

Moscow

**Date:** 21 June 2013

**To:** Council for Global Equality

**From:** Thomas McDonald, Moscow office  
Natalia Yefanova, Moscow office

**Re:** Anti-Gay Propaganda Laws in Russia

You have asked us to provide a brief analysis of the potential impact of existing and proposed so-called “homosexual propaganda” laws (“**Anti-Gay Propaganda Laws**”) in the Russian Federation on the LGBT diversity and personnel policies of multinational corporations and NGOs operating in Russia. In particular, you are interested in assessing the potential liability of, or the impact on, the corporations and NGOs that seek to provide partnership benefits to LGBT employees or distribute information about LGBT-affirming diversity policies in their offices in Russia or who wish to demonstrate support for their LGBT employees and their diversity values by funding LGBT groups or sponsoring LGBT events.

This memorandum provides a brief overview of the relevant regional and federal regulatory provisions on propaganda of homosexuality and how these are interpreted in court practice; it does not attempt to analyze in detail all federal and regional legislation which could give rise to LGBT equality concerns. Nor does it attempt to analyze in detail the reasons why the Anti-Gay Propaganda Laws are likely to be considered incompatible with international law and the treaty obligations of the Russian Federation.

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**Summary of conclusions**

- *Anti-Gay Propaganda Laws*

Russian law does not prescribe any negative consequences for being a homosexual *per se*; however, in certain regions “propaganda” of homosexuality to minors is penalized. These regional laws are not uniform and do not define clearly what is meant by propaganda. There is now pending a new federal law in the last stages of the legislative process (the “**Draft Law**” described in Section 1 below) that does define “propaganda of non-traditional sexual

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relations among minors”. This Draft Law, significantly more severe and more precise than the existing regional legislation, will effectively supersede the local laws and will have a more direct application to the activities of international companies doing business in Russia.

It is likely that in light of the international obligations of Russia under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “**Convention**”) and the International Covenant on Civil and Political Rights (the “**Covenant**”), any attempt by Russian officials to enforce the Anti-Gay Propaganda Laws (in particular the Draft Law) will be challenged before the Russian courts by LGBT activists.

Based on our analysis of existing legislation and court cases, it is highly likely that most of such challenges will be rejected by the Russian courts, which have in the past consistently upheld the existing Anti-Gay Propaganda Laws. However, any court decisions upholding the Anti-Gay Propaganda Laws will very likely be appealed to the European Court of Human Rights (“**ECHR**”), where they could well succeed, based on the reasoning of the decision of such court in *Alekseyev v. Russia*.

- *Potential Impact on International Companies in Russia*

There are no laws in Russia that directly prohibit an employer from formulating, implementing or training with respect to LGBT diversity policies. The analyses of the existing court practice applying relevant regional laws to date has shown that the formulation of such policies is possible if done in a neutral manner, as well as their implementation and dissemination at workplaces (locations which are not freely accessible by children). However, as discussed below, the Draft Law gives rise to uncertainty as to whether a company that publishes its LGBT policies or sets out its support for LGBT groups using the Internet could be subject to prosecution. While this would seem unlikely in light of existing court practice interpreting the current regional legislation, the more severe and more precise wording of the Draft Law is significantly different from the regional legislation and indicates a legislative intent to go beyond the existing laws.

The existing Anti-Gay Propaganda Laws, and in particular the proposed Draft Law on the subject (as discussed in Section 1 below), will be viewed by the international legal community as discriminatory with the effect of legitimizing and institutionalizing social exclusion and stigmatization of LGBT people. As noted above, national and international challenges to any judgments enforcing the Anti-Gay Propaganda Laws will likely occur.

The Anti-Gay Propaganda Laws and the national and international challenges to them will in turn have a direct impact on international companies doing business in Russia who have clear and well-publicized LGBT equality policies. Their willingness to transfer LGBT individuals to work in Russia will be an issue given the likely concern of such companies about placing LGBT individuals in Russia and the concerns of such individuals about living in Russia.

Moreover, the proposed Draft Law could dissuade company from recruiting LGBT citizens, or restrict companies that actively support LGBT events in other countries from doing so in Russia. It could also give rise to concern by the companies about the manner in which they publicize their LGBT policies, as well as influencing their recruitment decisions, the application of their stated LGBT policies in Russia and the way that such policies are publicized.

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It is accordingly likely that the Anti-Gay Propaganda Laws will have a chilling effect on all individuals and companies who by lifestyle or stated policy are potentially at risk of prosecution under the Anti-Gay Propaganda Laws.

### 1. Anti-Gay Propaganda Federal Law in Progress

On 11 June 2013, the Russian State Duma (the lower chamber of the Parliament) approved, (in the 2<sup>nd</sup> and 3<sup>d</sup> readings which took place the same day, by 436 votes with only one against), Draft Law No. 44554-6 “On Amendments to Article 5 of the Federal Law “On Protection of Children from Information that is Harmful to their Health and Development” and certain other laws of the Russian Federation with the aim of protecting children from information that is promoting denial of traditional family values”<sup>1</sup>) (the “**Draft Law**”). **Propaganda** is defined in the Draft Law as follows:

*distribution of information that is aimed at the formation among minors of non-traditional sexual attitudes, attractiveness of non-traditional sexual relations, misperceptions of the social equivalence of traditional and non-traditional sexual relations, or enforcing information about non-traditional sexual relations that evokes interest to such relations [...].*

The Draft Law sets administrative fines for such propaganda as follows:

*on individuals in the amount of four thousand to five thousand rubles, on officials - forty thousand to fifty thousand rubles, and on legal entities in an amount of eight hundred thousand to one million rubles or administrative suspension of activities for the period of up to 90 days.*

More severe administrative fines are proposed if the propaganda is i) carried out via the Internet or other media/telecommunication networks, or ii) committed by a foreign citizen or a stateless individual. In the latter case the person would be deported from the Russian Federation.

The Explanatory Note to the Draft Law expressly specifies that *it does not attempt to infringe on the rights of sexual minorities and does not impose administrative liability for homosexuality as such*, [but rather it is intended to] *prohibit propaganda with the purposeful and uncontrolled formation among minors of a distorted attitude to the social equality of people of any sexual orientation.*

Nonetheless, the text of the Draft Law has changed significantly during the legislative process, and from the 1<sup>st</sup> to the 3<sup>d</sup> reading the definition of propaganda became broader.<sup>2</sup> Additional articles were introduced to impose more severe punishments on foreign citizens and for the dissemination of information via the Internet. These all gives rise to the presumption of more severe and broader interpretation and application of the Draft Law (once adopted) by law-enforcement authorities.

<sup>1</sup> The text of the Draft Law is available on the State Duma official website at: [http://asozd.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=44554-6](http://asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=44554-6). In the 1<sup>st</sup> reading on 25 January 2013, this Draft Law was adopted under the name “Amendments to the Russian Code of Administrative Offenses (on Administrative Liability for the Propaganda of Homosexuality to Minors).”

<sup>2</sup> The proposed definition of the propaganda at the 1<sup>st</sup> reading was limited to: “*the holding, in locations accessible to children, of spectator events with the participation of homosexuals, and calls for and approval of, homosexual relations on television and radio during periods available to children.*”

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It is particularly relevant to note the fact that the new definition refers to “*misperceptions of the social equivalence of traditional and non-traditional sexual relations*”, giving rise to questions as to whether the publication of LGBT-friendly corporate policies, which are based on the social equivalence of such relations, could be deemed to fall within the definition. It is of course relevant to note that the definition requires that the information be *aimed at minors*, which is not the case, but the explicit reference to publication via the Internet – freely available to minors – could nonetheless allow a tribunal to sanction a company for publishing its LGBT policies on its website. While this would appear to be unlikely in light of judicial precedents interpreting the existing regional legislation (as discussed in Section 5 below), the broad definition of propaganda and the reference to the use of the Internet in the Draft Law does demonstrate a legislative intent to go beyond the existing laws.

The provisions of the Draft Laws will apply when approved by the Federation Council, signed by the President and officially published. The next regular meeting of the Council will take place on 26 June 2013 and the Draft Law is Item No. 14 on the proposed agenda list.

Once adopted, the Draft Law will prevail over and will be influential in the interpretation by the courts of similar regional legislation.

It is worth noting though that more severe punishments (i.e., 15 days administrative detention and deportation from Russia) established by the Draft Law for propaganda by foreign citizens (as compared to punishments envisaged for Russian citizens) are likely soon to be challenged in Russian courts based on the grounds that these violate the general principles of international law, such as non-discrimination between Russian citizens and foreigners and equality before the law, as provided in Article 62 (3) of the Russian Constitution.

## 2. Regional Anti-Gay Propaganda Laws

In the recent years, several regions of the Russian Federation adopted laws prohibiting *organization of public events* drawing attention to LGBT issues. The relevant laws came into force: in March 2006 – in Ryazan region; in September 2011 – in Arkhangelsk region; in February 2012 – in Kostroma region; in March 2012 – in Saint Petersburg; in June 2012 – in Magadan region and Novosibirsk region; in July 2012 – in Krasnodar Krai, Bashkortostan Republic and Samara region; in November 2012 – in Vladimir region; and in January 2013 – in Kaliningrad region. In a few other regions the adoption of the regional law in this area was suspended in view of the development of draft federal law on the subject.

All the relevant regional laws – although with varying wording – seek to prohibit *propaganda* of homosexuality to minors and set administrative fines for such an offence. For example, Article 7-1<sup>3</sup> of the St. Petersburg Law “On Administrative Offenses in St. Petersburg,” and Article 2.28<sup>4</sup> of the Samara region Law “On Administrative Offenses in the Samara region” read as follows:

*Public actions designed to promote sodomy, lesbianism, bisexuality and trans-genderism to minors shall be punishable by an administrative fine on individuals in the amount of five thousand rubles, on officials in the amount of fifty thousand rubles and*

<sup>3</sup> Article 7-1: “Public Actions Designed to Promote Sodomy, Lesbianism, Bisexuality and Trans-Genderism to Minors,” enacted under St. Petersburg Law No 108-18 dated 7 March 2012.

<sup>4</sup> Article 2.28 “Public Actions Designed to Promote Sodomy, Lesbianism, Bisexuality and Trans-Genderism to Minors,” enacted under Samara region Law No.75-GD dated 10 July 2012.

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*on legal entities in an amount of from two hundred fifty thousand to five hundred thousand rubles.*

Several regions attempted not only to set up a fine for such propaganda but also to define what *public actions* mean for this purpose. In particular, the St. Petersburg Law and the Samara region Law attempt to clarify the meaning of *public actions* as follows:

*Note. For the purposes of this Article, public actions designed to promote sodomy, lesbianism, bisexuality and trans-genderism to minors shall mean activities for purposeful and uncontrolled dissemination of generally available information capable of inflicting harm on the health and moral and spiritual development of minors, including promotion among them of distorted attitudes with respect to the social equality of traditional and non-traditional marital relations.*

In 2008 the Kaliningrad region – among the first to do so – adopted Law No. 217 “On the Protection of the Population of Kaliningrad region from Information Products Harming Spiritual and Moral Development.”<sup>5</sup> In January 2013, the law was amended with Article 8 “Prohibition of public actions designed to promote pedophilia, sexual relations *with minors*, pederasty, lesbianism and bisexuality,” which reads:

*Public actions designed to promote pedophilia, sexual relations with minors, pederasty, lesbianism and bisexuality shall be prohibited.*

Thus the article extends to all the population of the region, and is not only limited to actions directed to minors.

### 3. Brief Historical Overview of Laws Relating to Homosexuality

According to Russian law, homosexuality is not considered to be a crime or directly punished in any other way. There have been some noteworthy liberalization developments in the area since the dissolution of the Soviet Union in 1991, namely:

- Homosexuality was officially removed from the official Russian list of mental illnesses in 1999 (after endorsing ICD-10),<sup>6</sup>
- Male homosexuality was decriminalized in 1993;<sup>7</sup> and
- Men who have sex with men were finally allowed to donate blood in 2008;<sup>8</sup>
- Since 1997 transgender people are able to change their legal gender after an appropriate medical procedure.<sup>9</sup> After the amendment of the identification documents, a transgender person can legally marry a person of a sex opposite to the reassigned sex. Documents, such as a diploma, can also be amended to reflect the person’s new

<sup>5</sup> Kaliningrad region Law dated 18 January 2008 No. 217 “On the Protection of the Population of Kaliningrad region from Information Products Harming Spiritual and Moral Development”, as amended by Kaliningrad region Law dated 30 January 2013 No.199.

<sup>6</sup> Order of the Ministry of Public Health No. 170 dated 27 May 1997.

<sup>7</sup> Article 121 (1) of the Criminal Code of the USSR became invalid on 27 May 1993.

<sup>8</sup> Order of the Ministry of Public Health and Social Development No. 175n dated 16 April 2008.

<sup>9</sup> Article 70 of Federal Law No. 143-FZ "On Acts of Civil Status" dated 15 November 1997 provides for the possibility to rectify acts of civil status based on the document confirming sex transformation issued by a health institution.

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name (no gender is indicated in the diploma).<sup>10</sup> A new diploma can be issued based on the decision of the university chancellor upon the application of the transgender person; the old diploma is to be destroyed.

Despite these liberalization trends, it is nonetheless clear from the votes and debates in the Duma during the adoption of the Draft Law that this law enjoys almost unanimous support of the legislature, which of course is reflected in (and perhaps the reflection of) the statements made at the highest level of the government.

#### 4. LGBT Diversity and Personnel Policies

- *Employment issues*

The Russian Constitution (Article 19) declares equal rights of every human regardless of gender, race, nationality, language, ancestry, amount of property in possession or job position, place of living, religion, political or other views, affiliation to non-governmental organizations and other conditions. Prohibition of discrimination on any grounds except business qualities is the fundamental principle of the Russian labor law.<sup>11</sup>

Russian law does not provide any specific or beneficial regime regulating employment or other aspects of the lives of homosexuals. If an employer discriminates against an employee based on his/her sexual orientation, there are no available legal remedies for the employee. However, under Russian Labor Code, dismissal of an employee must meet certain statutory grounds and sexual orientation is not one of them. As a result, an employer may not dismiss an employee solely because of the employee's sexual orientation.

- *Same sex marriages and visa issues*

There is no law prohibiting an employer from providing equal employment benefits to LGBT employees in Russia, or enforcing an LGBT-affirming diversity policy at workplaces. Nevertheless, because same-sex marriage is not recognized in Russia, an employer may face difficulties providing certain equal benefits to its LGBT employees, such as sponsoring a visa for their same-sex spouse. The Russian Family Code recognizes only marriages between a man and a woman. Therefore the visa application for a same-sex couple would most likely be denied as there are no formal grounds or documents to support such application. The person can file for a visa on general terms and conditions (as clarified below).<sup>12</sup>

In 2006 the claim was filed to the Constitutional Court contesting the legality of Article 12(1) of the Family Code whereby the claimant was *de facto* asking to recognize his homosexual family. Turning down the claim, the Court in its Resolution No. 496-O ruled that the Russian Federation “*has not undertaken any national or international obligation whereby it would create conditions to allow propaganda, support to or recognition of, homosexual marriages.*” The Court also noted that “*lack of such recognition in Russia (as well as recognition of same-sex marriages in other states) does not affect rights and freedom of a human being and the citizen.*” The Court addressed to the Covenant and the Convention that recognize a marriage only between man and woman and defer to the national legislation of each state to regulate the family sphere.

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<sup>10</sup> Order of the Ministry of Education and Science No. 65 dated 10 March 2005.

<sup>11</sup> Article 3 of Federal Law No. 197-FZ “Labor Code” dated 30 December 2001.

<sup>12</sup> We are not aware of companies who tried to sponsor visas for gay couples.

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Pursuant to the Russian Law on Entry and Exit of Borders of the Russian Federation, a foreigner may enter the Russian Federation if he/she has a visa issued according to valid identity documents (a passport or other traveling document which the Russian Federation recognizes as an identity document). The Russian diplomatic office will issue a visa to a transgender person according to the gender information recorded on his or her passport (identity document).

## 5. Overview of Court Practice

The LGBT activists contested several regional Anti-Gay Propaganda Laws in the Russian Constitutional Court, the Russian Supreme Court, and the ECHR. In particular, the activists contested the legality of the Ryazan region law on the subject and its compliance to the Russian Constitution. Having reviewed the Ryazan region Law banning public actions aimed at propaganda to minors, the Constitutional Court declared that *the law does not prohibit or disapprove of homosexuality itself* and therefore does not discriminate against LGBT persons, *nor does it have any flavor of negative assessment of homosexuality in a regulatory framework*.<sup>13</sup>

Similar appeals were heard in other courts throughout the regions where laws banning homosexual propaganda are in effect. The courts have dismissed LGBT activists' claims. The position similar to the position of the Constitutional Court was expressed recently by the Supreme Court when reviewing appeals of the activists of the Kostroma, Samara and Arkhangelsk regional laws on the subject.<sup>14</sup> The Supreme Court pointed out that these laws do not prohibit or disapprove homosexuality as such and do not discriminate against LGBT persons.

Moreover, the Supreme Court dismissed entirely the arguments that the laws punish the *neutral dissemination of knowledge about sodomy, lesbianism, bisexuality and transgenderism, including scientific information sharing*. The Court stated that homosexual propaganda to minors contemplates *active public activities for purposeful formation of attractive mode of non-traditional sexual behavior, and distorted attitudes with respect to the social equality of traditional and non-traditional marital relations*.<sup>15</sup>

The Supreme Court ruled that not all public activities can be qualified as propaganda for this purpose; *the prohibition of homosexual propaganda does not interfere with the right to obtain and share information about homosexuality of a general, neutral nature, the right to hold public events in the procedure prescribed by the law, without influencing the opinion of minors about homosexual type of behavior [...]*.<sup>16</sup>

<sup>13</sup> Decision of the Constitutional Court No. 151-O-O dated 19 January 2010 in relation to the legality and its compliance to the Constitution of Article 4 of the Ryazan regional Law "On Protection of Morality of Children in Ryazan region" and Article 3.10 of the Ryazan region Code of Administrative Offences.

<sup>14</sup> Resolution of the Supreme Court No. 87-APG12-2 dated 7 November 2012 in relation to the Kostroma region Law; Resolution of the Supreme Court No. 46-APG13-2 dated 27 February 2013 in relation to the Samara region Law; Resolution of the Supreme Court No. 1-APG12-11 dated 15 August 2012 in relation to the Arkhangelsk region Law, and some others.

<sup>15</sup> Resolution of the Supreme Court No. 87-APG12-2 dated 7 November 2012 in relation to the Kostroma region Law.

<sup>16</sup> Resolution of the Supreme Court No. 1-APG12-11 dated 15 August 2012 in relation to the Arkhangelsk region Law.

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It is not quite clear at this point how the interpretation by the courts of “propaganda” will be influenced as a result of the adoption of the Draft Law, but it is likely that the definition in the Draft Law will have significant impact.

## 6. Law Enforcement Practice

It is not only court practice in Russia that is relevant. LGBT arrests, even if not followed by prosecution or administrative proceedings, are not infrequent and often are premised on Anti-Gay Propaganda Laws. We refer to the summary of such cases prepared by International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe)<sup>17</sup> and the Report on the Enforcement of the judgment of the ECHR on application no. 4916/07, 25924/08 and 14599/09 *Alekseyev v. Russia*,<sup>18</sup> which you kindly provided to us.

It is very likely that the Draft Law – when in force and applied – will result in arrests, prosecutions and convictions that will very likely be upheld by the Russian courts who will find the prohibition of propaganda to minors in the Draft Law in conformity with the Russian Constitution.

If and when the convictions will be challenged in the ECHR, the proposed Draft Law could well be held incompatible with the decision of *Alekseyev v. Russia* and contrary to international obligations of Russia resulting from the Convention, such as the obligation to ensure the right to freedom of expression and the obligation not to discriminate on the basis of sexual orientation.<sup>19</sup> And even if the ECHR finds that the law violates Russia’s international obligations, that is not likely to significantly change local enforcement decisions and could actually increase attention to and therefore use of the law.

The question of whether a judgment of the ECHR prevails over a contradictory ruling of the Constitutional Court is currently before the Constitutional Court, but in a case unrelated to LGBT issues.<sup>20</sup> The determination of this case could have relevance if the Draft Law is upheld by the Constitutional Court but is deemed by the ECHR to be incompatible with Russia’s international obligations.⊕

<sup>17</sup> You have kindly provided to us, and we accepted without further verification, the Submission of the ILGA –Europe to the Committee of Ministers of the Council of Europe in the cases of *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, prepared on 14 February 2013.

<sup>18</sup> The Report on the Enforcement of the judgment of the ECHR on application no. 4916/07, 25924/08 and 14599/09 *Alekseyev v. Russia* prepared for the 1150th CMCE meeting on 24-26 September 2012 (DH level).

<sup>19</sup> For more details please refer to the Excerpt of Report by ILGA Europe and the International Commission of Jurists: “Homosexual Propaganda” Bans: Analysis and Recommendations (June 2012).

<sup>20</sup> In January 2013 the Constitutional Court has accepted for the review the application from the Military Court of the Leningradskiy Command. The Military Court is asking the Constitutional Court for clarifications, *inter alia*, whether the provisions of Article 392 (“Grounds for reconsideration due to newly discovered circumstances of effective judgments”) of the Russian Civil Procedure Code are compatible with the Constitution; and whether a ruling of the ECHR or the Constitutional Court shall prevail if the rulings contradict each other. The underlying cases are: ECHR Case No. 30078/06 *Konstantin Markin v. Russia* and the Constitutional Court Ruling No. 187-O-O dated 15 January 2009. The date of the Constitutional Court’s review of this application has not yet been announced.