).

<sup>15</sup> UN Commission on Human Rights, *New Zealand joint statement on promotion and protection of human rights*, (April 15, 2005) available at <[www.arc-international.net/global-advocacy](http://www.arc-international.net/global-advocacy)>.

### 1.3 The Norwegian Joint Statement (1 December 2006)

By 2006 the influence of pro-homosexual lobby groups could clearly be seen at work in various UN entities. In 2005 one such group, ARC International, established an office in Geneva with the intention of lobbying the newly formed Human Rights Council. A year later the Yogyakarta Principles were launched by a self-described “distinguished group of human rights experts.” The highly controversial guide on the “application of international human rights law in relation to sexual orientation and gender identity,” initiated by ARC International, has no formal power but does illustrate the recent convergence of pro-homosexual lobby groups and UN officials: around half the signatories were the former and half the latter.<sup>16</sup>

The lobbyist influence was also at work within the UN machinery and during the 3rd Session of the Human Rights Council, Norway delivered the next joint statement on “Human Rights Violations Based on Sexual Orientation and Gender Identity” on behalf of 54 nations.<sup>17</sup> The statement urged the Human Rights Council to “pay due attention to human rights violations based on sexual orientation and gender identity” and requested the President of the Council to “provide an opportunity, at an appropriate future session of the Council, for a discussion of these important human rights issues.” ARC International claim they were “instrumental in conceiving, drafting and implementing” the joint statement.<sup>18</sup>

Directly following the Norwegian joint statement, 19 ECOSOC-accredited NGOs delivered a statement on behalf of a further 400 NGOs that dovetailed with the Member States’ joint statement.<sup>19</sup> The intervention called upon the UN to take further action and concluded that “this issue will not go away.” Indeed it did not.

### 1.4 The General Assembly Statements (18 December 2008)

In December 2008 the SOGI movement was brought before the General Assembly for the very first time. During the 63rd Session of the General Assembly a pre-recorded statement was given on behalf of the United Nations High Commissioner for Human Rights, Navi Pillay, on the theme of “Gender Identity, Sexual Orientation and Human Rights.” The statement contended that, “There is now a considerable body of decisions affirming that discrimination on the basis of sexual orientation is contrary to international human rights law.” It further stated that laws criminalizing

<sup>16</sup> <[http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)>. For a critique see Piero A. Tozzi J.D, ‘Six Problems with the “Yogyakarta Principles,”’ IORG, Number 1 (April 2, 2007).

<sup>17</sup> *UN Human Rights Council, Human Rights Violations Based on Sexual Orientation and Gender Identity*, (Dec. 1, 2006) available at <[www.norway-geneva.org/unitednations/humanrights/hrc011206/](http://www.norway-geneva.org/unitednations/humanrights/hrc011206/)>.

<sup>18</sup> See <[www.arc-international.net/about](http://www.arc-international.net/about)>.

<sup>19</sup> *UN Human Rights Council, NGO Joint Statement on Sexual Orientation, Gender Identity & Human Rights* (Dec. 1, 2006) available at <<http://www.ilga-europe.org/>>.

homosexual behaviour were “anachronistic” and “inconsistent with international law” and spoke of the need to overturn “decades of prejudice and intolerance.”<sup>20</sup>

The statement also lent support to a new joint statement on “Human Rights, Sexual Orientation and Gender Identity” delivered by Argentina on behalf of 66 States. Although the statement was delivered by the Argentinean ambassador, it was the creation of the French and Dutch foreign affairs ministries<sup>21</sup> – together with the intense lobbying efforts of a number of pro-homosexual lobby groups.<sup>22</sup>

This was the first time that any such statement had been given at the UN General Assembly and it was not without opposition. The Holy See Delegation opposed the statement, noting that, “Despite the *statement’s* rightful condemnation of and protection from all forms of violence against homosexual persons, the document, when considered in its entirety, goes beyond this goal and instead gives rise to uncertainty in the law and challenges existing human rights norms.”<sup>23</sup>

Furthermore, an alternative statement supported by 57 Member States was read by the Syrian Delegation on behalf of the Organization of the Islamic Conference (OIC). The Syrian statement highlighted the lack of legal grounds for the SOGI statement, arguing that it fell “within the domestic jurisdiction of States counter to the commitment in the United Nations Charter to respect the sovereignty of States and the principle of non-intervention.” The Syrian statement also criticized the use of the terms “sexual orientation” and “gender identity,” arguing that particular sexual interests or behaviours could not be attributed to genetic factors and that the protection of such behaviours could open the door to the legitimization of many other forms of sexual behaviour in the future, including paedophilia.<sup>24</sup>

With 66 States supporting the SOGI statement, 57 States condemning it and many more refusing to be drawn either way, the future success of the movement was far

<sup>20</sup> UN General Assembly, *Address by Ms. Navanetham Pillay, United Nations High Commissioner for Human Rights, on the theme of gender identity, sexual orientation and human rights* (Dec. 18, 2008) available at <[www.arc-international.net/global-advocacy/sogi-statements/hc-ga-200](http://www.arc-international.net/global-advocacy/sogi-statements/hc-ga-200)>.

<sup>21</sup> See *Statement on Human Rights, Sexual Orientation and Gender Identity* (December 18, 2008) available at <[www.gayswithoutborders.files.wordpress.com/2008/12/droit-lgbt.pdf](http://www.gayswithoutborders.files.wordpress.com/2008/12/droit-lgbt.pdf)>.

<sup>22</sup> Commenting on the Joint Statement, homosexual activist Peter Tatchell stated on his website: “As well as IDAHO, I pay tribute to the contribution and lobbying of Amnesty International; ARC International; Centre for Women’s Global Leadership; COC Netherlands; Global Rights; Human Rights Watch; International Committee for the International Day Against Homophobia; International Gay and Lesbian Human Rights Commission; International Lesbian, Gay, Bisexual, Transgender and Intersex Association; International Service for Human Rights; Pan Africa ILGA; and Public Services International.” See Peter Tatchell, *66 countries sign UN gay rights statement*, PeterTatchell.net (Dec. 18, 2008).

<sup>23</sup> *Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity* (Dec. 18, 2008) available at <[www.vatican.va](http://www.vatican.va)>.

<sup>24</sup> UN General Assembly, *Response to SOGI Human Rights Statement* (December 18, 2008) available at <[www.arc-international.net/global-advocacy/sogi-statements/](http://www.arc-international.net/global-advocacy/sogi-statements/)>.

from certain. Indeed, it was still possible that support would dwindle each year as opposition increased, as was happening with the “defamation of religion” movement taking place at exactly the same time.<sup>25</sup>

Crucially, however, a change to the US administration at the end of 2008 saw a reversal of its previous position at the UN. Having refused to support the SOGI statement under President Bush, the US signed the document at the beginning of 2009 – signalling a significant change of foreign policy priorities under the Obama administration.<sup>26</sup> The SOGI movement had found a powerful new ally.

### 1.5 The Colombian Joint Statement (22 March 2011)

Two years passed and the SOGI movement returned to the Geneva-based Human Rights Council in March 2011. During the 16th Session of the Human Rights Council Colombia delivered a joint statement on “Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity”<sup>27</sup> on behalf of a record 85 Member States, including, for the first time, South Africa. At the time South Africa was one of only six countries in the world to mention sexual orientation in its constitution and many were surprised it had not supported previous SOGI statements. Faced with a combination of international and domestic pressure and intense lobbying efforts, South Africa eventually joined the statement and gave its support to the SOGI movement.<sup>28</sup>

With several joint statements now achieved at both the Human Rights Council and the General Assembly, the newly found support of the US and South Africa and the backing of high-ranking UN officials, the SOGI movement developed one step further – securing a first UN resolution later that year.

### 1.6 The Human Rights Council Resolution (17 June 2011)

In June 2011 the Human Rights Council adopted resolution 17/19 on ‘Human rights, sexual identity and gender identity’ – the first time that any UN body has approved a resolution in support of the SOGI movement.<sup>29</sup> The resolution called upon the High Commissioner for Human Rights to commission a study “documenting

<sup>25</sup> See e.g. Lorenz Langer, *The Rise (and fall?) of Defamation of Religions*, 35 YALE J. INTL L. 257, 258 (2010).

<sup>26</sup> See e.g. *Department of State's Accomplishments Promoting the Human Rights of Lesbian, Gay, Bisexual and Transgender People*, U.S. Department of State (Dec. 6, 2011).

<sup>27</sup> UN Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (March 22, 2011) available at <[www.refworld.org/docid/4eb8f32e2.html](http://www.refworld.org/docid/4eb8f32e2.html)>.

<sup>28</sup> See Human Rights Monitor Quarterly 2:2011, 5 and Human Rights Monitor Quarterly 3:2011, 4, available at <[www.ishr.ch/quarterly](http://www.ishr.ch/quarterly)>.

<sup>29</sup> A/HRC/RES/17/19/Rev.1.

discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.”<sup>30</sup>

Breaking from other African nations, South Africa joined forces with the US and took the lead with the resolution, introducing it before the Human Rights Council. Pakistan spoke against the resolution on behalf of the OIC and Nigeria also spoke against the resolution, arguing that 90% of Africans were against it.<sup>31</sup> Despite clear opposition, the resolution was narrowly adopted by 23 votes to 19 with the three abstentions.

Although the scope of the resolution was relatively limited, commentators were quick to note that, “Placed into historical context ... the adoption of this resolution is remarkable.”<sup>32</sup> Given that, in 2011, “a resolution still remained only a distant possibility,”<sup>33</sup> the pro-homosexual lobby similarly saw it as their biggest success at the UN so far.<sup>34</sup>

The resolution launched the OHCHR’s official SOGI policy. While previous developments had centred on State-driven (or perhaps more accurately, lobbyist-driven) joint statements, the resolution gave the UN an official mandate to operate – in concrete ways and ways yet to be revealed. As the fourth and final point of the 2011 resolution stated, the Human Rights Council, “Further decides to remain seized of this priority issue.” Similarly, the joint press release of pro-homosexual lobby groups concluded, “Now, our work is just beginning.”

### 1.7 The OHCHR Report and further UN activity (2011–2012)

On 17 November 2011 the OHCHR published the first UN report on sexual orientation and gender identity and submitted it to the General Assembly.<sup>35</sup> While the report rightly condemns violence, killings, torture and other forms of cruel, inhuman and degrading treatment, the majority of the report goes well beyond the issue of violence and instead focuses on issues of discrimination.<sup>36</sup>

<sup>30</sup> *Id.*, at § 1.

<sup>31</sup> See UN Human Rights Council, *Council establishes mandate on Côte d'Ivoire, adopts protocol to child rights treaty, requests study on discrimination and sexual orientation* (June 17, 2011) available at <[www.ohchr.org/EN/NewsEvents/Pages/Media.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx)>.

<sup>32</sup> Human Rights Monitor Quarterly 3:2011, 4.

<sup>33</sup> *Id.*

<sup>34</sup> See e.g. *Historic Decision at the United Nations: Human Rights Council Passes First-Ever Resolution on Sexual Orientation and Gender Identity*, International Service for Human Rights (June 17, 2011) available at <[www.ishr.ch/news/lgbt-rights](http://www.ishr.ch/news/lgbt-rights)>.

<sup>35</sup> *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Ohchr (Nov. 17, 2011), (A/HRC/19/41).

<sup>36</sup> For a critique, see *Policy Brief on OHCHR Report on Sexual Orientation and Gender Identity*, Family Watch International (2011).

The report contends that “sexual orientation” and “gender identity” discrimination exists in every aspect of society, including employment, health care, education, freedom of speech and assembly, and in the family and community. In each of the chosen areas, examples are given of discrimination. For example, in the field of education the report notes that sex education is as an “area of concern” and claims that the right to education “includes the right to receive comprehensive, accurate and age-appropriate information regarding human sexuality.”<sup>37</sup> Citing the Special Rapporteur on the right to education, the sex education must “pay special attention to diversity, since everyone has the right to deal with his or her own sexuality.”<sup>38</sup>

Therefore, to combat the alleged discrimination, the High Commissioner recommended that Member States, “Enact comprehensive anti-discrimination legislation that includes discrimination on grounds of sexual orientation and gender identity among prohibited grounds.”<sup>39</sup>

The OHCHR report was followed up with an extensive booklet, entitled ‘Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law,’ published in September 2012,<sup>40</sup> and a Human Rights Council Panel Discussion on the issue.<sup>41</sup> The OHCHR has also dedicated a section of its website to “LGBT discrimination,” created a UN email account on “LGBT Human Rights”<sup>42</sup> and recently launched an “unprecedented” LGBT worldwide campaign.<sup>43</sup>

Through various different actions over the past two years, the immediate aims of the UN in regard to the SOGI movement have now been clarified and listed. In some places this list is referred to as “recommendations” but in other places – even within the same document – they are listed as “core legal obligations.”<sup>44</sup> The list is as follows:

- i. Protect individuals from homophobic and transphobic violence;
- ii. Prevent torture and cruel, inhuman and degrading treatment;
- iii. Repeal laws criminalizing homosexuality;
- iv. Prohibit discrimination based on sexual orientation and gender identity;

<sup>37</sup> A/HRC/19/41 at § 61.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, at § 84(e).

<sup>40</sup> *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, OHCHR (September 2012).

<sup>41</sup> Resolution 17/19, § 2, called for the UN Human Rights Council to hold a panel discussion on “sexual orientation” and “gender identity”, which it did in March 2012. In response, the OIC wrote to the President of the Council to once again outline the concerns of its Members, see *Permanent Mission of Pakistan to the United Nations and other International Organizations*, No. Pol/SO/2012, (Febr. 14, 2012).

<sup>42</sup> See <<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>> and [LGBTHumanRights@un.org](mailto:LGBTHumanRights@un.org).

<sup>43</sup> See <<https://www.unfe.org/en/about>>.

<sup>44</sup> See *Born Free and Equal supra* n 40, 5 and 13.



- v. Safeguard freedom of expression, association and peaceful assembly for all LGBT people.<sup>45</sup>

Regarding the implications for religious liberty, item “iv” is of particular concern. The notion that there is a core legal obligation upon States to enact comprehensive non-discrimination laws that include “sexual orientation” and “gender identity” as prohibited grounds is clearly contestable. It has never been accepted by Member States that “sexual orientation” and “gender identity” form part of the “other status” language within the non-discrimination articles of the international human rights treaties,<sup>46</sup> and, even if “sexual orientation” and “gender identity” were implicitly present in the “other status” provisions, this would not create a positive obligation on Member States to enact legislation.

Thus, while it is far more accurate to refer to the list as “recommendations” rather than “core legal obligations,” in whatever terminology the list is described, it is clear what various UN entities have set out to achieve: ubiquitous non-discrimination legislation that includes “sexual orientation” and “gender identity” as a protected class. If this aim is realized, there will be major implications for religious liberty.

## 2. The implications for religious liberty

Opposition to the SOGI movement at the UN has focussed on a number of issues. For example, it has been argued that it overrides the sovereignty of States and the principle of non-intervention,<sup>47</sup> it introduces new norms that are without legal foundation<sup>48</sup> and it undermines traditional concepts of the family.<sup>49</sup> What have been less clearly explained within the intergovernmental bodies are the implications that the movement will have on religious liberty.

However, non-discrimination laws covering “sexual orientation” and “gender identity” have now been in existence long enough in some Western nations that the consequences can clearly be seen. As will be detailed below, an undeniable pattern has now emerged: wherever such laws are adopted, religious liberty is diminished.<sup>50</sup>

<sup>45</sup> See *Id.*, 13 and <[www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx)>.

<sup>46</sup> See Universal Declaration of Human Rights, Article 2; International Covenant on Civil and Political Rights, Article 2(1) and 26; International Covenant on Economic, Social and Cultural Rights, Article 2 and Convention on the Rights of the Child, Article 2.

<sup>47</sup> See e.g. *supra* n 28 above.

<sup>48</sup> See e.g. OIC Letter, *supra* n 41, §§ 4 and 5.

<sup>49</sup> See e.g. the speech delivered at the UN by the Nigerian representative in opposition to the SOGI movement: “Our own concept of children is that children come from the combination of the man and the wife, under the family husband and wife. It also touches on what we regard as family because for us family stands at the heart of everything we do. We live for the family” available at <[www.stanfordfamiliesworldwide.org/sffww/obamas-sexual-agenda/](http://www.stanfordfamiliesworldwide.org/sffww/obamas-sexual-agenda/)>.

<sup>50</sup> See e.g. Stephen Baskerville, *The sexual agenda and religious freedom, Challenges in the Western world*, IJRF 4:2 2011 (91–105).

## 2.1 Employees

Firstly, it is now clear that religious employees face significant problems when SOGI non-discrimination laws are introduced. Courts have consistently held that when a religious employee has a conscientious objection in the workplace because he cannot endorse, condone or approve homosexual behaviour, no exemption needs to be made. The employee will have to fall in line or leave his job. This position was reiterated in the recent European Court of Human Rights cases of Gary McFarlane and Lillian Ladele against the United Kingdom.<sup>51</sup> Both McFarlane and Ladele were dismissed from their respective jobs for refusing to perform duties that they believed endorsed homosexual behaviour. Rather than uphold their freedom of conscience as protected by Article 9 of the European Convention on Human Rights, the Court held that dismissing the Christian employees was perfectly legitimate.

In Canada, following the introduction of same-sex marriage in 2004, courts have held that forcing marriage commissioners to resign because of their religious beliefs is not unlawful discrimination and the state has no duty to accommodate them.<sup>52</sup> Moreover, enacting exemptions for marriage commissioners that would allow them to conscientiously object from performing same-sex marriages “would violate the equality rights of gay and lesbian individuals” and would be unconstitutional.<sup>53</sup>

Similarly, in 2008 the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*) ruled that, contrary to its previous decisions, civil union registrars were required to celebrate same-sex marriages and public authorities must play an “exemplary role” in combating discrimination.<sup>54</sup> This position was solidified in legislation in 2011.<sup>55</sup>

## 2.2 Employers

Religious employers have also had their religious freedom attacked in the wake of SOGI non-discrimination laws. In particular, employers now face burdensome restrictions regarding the hiring and dismissing of employees.

<sup>51</sup> *Eweida and others v United Kingdom*, (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013. An appeal to the Grand Chamber was rejected.

<sup>52</sup> See *Marriage Commissioners Reference 2011 SKCA 3* § 13.

<sup>53</sup> *Marriage Commissioners Reference 2011 SKCA 3*. In 2009 a marriage commissioner who refused to perform a same-sex marriage ceremony was held to have acted in a discriminatory manner contrary to the *Human Rights Code* and had to pay the offended party \$2,500 in damages. See *Nichols v. Saskatchewan* (Human Rights Commission), 2009 SKQB 299, [2009] 10 W.W.R. 513.

<sup>54</sup> See Opinion No 2008-40, available at <[www.cgb.nl](http://www.cgb.nl)>. For an explanation of the case, see *Rikki Holmaat, Netherlands Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC*, European Network of Legal Experts (2008).

<sup>55</sup> *Motie van Gent c.s., Tweede Kamer 2010-2011, 27017, nr 77*.

In the Canadian case of *Heintz v. Christian Horizons*<sup>56</sup> an employee brought a complaint against her employer, a large Christian charity, after she was dismissed for entering into a homosexual relationship. Christian Horizons required all employees to sign a statement of faith and follow a biblical code of conduct that prohibited, amongst other things, extra marital relationships and homosexual relationships. Following her dismissal, Ms. Heintz sued for discrimination and in 2008 the Tribunal held that the employer had discriminated on the grounds of sexual orientation and had created a "poisoned work environment." Christian Horizons was ordered to pay \$23,000 in damages and abolish its lifestyle and morality code requirement.<sup>57</sup>

In the UK case of *Reaney v. Hereford Diocesan Board of Finance*<sup>58</sup> Mr. Reaney, a practicing homosexual, applied for the position of Youth Officer in the Church of England. Following an interview, the Bishop of Hereford informed Mr. Reaney that he would not be appointed as the Youth Officer, on the basis that the Church could not condone a homosexual lifestyle during his employment and the Bishop believed that, despite his assurances to the contrary, Mr. Reaney was in no position to commit to a life of celibacy. Mr. Reaney launched a sexual orientation discrimination claim against the diocese and was awarded £47,000 in damages.<sup>59</sup>

A similar case took place in Finland in 2004 when a lesbian woman sued a church for sexual orientation discrimination because she was not appointed to the position of chaplain. The Vaasa Administrative Court annulled the decision and held that the Evangelical Lutheran Church could not refuse to appoint the woman on the basis that she was publicly living in a same-sex relationship.<sup>60</sup>

### 2.3 Private associations

The limitation on freedom of association has not just affected religious organizations that act as employers; private voluntary associations have also come under threat. In the US case of *Christian Legal Society v. Martinez*,<sup>61</sup> the Hastings College of Law refused to recognize the Christian Legal Society as an official student organization because the society required members to sign their statement of faith. Because the statement affirmed the Christian view that sexual activity should not occur outside of marriage between a man and a woman, the college rejected its

<sup>56</sup> *Heintz v. Christian Horizons*, 2008 HRT0 22 (CanLII).

<sup>57</sup> *Id.*, at § 286. The law was somewhat clarified on appeal but the Tribunal's order was upheld. See *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII).

<sup>58</sup> ET judgment 17 July 2007 (Case No: 1602844/2006).

<sup>59</sup> £47,000 fine for Bishop sued by homosexual youth worker, The Christian Institute (Febr. 12, 2008).

<sup>60</sup> Vaasa Administrative Tribunal, Finland, vaasan Hallinto-oikeus - 04/0253/3. See *Handbook on European non-discrimination law*, EU Agency For Fundamental Rights (2010), 50.

<sup>61</sup> 130 S.Ct. 2971 (2010).

application as a registered student group because it excluded students based on sexual orientation. In 2010 the US Supreme Court upheld the college's policy.

Likewise, various university Christian Unions in the UK have faced pressure to be removed from campus because requiring leaders to sign a doctrinal statement was seen to be discriminatory. Further, in Edinburgh University, the Christian Union was prohibited from running a course on sexual ethics anywhere on campus because it was deemed "offensive" to homosexuals.<sup>62</sup>

## 2.4 Educational establishments

Private educational establishments have also been impacted by SOGI non-discrimination laws. In 2005 the Károli Gáspár Calvinist University in Hungary was sued by the Háttér Support Group for Gays and Lesbians after the University dismissed a student for engaging in homosexual behaviour and subsequently published a declaration stating that: "The church may not approve of the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life." The case went all the way to the Supreme Court before the University was cleared, although subsequent amendments to Hungary's non-discrimination legislation mean that a different decision could be reached on similar facts in the future.<sup>63</sup>

In Canada the Ontario Ministry of Education released a memorandum in 2009 which stated that school boards must "give support to students who wish to participate in gay-straight alliances."<sup>64</sup> The memorandum applied to both public schools and private Catholic schools. Rather than being allowed to govern their own internal affairs, Catholic schools were forced to allow the pro-homosexual groups into their schools. Moreover, the Minister of Education later confirmed that the groups cannot be used to counsel students to reform their sexuality or try to dissuade them from engaging in homosexual behaviour.<sup>65</sup> More recently, the Ontario Premier confirmed that the issue was not a matter of choice for school boards or principals and commented that the government was more interested in "changing attitudes" on homosexuality than changing laws; a process that "should begin in the home, extend deep into our communities, including our schools."<sup>66</sup>

<sup>62</sup> *Defending your Christian Union*, The Christian Institute (May 2007).

<sup>63</sup> *Háttér Társaság a Melegekért v. Károli Gáspár Református Egyetem* (2005). See András Kádár, *Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC Hungary Country Report*, European Network of Legal Experts (2011) 93.

<sup>64</sup> *Ontario Ministry of Education Policy/Program Memorandum*, No. 145, (October 19, 2009) 6.

<sup>65</sup> See Patrick B. Craine, *Mandated gay clubs in Catholic schools can't help students overcome homosexuality: Ontario gymt LifeSiteNews* (April 8, 2011).

<sup>66</sup> *Premier Dalton McGuinty's Remarks to Pride Gala*, Office of the Premier (July 4, 2011).

In the US a New York court held that because of non-discrimination laws, a private, religiously affiliated university could not prohibit same-sex couples from living together in university housing.<sup>67</sup> Similarly, a District of Columbia court has held that a sexual orientation non-discrimination law required a private, religiously affiliated university to give “tangible benefits” to a proposed student organization that engaged in homosexual advocacy.<sup>68</sup>

## 2.5 Businesses

In some countries SOGI non-discrimination laws have also been applied to the marketplace as well as the workplace. This has had a detrimental effect on business owners that have sought to act on their religious convictions in their business life as well as their private life.

In 2009 British guesthouse owners Peter and Hazelmary Bull were sued £3,600 for refusing to offer double-bedded accommodation to unmarried couples, including same-sex couples.<sup>69</sup> Their guesthouse now faces closure. Other Christian guesthouses have also been successfully sued.<sup>70</sup>

In Canada a Christian printing business was sued after the owner, Mr. Brockie, refused to print material for a homosexual advocacy organization. Mr. Brockie believed that he should not assist in the dissemination of information intended to spread the acceptance of homosexuality but he had no problem acting for customers who were homosexual. After six years of legal proceedings he eventually had to pay \$5,000 in damages.<sup>71</sup>

In the Netherlands a company was sued for refusing to make bath towels that advertised an organization that promoted homosexual behaviour. The company had made it clear on its website that it would not do any work that was blasphemous or offensive to the morals of the company.<sup>72</sup>

In the US a wedding photography company was sued after it refused, for religious reasons, to photograph a same-sex couple’s “commitment ceremony.” The court ordered the company to pay over \$6,000 to the same-sex couple and seven years after the incident, the legal proceedings remain on-going.<sup>73</sup>

<sup>67</sup> Levin v. Yeshiva Univ., 754 N.E.2d 1099 (N.Y. 2001).

<sup>68</sup> Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 21-30 (D.C. 1987).

<sup>69</sup> Bull and Bull v. Hall and Preddy and Hall [2012] EWCA Civ 83.

<sup>70</sup> See Black and Morgan v Wilkinson, [2013] EWCA Civ 820 in the UK and Eadie and Thomas v. Molnar and others 2010 BCHRT 69 in Canada.

<sup>71</sup> Brockie v. Ontario (Human Rights Commission) [2002] O.J. No. 2375 (Sup. Ct. J. (Div. Ct.)).

<sup>72</sup> See ETC 2010-32 of 9 March 2010. For more information, see European Anti-Discrimination Law Review No. 11 – 2010, European Network of Legal Experts (2010) 67.

<sup>73</sup> Elane Photography, LLC v. Willock, Case. No. CV-2008-06632, (N.M. Court of Appeals, No. 30,203, May 31, 2012).

Similar cases are now appearing throughout the Western world, as business owners such as florists<sup>74</sup> and bakers<sup>75</sup> are refusing, on the grounds of religious conviction, to provide their services to same-sex ceremonies.

As with the other areas listed here, if SOGI non-discrimination laws are successfully pushed around the world, business owners being sued on account of their religious convictions will become commonplace outside of the West.

## 2.6 Charities

Remarkably, even charities that have served the public for over a century have come under threat from SOGI non-discrimination laws and some have even been shut down.

In Australia a Christian charity, the Wesley Mission, was sued after it refused the application of a same-sex couple to become foster carers on the basis of their homosexual lifestyle. The same-sex couple complained of unlawful discrimination on the basis of sexual orientation and the Administrative Decisions Tribunal originally found against the Christian charity because it believed monogamous heterosexual marriage was not a doctrine of the Christian church as a whole.<sup>76</sup> Although the charity eventually won its case, it took seven years and multiple court hearings to defend itself.

Charities in the UK have not been as successful in the Courts, and in 2008 faith-based adoption agencies that refused to place children with same-sex couples were forced to close down or remove their religious ethos.<sup>77</sup> This was despite the adoption agencies being widely recognized as amongst the best in the country.<sup>78</sup>

## 2.7 Indirect effect of SOGI non-discrimination laws

As SOGI non-discrimination laws spread among legal systems throughout the world,<sup>79</sup> the result of such laws go far beyond the direct effects listed above. There are numerous other indirect effects that flow from elevating “sexual orientation” and “gender identity” above religious liberty. For example, the free speech of those who speak out against homosexual behaviour is increasingly threatened,<sup>80</sup> access

<sup>74</sup> Ben Johnson, *Elderly Christian florist faces thousands in fines for refusing to provide flowers for gay 'wedding'*, LifeSiteNews (April 10, 2013).

<sup>75</sup> Ivan Moreno, *Colorado gay discrimination alleged over wedding cake*, The Gazette (June 6, 2013).

<sup>76</sup> *OV and OW v QZ and Uniting Church in Australia Property Trust (NSW) (No. 2)* [2008] NSWADT 115 (1 April 2008) § 126.

<sup>77</sup> *Adoption agencies shut under 'equality' laws*, The Christian Institute (April 2009).

<sup>78</sup> See Paul Coleman and Roger Kiska, *The proposed EU "equal treatment" directive: How the UK gives other EU member states a glimpse of the future*, IJRF 5:1 2012 (113-128). The last remaining Catholic adoption agency lost its case at the end of 2012. See *Catholic Care v. The Charity Commission*, FTC/52/2011, 2 November 2012.

<sup>79</sup> There are currently 54 States that prohibit discrimination on the ground of sexual orientation in the area of employment. See (A/HRC/19/41), p.17.

<sup>80</sup> See e.g. *Hammond v DPP* [2004] EWHC 69 (Admin) (31 January 2004); *Saskatchewan (Human*

to premises is starting to be denied to religious groups on the basis of so-called “equality and diversity” policies<sup>81</sup> and believers in traditional marriage can find themselves open to abuse – including hate mail and death threats.<sup>82</sup>

Thus, the introduction of SOGI non-discrimination laws consistently results in the withdrawal of tolerance for those who hold a differing view. In April 2012 the current Mayor of London, Boris Johnson, summed up this position perfectly. After banning bus advertisements deemed to be “homophobic” he proudly proclaimed: “London is one of the most tolerant cities in the world and is intolerant of intolerance.”<sup>83</sup> Such unashamed intolerance for anyone who voices disagreement with the aims of the SOGI movement is clearly a worrying trend. Moreover, it demonstrates that the implications of the SOGI movement not only encroach upon religious freedom, but other basic human rights such as freedom of speech and freedom of assembly, which for decades have been the bedrock of UN human rights treaties.

### 3. Conclusion

This article has sought to highlight two things. Firstly, the last ten years has seen the joining together of well-funded lobby groups, a growing number of Member States and key UN entities to push the “sexual orientation” and “gender identity” movement from the fringes of UN human rights activity to its very centre. Secondly, this development, particularly the recommendation to have SOGI non-discrimination laws introduced throughout the world, will have significant implications for religious liberty. The introduction of such laws in the West has undoubtedly threatened religious liberty in a number of different areas: employees, employers, private associations, educational establishments, businesses and charities have all been negatively affected. Thus, if UN entities such as the OHCHR are successful in pushing newly adopted SOGI recommendations on other Member States, the threat to religious liberty will spread from the West into other regions across the globe.

---

*Rights Commission) v. Whatcott*, 2013 SCC 11.

<sup>81</sup> For example, in 2012 a Christian group was prevented from hosting a conference on marriage at the Law Society because it allegedly breached the hosts’ “diversity policy”. See *Law society cancels pro-marriage conference amid diversity dispute*, Legal Week (May 14, 2012).

<sup>82</sup> For example, British politician, David Burrowes MP, revealed that he has received hate mail and death threats for supporting marriage in parliament. See Rowena Mason, *Tory MP gets ‘death threats’ over gay marriage opposition*, The Telegraph (Febr. 3, 2013).

<sup>83</sup> The adverts suggested people could change their sexuality and were launched by a UK Christian Charity, Core Issues Trust. Time Magazine awarded this quote its “quote of the day” available at <<http://content.time.com/time/quotes/0,26174,2111895,00.html>>.