COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, le 21 mars 2013

CDDH(2013R77
Addendum VI

COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME (CDDH)

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RAPPORT

sur la mise en œuvre de la Recommandation CM/Rec(2010)5 du Comité des Ministres sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre

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77e réunion, 19-22 mars 2013

Documents de référence

- Recommandation CM/Rec(2010)5 du Comité des Ministres aux Etats membres sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre, 31 mars 2010
- Exposé des motifs de la Recommandation CM/Rec(2010)5, document CM(2010)4 add3 final, 31 mars 2010
- Questionnaire sur la mise en œuvre de la Recommandation CM/Rec(2010)5 du Comité des Ministres sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre, CDDH(2012)R76 Addendum VIII
- Compilation des réponses des Etats membres au questionnaire, CDDH(2013)004 Document disponible en ligne uniquement étant donné sa longueur, à l'adresse : http://www.coe.int/t/dghl/standardsetting/hrpolicy/others_issues/lgbt/follow_up_FR.asp?;
- Compilation des contributions envoyées par *Amnesty International*, ILGA Europe et l'Agence des droits fondamentaux de l'Union européenne (FRA), CDDH(2013)008.

Historique

1. Lors de l'adoption de la Recommandation CM/Rec(2010)5 du Comité des Ministres aux Etats membres sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre, le Comité des Ministres avait convenu d'examiner la mise en œuvre de la recommandation deux ans après son adoption.

2. Lors de leur 1151e réunion (18 et 19 septembre 2012), les Délégués des Ministres ont donc chargé le Secrétariat du Conseil de l'Europe d'élaborer, sous la supervision du Comité directeur pour les droits de l'homme (CDDH), un questionnaire sur la mise en œuvre de la Recommandation CM/Rec(2010)5 et de transmettre le document aux Etats membres et à d'autres parties prenantes concernées.

3. Pour faire suite à cette décision, le Secrétariat a élaboré un questionnaire (CDDH(2012)R76 Addendum VIII), adopté par le CDDH lors de sa 76e réunion plénière (27-30 novembre 2012). Le CDDH a fourni des orientations pour la préparation du présent rapport sur la mise en œuvre de la recommandation, à soumettre au Comité des Ministres de préférence pour la fin mars 2013. Les autorités compétentes ont été invitées à répondre au questionnaire en respectant l'échéance du 31 janvier 2013 au plus tard.

4. **39** des 47 Etats membres ont répondu au questionnaire soumis, à savoir : Albanie, Andorre, Arménie, Autriche, Belgique, Bosnie-Herzégovine, Croatie, Chypre, République tchèque, Danemark, Estonie, Finlande, France, Géorgie, Allemagne, Grèce, Hongrie, Irlande, Italie, Lettonie, Liechtenstein, Lituanie, Malte, République de Moldova, Monténégro, Pays-Bas, Norvège, Pologne, Portugal, **Roumanie**, Serbie, Slovaquie, Slovénie, Espagne, Suède, Suisse, « l'ex-République yougoslave de Macédoine », Turquie et Royaume-Uni. Des contributions envoyées par *Amnesty International*, ILGA Europe et l'Agence des droits fondamentaux de l'Union

européenne **(FRA)**, ne sont pas reprises dans le présent rapport, mais elles y figurent en annexe**.**

5. L'analyse ci-après concerne les réponses reçues de la part de ces **39** Etats membres. Pour faciliter la lecture des chapitres ci-après, l'expression « tous les Etats » s'emploie par référence à tous les Etats ayant soumis leurs réponses. Il convient aussi de noter que dans certains cas des divergences ont été remarquées entre la case cochée et les explications fournies. Dans ces cas, les réponses ont été évaluées sur la base des explications fournies.

Section I

6. La présente section traite de la ***mise en œuvre et diffusion de la recommandation***.

7. S'agissant de la question de savoir comment les Etats évaluent la mise en œuvre de la recommandation dans leur pays, les réponses collectées montrent qu'une majorité des Etats répondants (**vingt-et-un**) qualifie l'état de mise en œuvre de « satisfaisant ». Six Etats ont répondu « pleinement satisfaisant » et six autres « insuffisant ». Enfin, un Etat a répondu « absence d'impact ». Les Etats ayant qualifié l'état de mise en œuvre de « satisfaisant » ont motivé leur réponse en expliquant que combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre est une tâche complexe qui s'inscrit dans la durée et ne saurait donc être considérée comme achevée. Les Etats ayant répondu « insuffisant » ont indiqué des difficultés liée à une coordination interne insuffisante, ou que la prévention de la discrimination fondée sur l'orientation sexuelle ou l'identité de genre demeure une question sensible pour l'opinion publique, et ont souligné la persistance de diverses formes de discrimination, de violences et de menaces à l'égard des lesbiennes, des gays et des personnes bisexuelles et transgenres (LGBT). **Un Etat informe qu'il était impossible de fournir une évaluation globale.**

8. La plupart des Etats répondants considèrent que leur système juridique (notamment leur Constitution mais aussi les lois en matière de non-discrimination et d'égalité) est déjà conforme à la recommandation et à son annexe sous l'angle de l'interdiction de toute forme de discrimination, y compris celle fondée sur l'orientation sexuelle. A cet égard, certains Etats ont mentionné que la mise en œuvre de la recommandation intervient dans le cadre de la politique générale de lutte contre la discrimination, sans distinguer les droits et intérêts de tel ou tel groupe. Par ailleurs, plusieurs Etats ont également adopté des mesures législatives et politiques particulières, afin d'interdire la discrimination fondée sur l'orientation sexuelle et l'identité de genre ou envisagent de le faire prochainement, notamment dans le domaine de l'emploi dans la fonction publique. Il a en outre été mentionné que la recommandation aide à déterminer les améliorations à apporter dans chaque Etat en vue de garantir les droits des personnes LGBT. Beaucoup d'Etats affichant un niveau de conformité élevé ont indiqué que cela s'explique par des actions antérieures à la recommandation (principalement dans des domaines concernant la dépénalisation des relations entre personnes de même sexe, la déclassification de l'homosexualité comme maladie, ou l'adoption d'une

législation interdisant la discrimination fondée sur l'orientation sexuelle dans le domaine de l'emploi). Il est à noter, à cet égard, que, dans la plupart des cas l'accent a davantage été mis sur la révision des dispositions législatives en vigueur plutôt que sur la mise en place de mesures préventives comme la formation ou la sensibilisation et que, le plus souvent, ces mesures ne s'inscrivent pas dans une stratégie globale et transsectorielle aux niveaux national et local.

9. D'autres Etats ont affirmé ne pas avoir de problème social d'intolérance. En conséquence, ils n'ont pas jugé nécessaire de prendre des mesures visant à promouvoir la tolérance à l'égard des personnes LGBT. Les Etats ont indiqué plusieurs domaines dans lesquels il existe d'autres obstacles à la pleine mise en œuvre de la recommandation, notamment : vie privée et relations familiales, reconnaissance des traitements de conversion sexuelle pour les personnes transgenres, protection des participants lors de manifestations pacifiques en faveur des droits fondamentaux des personnes LGBT.

10. S'agissant de la question de savoir s'il avait été procédé à un examen des dispositions législatives en vigueur et d'autres mesures susceptibles d'avoir une incidence directe ou indirecte sur la discrimination fondée sur l'orientation sexuelle ou l'identité de genre, seul un petit groupe d'Etats (huit Etats) a déclaré avoir modifié plusieurs lois en vue de renforcer la réglementation en matière de discrimination fondée sur l'orientation sexuelle et l'identité de genre après l'adoption de la recommandation ; onze Etats ont déclaré y travailler, et quatre autres ont assuré avoir l'intention de le faire dans un proche avenir. Enfin, huit Etats ont simplement répondu ne pas avoir effectué cet examen.

11. Certains des Etats ayant répondu par la négative ont déclaré que leur législation nationale ne contient pas en elle-même de clauses discriminatoires et que toute disposition présumée discriminatoire, le cas échéant, est généralement supprimée lors de la rédaction. Certains de ces Etats ont en outre souligné que même si l'orientation sexuelle et l'identité de genre ne figurent pas explicitement comme motif de discrimination dans les clauses antidiscriminatoires, cela n'implique pas que la discrimination fondée sur ces motifs ne soit pas prohibée par la loi. A cet égard, ils ont également indiqué que toute personne peut saisir la Cour constitutionnelle d'un recours constitutionnel en invoquant une discrimination fondée sur l'orientation sexuelle ou l'identité de genre.

12. Certains des Etats ayant répondu par l'affirmative ont fait référence à des examens techniques de certaines lois (par exemple par un médiateur), d'autres ont mentionné la réalisation d'enquêtes pour déterminer si les personnes LGBT étaient dans une situation pire que les autres sur le plan des dispositions relatives à différents domaines de la vie et de leur application, ou d'analyses visant à identifier les obstacles qui subsistent et empêchent les personnes LGBT de bénéficier de l'égalité des droits et des chances. Dans certains Etats, comme l'Italie, l'instance nationale d'égalité des chances contrôle les actes administratifs ou réglementaires, afin de signaler d'éventuelles dispositions discriminatoires.

13. **Dix-neuf** Etats ont indiqué avoir mis en place des mesures visant à mettre fin aux discriminations susmentionnées, treize autres Etats ont engagé ce processus et un autre prévoit de le faire. Un autre Etat a répondu qu'aucune mesure n'avait été adoptée pour mettre fin à ces discriminations. La plupart de ceux ayant répondu par l'affirmative ont cité leur législation nationale et mentionné des voies de recours individuel (médiateurs, cours et tribunaux chargés des questions d'égalité) qui permettent l'accès à un recours juridique dans de tels cas, ainsi que le droit d'obtenir réparation pour tout préjudice, matériel ou moral, causé par le non-respect du principe d'égalité de traitement (concernant neuf motifs de discrimination explicitement mentionnés). Certains des Etats ayant répondu par la négative ont commenté qu'aucun cas de discrimination n'ayant été porté jusqu'à présent à l'attention des autorités compétentes, il était inutile de prendre des mesures visant à mettre fin à d'éventuelles sources de discrimination.

14. Pour faire suite à l'adoption de la Recommandation 2010(5) du Comité des Ministres, plus de la moitié des Etats répondants ont adopté et mis en œuvre des mesures (législatives ou autres) de lutte contre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre (y compris la mise en place de plans d'action nationaux, l'ajout de la recommandation dans des plans existants ou la création de groupes de travail intersectoriels pour sa mise en œuvre) ; **quatorze** autres Etats ont déclaré avoir engagé ce processus et deux autres ont mentionné leur intention de prendre de telles mesures. Toutefois, un groupe de quatre Etats ont répondu par la négative à cette question.

15. Ceux ayant répondu par l'affirmative ont cité : l'adoption de nouvelles dispositions législatives (lois en matière d'égalité des sexes, protocoles traitant des crimes de haine, lois relatives au mariage, politiques nationales en faveur de l'égalité des sexes, etc.) ; des amendements à la législation dans plusieurs domaines (par exemple examen de la législation antidiscriminatoire en vigueur dans l'intention d'élargir le champ d'application de la protection juridique, afin de garantir un traitement de tous les motifs de discrimination sur un pied d'égalité ; l'extension, sur les mêmes bases, de la protection conférée par les lois relatives aux violences conjugales aux couples de même sexe n'ayant pas conclu de partenariat enregistré ; l'établissement en infraction pénale des discours de haine fondés sur l'orientation sexuelle ou l'identité de genre). Un très grand nombre d'Etats a mentionné la création de groupes de travail et comités intersectoriels ainsi que la mise en place de plans d'action nationaux en faveur des personnes LGBT (en matière de santé par exemple). Concernant les mesures législatives, un Etat a précisé que l'expression « identité de genre » n'existait pas dans son droit interne, et que l'expression « identité sexuelle » est employée à la place, afin de recouvrir la situation des personnes transsexuelles et transgenres, conformément à la recommandation. Un autre Etat a en outre indiqué qu'un protocole d'accord avait été rédigé en coopération avec les collectivités locales pour combattre la discrimination fondée sur l'orientation sexuelle et l'identité de genre. Comme déjà mentionné plus haut, il faut garder présent à l'esprit que la plupart de ces évolutions positives sont en effet le fruit d'actions antérieures à la recommandation. Par ailleurs, les réponses reçues des Etats font également apparaître que l'identité de genre n'est

incluse que de façon très limitée dans ces mesures, par comparaison avec l'orientation sexuelle.

16. Six Etats (Albanie, Italie, Lettonie, Monténégro, Pologne et Serbie) ont explicitement fait référence au projet d'assistance du Conseil de l'Europe dans le contexte de la mise en œuvre de la recommandation, notamment en ce qui concerne la mise en place de plans d'action nationaux et l'organisation de séminaires ou d'activités de formation.

17. **Onze** Etats seulement ont confirmé avoir des mesures en place afin de collecter et analyser les données pertinentes relatives à la discrimination fondée sur l'orientation sexuelle ; onze autres ont entrepris la mise en place de ces mesures, et un Etat a déclaré son intention de le faire. Dans huit Etats, elles sont inexistantes. S'agissant des mesures visant à collecter et analyser les données pertinentes relatives à la discrimination fondée sur l'identité de genre, huit Etats seulement ont déclaré avoir pris des mesures ; plusieurs autres (**dix**) n'ont rien fait. Dix autres Etats y travaillent actuellement et cinq autres prévoient de le faire.

18. Dix Etats seulement ont en outre confirmé avoir des mesures en place afin de collecter et analyser les données pertinentes relatives aux crimes de haine et autres incidents motivés par la haine pour lesquels l'orientation sexuelle ou l'identité de genre de la victime peut être raisonnablement soupçonnée d'avoir été l'un des motifs de l'auteur de l'infraction. Onze autres Etats travaillent à la mise en œuvre de telles mesures et quatre autres ont l'intention de le faire bientôt. Par ailleurs, **onze** Etats ont répondu ne pas avoir de mesures en place. Certains des Etats ayant répondu par la négative ont indiqué ne pas avoir traité jusqu'à présent d'affaires de discrimination fondée sur l'orientation sexuelle qui auraient requis l'adoption de mesures pour collecter et analyser les données. D'autres Etats ont évoqué le conflit avec les règles en matière de protection des données à caractère personnel, qui interdisent le traitement de renseignements personnels concernant l'orientation sexuelle.

19. Les Etats ayant déclaré collecter et analyser des données pertinentes ont indiqué que les données recueillies concernent les domaines suivants : la discrimination motivée par l'orientation sexuelle, la violence à l'égard des personnes LGBT, la santé et l'éducation ; des enquêtes quantitatives ciblées sur la nature et l'étendue de la discrimination ; la violence, l'humiliation et la victimisation motivées par l'orientation sexuelle et l'identité de genre ; des enquêtes parmi les forces armées. Certains de ces Etats ont également mentionné l'existence d'un organe spécial de lutte contre la discrimination ou d'un médiateur chargé de cette tâche. D'autres Etats ont fait référence à des instances telles que les tribunaux, les médiateurs, le ministère de l'Intérieur, la police ou les services de sécurité et de renseignements. Cependant, de nombreux Etats ont indiqué que ces données ne sont pas ventilées en fonction du mobile de l'auteur de l'infraction. A cet égard, il convient également de noter que le nombre de plaintes ne reflète pas la prévalence de la discrimination car la plupart des victimes d'actes de discrimination ne portent pas plainte.

20. S'agissant de l'existence de voies de recours effectives pour les victimes de discrimination fondée sur l'orientation sexuelle ou l'identité de genre (y compris des sanctions en cas d'infraction et des réparations adéquates pour les victimes), d'une manière générale tous les Etats ont affirmé l'existence de ces voies de recours ou leur disponibilité prochaine. La plupart ont mentionné que leur droit interne non seulement donne aux victimes d'une discrimination (y compris fondée sur l'orientation sexuelle ou l'identité de genre) le droit de demander réparation en cas d'atteinte à leur vie privée, mais prévoit aussi des sanctions (placement en détention ou amende) pour les infractions, tandis que les victimes ont droit à une réparation au titre du préjudice matériel ou moral. Il est frappant de noter qu'un Etat a mentionné la possibilité de demander réparation pour non-respect du principe d'égalité de traitement en cas de discrimination fondée sur l'orientation sexuelle, mais pas en cas de discrimination fondée sur l'identité de genre. Certains Etats ont également fait référence à des procédures de conciliation facilement accessibles. En l'absence de mesures spécifiques dans la législation pertinente concernant l'orientation sexuelle et l'identité de genre, le droit de saisir les tribunaux en cas de discrimination injustifiée s'infère de la Constitution. En pratique, cependant, le nombre de plaintes relatives à la discrimination fondée sur l'orientation sexuelle ou l'identité de genre demeure semble-t-il très peu élevé.

21. **Dix-sept** Etats ont signalé l'existence de mesures pour informer les victimes des dispositifs existants et faciliter leur accès à ces voies de recours, et treize travaillent à leur mise en place. Un petit groupe de trois Etats a répondu par la négative. Certains Etats ont commenté qu'aucune mesure particulière ne s'adresse spécifiquement aux victimes d'une discrimination fondée sur l'orientation sexuelle et que ces victimes peuvent bénéficier, comme toute autre personne, des voies de recours existantes. D'autres Etats ont fait référence aux structures nationales des droits de l'homme (médiateurs, organismes de promotion de l'égalité) chargées de mener à bien des actions de sensibilisation et de faciliter l'accès des victimes à ces voies de recours, ainsi qu'à la création d'unités anti-discrimination au sein des tribunaux de grande instance. Certains des Etats répondants ont en outre mentionné l'existence d'associations d'aide aux victimes, et que sous certaines conditions, les plaignants peuvent demander à bénéficier d'une assistance juridique gratuite. La France a indiqué que des formulaires spécifiques de plainte ou de signalement sont mis à disposition dans les commissariats, gendarmeries ou maisons du droit, afin de dénoncer ces formes de discrimination. La France, Malte et le Royaume-Uni ont évoqué des campagnes d'information sur les droits des victimes d'actes homophobes, ainsi que la publication d'une brochure destinée à aider les victimes potentielles d'une discrimination. Des avis qualifiés et impartiaux sont également fournis aux employés et aux employeurs par le biais de l'Internet et de lignes d'écoute téléphonique.

22. A des fins de diffusion de la recommandation, les Etats ont été invités à la traduire. Un nombre conséquent (vingt-trois) d'Etats l'ont déjà fait et deux autres se sont engagés à donner suite à cette invitation. Un Etat a indiqué son intention de traduire la Recommandation aussi dans les langues minoritaires. Ceci dit, **quatorze** autres Etats doivent encore le faire.

23. Concernant la question de savoir quelles mesures ont été prises pour veiller à ce que la recommandation ainsi que son annexe soient diffusées aussi largement que possible, de nombreux Etats ont indiqué que la recommandation traduite avait été transmise à toutes les autorités nationales concernées (notamment différents ministères, la police, le médiateur), à toutes les ONG œuvrant en faveur des personnes LGBT, aux syndicats et aux salariés, à la presse et aux bibliothèques nationales. Le Monténégro a mentionné l'organisation d'une conférence de promotion de la recommandation ouverte à la participation de toutes les parties prenantes publiques et non-gouvernementales. En outre, un petit nombre d'Etats ont lancé des campagnes de sensibilisation aux questions LGBT, en englobant la recommandation. Certains Etats ont en outre souligné l'importance de la société civile dans ce processus.

Section II

24. Cette section concerne la ***mise en œuvre des dispositions spécifiques énoncées en annexe*** à la recommandation.

I- Droit à la vie, à la sécurité et à la protection contre la violence

25. La majorité des Etats répondants a indiqué qu'en principe, les règles générales de droit garantissent qu'une enquête est menée sur toutes les infractions pénales, quel qu'en soit le motif. Dans neuf Etats, des dispositions plus spécifiques sont applicables lorsque l'on peut raisonnablement soupçonner que l'infraction considérée relève de l'homophobie. Un seul Etat a répondu par la négative à cette question, et un autre a indiqué que sa position sur cette question n'était pas déterminée. Dans un Etat, de récents amendements au Code pénal ont permis d'ajouter des mobiles liés à l'orientation sexuelle dans la définition des « crimes de haine », et dans sept autres Etats des amendements aux textes en vigueur sont en cours d'examen en vue d'énoncer clairement ces mobiles dans la loi ou de clarifier la loi applicable. Dans trois Etats, le médiateur (et également le ministre de la Justice dans un cas) est habilité à recevoir des plaintes ou ouvrir une enquête d'office lorsqu'une agression est commise en raison de l'orientation sexuelle de la victime.

26. Pour au moins **seize** Etats, un mobile fondé sur un préjugé lié à l'orientation sexuelle est considéré comme une circonstance aggravante. Dans un Etat, il s'agit d'une circonstance aggravante en cas d'homicide ; dans un autre, la discrimination en soi est qualifiée d'infraction par le Code pénal. Dans quatre Etats, la décision est laissée à l'appréciation du juge. Dans sept Etats, il n'y a pas de mesures en place pour garantir qu'un mobile fondé sur un préjugé lié à l'orientation sexuelle ou à l'identité de genre puisse être pris en compte en tant que circonstance aggravante ; cinq d'entre eux envisagent cependant de modifier la législation. L'identité de genre n'est pas toujours explicitement mentionnée dans la loi comme circonstance aggravante ; deux Etats ont indiqué clairement que cela serait qualifié de circonstance aggravante sous « autres motifs » ou « autres actes comparables ».

27. Des campagnes de sensibilisation, l'information sur internet, des publications et la formation de la police et d'autres professionnels figurent parmi les mesures prises par dix-neuf Etats pour encourager les victimes et les témoins de crimes de haine motivés par l'orientation sexuelle ou l'identité de genre à les signaler. Quatre Etats ont cité des mesures générales de protection des victimes. Dans un Etat, un projet de loi concernant les victimes d'infractions pénales est à l'étude. Dix Etats n'ont semble-t-il entrepris aucune action particulière. Au Monténégro, un accord de coopération a été conclu entre une ONG et la Direction de la Police afin d'accroître la confiance du public et d'améliorer la capacité de la police de protéger les droits des personnes LGBT. **En Roumanie, un partenariat entre la Police et l'Institut danois des droits de l'homme a abouti à l'élaboration de lignes directrices à l'intention des policiers, distribuées dans les postes de police de Bucarest, et à l'organisation de cours de formation pour des fonctionnaires de police sur la manière d'identifier et d'aborder des crimes de haine à l'encontre des personnes LGBT.**

28. **Trente-deux** Etats mentionnent des programmes de formation existants ou en préparation; certains sont spécifiquement consacrés aux questions LGBT, d'autres mettent l'accent sur les droits de l'homme et la diversité. Dans un Etat, une formation devrait être mise en place après l'entrée en vigueur d'un amendement apporté au Code pénal et un autre Etat a indiqué l'intention de travailler sur cette question. Deux Etats membres ont indiqué ne pas avoir de programmes de formation en place sur ces questions et trois Etats membres n'ont fourni aucune information à cet égard.

29. La majorité des Etats membres applique les normes antidiscriminatoires générales pour protéger la sécurité et la dignité de tous les détenus. Lorsqu'il y a un risque d'agression physique ou de violence, plusieurs Etats membres prévoient des mesures spécifiques pour garantir la sécurité, comme la détention dans des installations séparées ; deux Etats membres ont fait état de mesures spéciales pour les personnes transgenres. Trois Etats membres n'ont pas répondu à la question ; l'un d'eux considère que les mesures actuelles visant à garantir la sécurité et la dignité des détenus sont suffisantes.

30. **Vingt-neuf** Etats membres ont indiqué que des mesures appropriées ont été prises ou que des travaux sont en cours, afin de combattre toutes les formes de « discours de haine », conformément à la recommandation. Cinq Etats membres prévoient de travailler sur cette question. Dans huit Etats membres, il est fait référence aux dispositions du Code pénal, mais d'autres lois, notamment celles relatives à la presse et à d'autres mass-médias, prohibent également le discours de haine. Un Etat membre n'a pas de position déterminée à cet égard et ne dispose d'aucune mesure particulière pour combattre le discours de haine contre les personnes LGBT : dans leur réponse, les autorités indiquent que ce phénomène n'a pas été observé. Deux Etats membres n'ont pas pris de mesures spécifiques, et deux autres n'ont fourni aucune information. Un Etat membre a souligné la nécessité de mettre en balance le droit à la liberté d'expression et la nécessité d'empêcher tout acte d'intimidation, les menaces de violence et l'incitation à la haine. Concernant la sensibilisation des autorités et organismes publics à leur responsabilité de s'abstenir de faire des déclarations susceptibles de cautionner la haine contre les personnes LGBT, sept Etats membres

ont pris des mesures en ce sens, quatorze ont mentionné que des travaux étaient en cours dans ce domaine et quatre ont indiqué qu'ils avaient l'intention de travailler sur cette question.

31. Comme exemple de bonnes pratiques, trois pays partenaires du projet LGBT du Conseil de l'Europe ont mentionné le séminaire international tenu à Budva (Monténégro), en décembre 2012, sur la formation des forces de police relative aux questions LGBT. Ce séminaire a rassemblé les parties prenantes et les décideurs dans ce domaine, ainsi que les ONG concernées, pour procéder à des échanges de vues et de bonnes pratiques. L'un des objectifs était de développer la confiance entre la police et la communauté LGBT.

II- Liberté d'association

32. La quasi-totalité des Etats (**trente-sept**) ont déclaré avoir des mesures en place garantissant la jouissance du droit à la liberté d'association (y compris l'accès au financement public disponible pour les organisations non gouvernementales) sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre. Un seul a indiqué n'avoir aucune mesure de la sorte et un autre a expliqué que sa position sur cette question n'était pas déterminée. Il convient de noter cependant que dans au moins un Etat, les informations relatives aux membres du conseil d'administration des associations LGBT doivent être accessibles au public.

33. Concernant les mesures visant à revoir ou lever les restrictions ou exceptions aux garanties énoncées aux paragraphes 9 et 10 de l'annexe à la recommandation, aucune mesure particulière n'est en place dans la quasi-totalité des Etats répondants. Les réponses montrent que la législation nationale pertinente ne prévoit aucune restriction à la liberté d'association fondée sur l'orientation sexuelle ou l'identité de genre et que les associations LGBT peuvent être enregistrées sans difficulté et fonctionner librement dans la plupart des Etats.

34. Concernant les mesures spécifiques en place pour protéger de manière effective les défenseurs des droits fondamentaux des personnes lesbiennes, gays, bisexuelles et transgenres contre les actes d'hostilité et les agressions auxquels ils peuvent être exposés (y compris lorsqu'ils sont censés avoir été commis par des agents de l'Etat), douze Etats seulement ont indiqué avoir adopté des dispositions de droit pénal protégeant les défenseurs des personnes LGBT. Cinq autres Etats ont déclaré que des travaux étaient en cours dans ce domaine et trois autres prévoient de le faire. Un groupe important de douze Etats ont indiqué ne pas avoir pris de telles mesures jusqu'à présent. La plupart le justifie par le fait que les mécanismes existants fournissent déjà une garantie, puisque toute personne est en droit de déposer une plainte devant les instances compétentes de l'Etat. En conséquence, ces Etats expliquent que rien ne fait apparaître la nécessité d'une protection particulière. Ceux ayant répondu par l'affirmative ont indiqué que leur droit pénal national protège les défenseurs des droits des personnes LGBT contre les actes d'hostilité et les agressions actives ou verbales.

35. **Vingt-quatre** Etats ont pris des mesures pour veiller à ce que les organisations non gouvernementales (ONG) défendant les droits de l'homme des personnes LGBT soient consultées de manière appropriée sur l'adoption et la mise en œuvre de mesures pouvant avoir un impact sur ces personnes. Sept Etats sont en train de le faire et deux autres ont indiqué leur intention d'adopter de telles mesures. Cependant, trois Etats ont répondu par la négative à la question.

36. La coopération entre les ONG défendant les droits des personnes LGBT et les pouvoirs publics s'est considérablement améliorée. Un grand nombre d'Etats a indiqué que les ONG concernées sont régulièrement invitées à participer à l'examen des propositions législatives et à la mise en œuvre de plans d'action ; elles sont représentées au sein des comités préparatoires et participent à la préparation des politiques publiques affectant les personnes LGBT, de même qu'aux travaux de divers groupes de travail. Certains Etats ont également mentionné à cet égard des consultations publiques par le biais de l'Interne **et des partenariats entre acteurs publiques et privés dans des projets sur la prévention de la discrimination**. Cependant, il n'est pas garanti dans tous les cas que les points de vue des personnes LGBT soient pris en compte dans toutes les procédures législatives pertinentes, ni qu'ils aient une quelconque incidence sur le résultat final.

III- Liberté d'expression et de réunion pacifique

37. La quasi-totalité des Etats (**trente-cinq**) a indiqué avoir des mesures en place garantissant que la liberté d'expression, notamment la liberté de recevoir et de transmettre des informations concernant l'orientation sexuelle ou l'identité de genre, puisse être exercée sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre. Un Etat a indiqué en être encore au stade de la mise en place de ces mesures et trois Etats ont déclaré que leur position à ce sujet n'était pas déterminée.

38. De même, **trente-cinq** Etats qui ont répondu ont pris des mesures garantissant que la liberté de réunion pacifique puisse être exercée sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre. Un autre Etat a mentionné que des travaux étaient en cours à ce sujet et deux autres ont dit leur position à ce sujet n'était pas déterminée.

39. Concernant les mesures visant à revoir ou lever des exceptions ou des restrictions spécifiques à l'égard de ces libertés, la plupart des Etats qui ont répondu a indiqué ne pas avoir de restrictions spécifiques à la liberté d'expression ou de réunion en lien avec l'orientation sexuelle ou l'identité de genre autres que les restrictions générales prévues par la loi et nécessaires, dans une société démocratique, à la sécurité nationale, à la sûreté publique, au maintien de l'ordre public, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui.

40. Concernant la question de savoir si les services répressifs prennent les mesures appropriées pour protéger les participants à des manifestations pacifiques en faveur des droits fondamentaux des personnes LGBT, une grande majorité des Etats (**trente-**

quatre) a répondu par l'affirmative. Un Etat y travaille actuellement et deux autres n'ont pas de position à ce sujet. Certains des Etats qui ont répondu ont souligné l'obligation positive – énoncée dans leur Constitution respective – de la police de protéger le droit des citoyens à la liberté de réunion et de défendre ce droit, y compris pour les participants à des manifestations en faveur des droits des personnes LGBT. A cette fin, de telles manifestations sont soumises à déclaration préalable à la police. Lorsqu'il existe des raisons de soupçonner la commission d'une infraction, la police est tenue de mener une enquête. Les Etats qui ont répondu ont également souligné qu'aucune distinction n'est effectuée en ce qui concerne les manifestations LGBT. A cet égard, plusieurs Etats qui ont répondu ont fait référence à des défilés LGBT (Gay Pride) pendant lesquels la police avait protégé efficacement les participants. Un Etat a toutefois signalé qu'à la suite de menaces reçues par les organisateurs, le défilé avait dû être annulé ; un autre a exposé les allégations d'ONG selon lesquelles des incidents intervenus lors d'un défilé n'auraient pas donné lieu à une réponse appropriée de la police.

41. Concernant des exemples de bonnes pratiques dans ce domaine, quelques Etats ont mentionné la publication de lignes directrices ou la réalisation d'une formation spéciale à l'intention des forces de police. La formation aborde des thèmes tels que la préparation mentale, la communication, la loi, l'identification des dangers et la prévention des blessures.

IV. Droit au respect de la vie privée et de la vie familiale

42. Vingt Etats ont souligné que les dispositions du droit pénal pouvant se prêter à une application discriminatoire s'agissant de l'orientation sexuelle ou de l'identité de genre sont abrogées depuis un certain temps, et que ces dispositions n'existent plus dans le Code pénal. Un Etat a mentionné un mécanisme qui permet, le cas échéant, d'apporter les modifications voulues au Code pénal, et un autre a indiqué que, à présent, aucune complainte liée à l'existence de ces dispositions n'avait été enregistrée. Trois États ont signalé quelques exceptions au principe général d'égalité qui existe toujours, et un Etat a indiqué que la terminologie employée dans son Code pénal pourrait être considérée comme contribuant à la discrimination. Un Etat a répondu que, à cet égard, une analyse approfondie de la législation est en cours. Un seul Etat a répondu n'avoir entrepris aucun examen de ces dispositions jusqu'à présent.

43. Tous les Etats – sauf deux – ont confirmé l'existence de mesures visant à faire en sorte que les données à caractère personnel mentionnant l'orientation sexuelle ou l'identité de genre d'une personne ne soient ni collectées ni conservées ou utilisées d'une autre manière, sauf si cela est nécessaire à des fins spécifiques, légales et légitimes. Dans tous les Etats, des lois spécifiques relatives à la protection des données définissent les conditions du traitement des données à caractère personnel. Les données relatives à l'orientation sexuelle ou à l'identité de genre d'une personne sont considérées comme des « données sensibles » et, à ce titre, bénéficient d'un degré de protection plus élevé – le traitement de ces données est généralement interdit et est constitutif d'une infraction pénale. Certaines exceptions sont clairement

énoncées dans la loi. Le consentement écrit de l'intéressé est souvent nécessaire, et dans certains cas, le traitement de données aussi sensibles est interdit en toutes circonstances.

44. **Vingt-trois** Etats ont indiqué avoir des mesures en place ou en préparation pour garantir la pleine reconnaissance juridique du changement de sexe d'une personne dans tous les domaines de la vie. Seize Etats membres ont répondu par l'affirmative à la question de savoir si les conditions préalables à la reconnaissance juridique d'un changement de sexe avaient été réévaluées ou étaient en cours de réévaluation afin de lever celles qui seraient abusives. Des exigences telles que la nécessité d'une intervention chirurgicale, dont l'intervention sur les organes génitaux et la stérilisation irréversible, un diagnostic médical de trouble de l'identité sexuelle, des traitements hormonaux et le divorce sont encore en vigueur, mais plusieurs Etats membres s'efforcent de changer cela par un réexamen des procédures actuelles, dans l'optique d'une révision. Un Etat a indiqué qu'il n'a pas de dispositions normatives en vigueur ou en préparation pour la reconnaissance du changement de sexe.

45. **Vingt-sept** Etats reconnaissent le droit d'une personne transgenre, une fois le changement de sexe accompli et juridiquement reconnu, d'épouser une personne du sexe opposé à son nouveau sexe. Dans les Etats reconnaissant le mariage des couples de même sexe, la personne transgenre peut rester mariée ou épouser une personne de son nouveau sexe. Dans un Etat, la question est à l'étude, mais il n'y a pas d'interdiction légale. Six Etats ont répondu par la négative (même si au moins dans un cas l'information fournie pourrait permettre de conclure le contraire) et deux n'ont pas envoyé d'information.

46. Dans certains Etats, des projets de loi sur le mariage égalitaire ou le partenariat civil sont en préparation ou soumis à des instances de décision. D'une manière générale, les partenariats civils donnent aux couples de même sexe les mêmes droits qu'aux couples hétérosexuels. Dans au moins un Etat cependant, les droits des couples de même sexe ne sont pas équivalents à ceux des couples mariés. Concernant la seconde partie de la question, relative à la possibilité de fournir aux couples de même sexe des moyens juridiques ou autres pour répondre aux problèmes pratiques liés à ce fait dans leur vie quotidienne, la majorité des pays n'ont pas répondu, ou ont répondu que cette question était sans objet ou qu'aucune mesure de la sorte n'était prévue.

47. Vingt-et-un Etats ont indiqué avoir des mesures en place pour s'assurer que les décisions en matière de responsabilité parentale et d'adoption d'un enfant soient prises premièrement dans l'intérêt supérieur de l'enfant, ainsi que sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre, en soulignant dans plusieurs cas que l'intérêt supérieur de l'enfant est une considération primordiale s'agissant des responsabilités parentales. Un Etat, dont la position n'est pas définie, note que l'orientation sexuelle n'est pas une question pertinente dans ce contexte, et qu'en tout état de cause le principe constitutionnel de non-discrimination s'applique. Dans certains Etats, la situation de l'adoption évolue en lien avec l'introduction du mariage entre personnes de même sexe. Dans la majorité des cas, seuls les couples hétérosexuels mariés peuvent adopter un enfant, et dans certains cas l'adoption par

une seule personne est prévue. Dans un Etat, un projet de loi visant à autoriser l'adoption indépendamment du statut marital est en cours d'examen, et une révision de la loi relative à la procréation médicalement assistée est envisagée. Dans sept Etats, les personnes LGBT, individuellement ou en tant que couple, ont la possibilité d'adopter ou accueillir un enfant.

V. Emploi

48. La quasi-totalité des Etats ayant répondu (**trente-sept sur trente-neuf**) ont déclaré disposer d'une législation prohibant la discrimination en matière d'emploi dans les secteurs public et privé pour des motifs d'orientation sexuelle. Deux Etats ont indiqué que la mise en place d'une telle législation était en cours.

49. Quant à l'existence d'une législation prohibant la discrimination en matière d'emploi dans les secteurs public et privé pour des motifs d'identité de genre, les Etats ont été moins nombreux à répondre par l'affirmative, même s'ils restaient une majorité (**vingt-neuf**). Cinq ont indiqué que des travaux étaient en cours à ce sujet. Néanmoins, quatre Etats ont déclaré ne disposer d'aucune législation en la matière.

50. Une majorité des répondants (**trente-et-un**) ont par ailleurs confirmé l'existence de mesures concernant l'accès à l'emploi. De même, **vingt-neuf** Etats ont indiqué avoir des mesures en place concernant les promotions, licenciements, salaires et autres conditions de travail ; cinq ont déclaré y travailler. **Vingt-neuf** Etats ont affirmé avoir adopté des mesures concernant la prévention du harcèlement et les sanctions applicables ; dans quatre Etats, des travaux à ce sujet sont en cours, tandis que trois autres ont indiqué n'avoir pris aucune mesure. Cependant, vingt Etats seulement ont indiqué avoir des mesures en place concernant la protection du droit à la vie privée des personnes transgenres (conformément au paragraphe 30 de l'annexe à la recommandation). Des travaux concernant ces mesures sont en cours dans sept Etats. Deux autres ont répondu n'avoir aucune mesure en place concernant la protection de la vie privée des personnes transgenres.

51. La plupart des Etats qui disposent d'une législation prohibant la discrimination en matière d'emploi dans les secteurs public et privé pour des motifs d'orientation sexuelle, ont fourni une description des instruments juridiques énonçant ces principes. Ont notamment été mentionnés les instruments suivants : lois relatives à l'égalité de traitement, selon lesquelles nul ne peut faire l'objet d'une discrimination, directe ou indirecte, à raison de son orientation sexuelle[1], droit du travail, droit administratif, code pénal, lois relatives à la protection des données. Dans un Etat, la protection de l'orientation sexuelle est explicitement couverte dans le domaine de l'emploi, alors que l'identité de genre ne l'est pas. Certains des Etats où les mesures susmentionnées ne sont pas encore en place ont affirmé que la protection contre la discrimination peut se déduire des dispositions de la Constitution nationale et des dispositions générales

[1] **Par exemple, en Albanie, Andorre, Autriche, Belgique, Bosnie-Herzégovine, Croatie, Chypre, République tchèque, Danemark, Estonie, Finlande, Géorgie, Allemagne, Grèce, Hongrie, Irlande, Italie, Lituanie, République de Moldova, Monténégro, Pays-Bas, Pologne, Portugal, Serbie, République Slovaque, Suède, Suisse, Royaume-Uni.**

de la législation du travail. Par conséquent, tout harcèlement et toute privation de droits sont interdits et les victimes peuvent saisir les organismes de promotion de l'égalité, le médiateur ou les tribunaux. La quasi-totalité des Etats a fourni peu d'éléments sur les mesures prises contre la discrimination dans les forces armées, notamment à l'égard des personnes transgenres.

52. Pour conclure, certains Etats ont mentionné des exemples de bonnes pratiques. La Finlande a indiqué l'existence de codes de conduite pour combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre dans les forces armées, tandis que l'Allemagne a cité des programmes de formation de la police comportant un module dédié à « L'homosexualité au sein de la police ». En outre, les résultats d'une étude sur l'approche intégrée de l'égalité et de la diversité – dont un aperçu des instruments existants, d'expériences individuelles et des perspectives offertes – ont été publiés et distribués parmi les fonctionnaires allemands.

53. Concernant l'élaboration de programmes axés spécifiquement sur les perspectives d'emploi des personnes transgenres, la Belgique a lancé une initiative de sensibilisation en publiant une brochure d'information destinée aux employeurs intitulée « Transgender on the work floor », afin de leur fournir avis et conseils pratiques. L'Italie a organisé des « journées carrières » pour les personnes vulnérables, en ciblant tout particulièrement les transgenres.

VI. Education

54. Concernant les paragraphes 31 et 32 de l'annexe à la recommandation, il était d'abord demandé aux Etats s'ils disposaient de mesures appropriées, législatives ou autres, visant le personnel enseignant et les élèves, afin de garantir la jouissance effective du droit à l'éducation sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre, en tenant dûment compte de l'intérêt supérieur de l'enfant et des droits des parents concernant l'éducation de leurs enfants. **Vingt-trois** Etats ont répondu par l'affirmative ; douze autres ont déclaré que de telles mesures, législatives ou autres, étaient en cours de rédaction. Un Etat a indiqué son intention de poursuivre ses travaux en la matière.

55. Environ la moitié des Etats répondants (dix-huit) a affirmé avoir des mesures en place prévoyant des formations, soutiens et outils pédagogiques anti-discrimination ; **quatorze** Etats ont déclaré y travailler et deux autres ont répondu par la négative. Concernant les mesures spécifiques en matière d'information, protection et soutien des élèves et étudiants, dix-sept Etats ont mentionné avoir déjà introduit de telles mesures ; **treize** Etats ont indiqué que des travaux dans ce domaine étaient en cours et un autre a déclaré qu'aucune mesure de la sorte n'était en place. Quinze Etats ont confirmé l'existence de mesures visant à fournir des informations objectives concernant l'orientation sexuelle et l'identité de genre dans les programmes scolaires ; **douze** ont déclaré y travailler et deux ont répondu qu'aucune mesure n'était en place. Quant à la question de savoir si des mesures avaient été prises en matière de politiques scolaires et plans d'action pour l'égalité et la sécurité, **dix-sept** Etats ont répondu par l'affirmative, neuf ont déclaré y travailler et trois prévoient de le faire. Trois Etats ont répondu par la négative.

56. En ce qui concerne les exemples concrets de bonnes pratiques, des Etats ont expliqué que, même si les questions LGBT ne sont pas directement couvertes par les programmes, le cours d'éducation civique aborde l'égalité de traitement (Andorre, Croatie, Estonie, France, Grèce, Monténégro, Serbie, Slovénie). D'autres Etats ont déclaré que les questions liées à l'orientation sexuelle et à l'identité de genre étaient prises en compte **dans les programmes (Arménie, Croatie, République tchèque, Danemark, France, Lettonie, Liechtenstein, Monténégro, Pologne, Suède, Royaume-Uni), par exemple** dans le cadre des cours d'éducation à la santé. Certains Etats ont évoqué l'intégration de la dimension de genre dans l'éducation, l'élaboration de manuels scolaires comportant des documents sur l'homophobie et la transphobie et une formation antidiscrimination (Autriche, Belgique, Finlande, France, Pays-Bas, Slovénie). D'autres Etats ont également fait référence à la mise en place de services de counselling en milieu scolaire (Slovénie).

57. Concernant la mise en place d'une formation (initiale ou en cours d'emploi) à la lutte contre les discriminations ou la fourniture d'un soutien ou d'orientations aux enseignants et autres personnels d'enseignement pour aborder ces questions, la Norvège a décrit un projet visant à améliorer les compétences du corps enseignant sur les questions LGBT. Le Royaume-Uni a fourni des orientations pour aider les établissements scolaires à prévenir et à combattre l'homophobie et les brimades homophobes. En outre, certains Etats ont mentionné la publication d'un guide de ressources sur les relations sexuelles et la sexualité à l'intention des enseignants des écoles primaires ainsi que la fourniture d'outils pédagogiques actualisés pour les cours d'éducation sexuelle. La Belgique a également évoqué l'organisation d'ateliers pour mettre fin aux stéréotypes de genre et aux images hétéronormatives, ciblés sur les éditeurs de livres et manuels scolaires. Concernant l'adoption de codes de conduite contre les attitudes homophobes ou transphobes, ou tout autre traitement discriminatoire, direct ou indirect, la Belgique a signalé l'existence d'un site internet sur lequel on trouve des informations utiles pour une école neutre quant à l'égalité entre les hommes et les femmes et ouverte aux personnes LGBT, avec des exemples de politiques en faveur de la diversité. Malte a évoqué l'apprentissage de l'égalité par le biais d'ateliers théâtre qui visent à donner aux apprenants la capacité de mettre en question les stéréotypes et la discrimination. L'Allemagne a fait référence à des initiatives combinant des campagnes de sensibilisation des jeunes et des offres concrètes de counselling. La France a mentionné la mise en place d'un projet relatif à la lutte contre les discriminations fondées sur l'orientation sexuelle ou l'identité de genre dont les travaux porteront notamment sur la prévention du suicide des jeunes victimes d'homophobie.

VII. Santé

58. Le paragraphe 33 de l'annexe à la Recommandation CM/Rec(2010)5 appelle les Etats à prendre des mesures adaptées pour assurer la jouissance effective du plus haut niveau de santé réalisable, sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre. Vingt-deux des Etats répondants ont confirmé que ce type de mesures est en place, le plus souvent en expliquant comment leurs instruments

juridiques satisfont à cette exigence ou se référant au principe général de non-discrimination. **Douze** autres ont indiqué que des travaux visant à introduire de telles mesures sont en cours et un a fait part de son intention d'y travailler. Considérer un partenaire de même sexe comme la personne la plus proche pose toujours problème dans plusieurs Etats. Les informations d'ONG jointes aux réponses d'un Etat révèlent des incidents où des enfants intersexués ont subi des actes chirurgicaux non justifiés par des exigences médicales et des enfants présentant un trouble de l'identité de genre ou des adolescents transsexuels ont été victimes d'inégalité dans l'accès à des services de santé.

59. Concernant les exemples de bonnes pratiques, plusieurs des Etats répondants ont mentionné des politiques adaptées en matière d'éducation et de formation ainsi que des programmes de sensibilisation et de développement des compétences destinés aux professionnels et aux étudiants du secteur de la santé pour une prestation de services de santé dans le respect de l'orientation sexuelle et de l'identité de genre de chaque individu. Ces pratiques englobent aussi la prise en compte des besoins particuliers des personnes LGBT dans l'élaboration des plans de santé nationaux, des programmes d'enseignement médical et des matériels de formation (Belgique, Finlande et Norvège). Le gouvernement danois, par exemple, a centré son action sur la situation des personnes LGBT en produisant un « kit de prévention » dans le domaine de la santé sexuelle, qui énumère des recommandations sur la manière dont les municipalités peuvent veiller à ce que des groupes vulnérables tels que les personnes LGBT bénéficient du conseil, de l'information et du traitement dont ils ont besoin. A cet égard, la France a publié des informations sur le risque de suicide parmi les minorités sexuelles victimes d'homophobie et sur sa prévention. La Norvège a indiqué qu'elle avait intégré la question des personnes LGBT à sa future stratégie nationale de santé publique et qu'un nouveau plan d'action, prévoyant des mesures spécifiques pour les personnes LGBT en tant que groupe vulnérable, était en cours d'élaboration pour prévenir le suicide et l'automutilation. Par ailleurs, certains Etats ont cité des initiatives visant à encourager les professionnels de santé et les travailleurs sociaux à créer un environnement rassurant et ouvert pour les jeunes LGBT. La Suède a notamment mené une campagne d'information à cette fin. Certains Etats ont signalé qu'ils réalisent des études sur la santé des personnes LGBT et, en particulier, des recherches comportementales sur la prévention du VIH (Arménie).

60. En outre, presque tous les Etats (**trente-quatre**) ont affirmé que l'homosexualité a été retirée de la classification nationale des maladies. Un Etat a précisé que des travaux allant dans ce sens sont en cours et un autre a expliqué qu'il a l'intention d'y travailler. Aucun pays n'a répondu par la négative.

61. S'agissant de l'existence de mesures destinées à garantir un accès effectif à des services adaptés de changement de sexe, **dix-sept** Etats ont répondu par l'affirmative, huit ont indiqué que des travaux sont en cours pour introduire des mesures de ce type et trois autres ont fait état de leur intention d'y travailler. Par contre, quatre Etats ont répondu par la négative et quatre ont expliqué que leur position en la matière n'est pas arrêtée. Tous les Etats ayant répondu par la négative ou dont la position n'est pas

encore arrêtée et certains des Etats ayant répondu par l'affirmative ont précisé que le coût des procédures de changement de sexe n'est pas pris en charge par l'assurance maladie. Pour certains, cela s'explique par le fait que les opérations chirurgicales de changement de sexe ne peuvent pas être pratiquées dans le pays et sont réalisées à l'étranger. Toutefois, dans ces cas, une aide psychologique est proposée dans certains pays d'origine. Les réponses recueillies montrent aussi que, dans certains Etats où le coût des procédures de changement de sexe est pris en charge par le régime public d'assurance maladie, ces services ne sont disponibles que dans certains cas très limités et la prescription médicale est nécessaire à la prise en charge. **Dans la plupart des cas, le traitement des caractéristiques sexuelles secondaires, pratiqué après une opération de changement de sexe, n'est pas remboursable.**

VIII. Logement

62. **Vingt-six** Etats ont indiqué avoir pris des mesures adéquates pour permettre la jouissance effective et égale par tous de l'accès à un logement décent sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre, assurer une protection contre les expulsions discriminatoires, et garantir l'égalité des droits d'acquisition et de propriété de terres et autres biens. Quatre Etats ont répondu que des travaux relatifs à de telles mesures sont en cours et deux autres n'ont pas indiqué de position déterminée à ce sujet. La plupart des Etats qui ont répondu ont fait référence au principe général de non-discrimination, énoncé dans leur législation nationale applicable, qui interdit toute discrimination fondée sur l'orientation sexuelle ou l'identité de genre et qui s'applique notamment à la propriété de terres et d'autres biens, aux expulsions et à d'autres situations en rapport avec le logement. Certains Etats ont ajouté que, si une personne LGBT a été victime de discrimination en matière de logement, elle peut déposer une plainte auprès du médiateur ou des organes de promotion de l'égalité compétents.

63. S'agissant d'exemples de bonnes pratiques dans ce domaine, le Royaume-Uni a mentionné l'élaboration et la promotion de lignes directrices devant aider les fournisseurs de logements à identifier les problèmes des personnes LGBT et à concevoir et fournir des services adaptés aux besoins spécifiques et aux préférences des différents groupes de clients. Ces lignes directrices comprennent des sections sur les initiatives visant à lutter contre les incidents de haine et à identifier et combattre les phénomènes de harcèlement homophobe ou transphobe. Une étude a été commandée sur la façon dont les lignes directrices ont été mises en œuvre et comment les utiliser à l'avenir.

64. Concernant les risques encourus par des personnes LGBT, en particulier des jeunes ou des enfants, de se retrouver sans abri, les Etats étaient priés de prendre des mesures pour faire en sorte que les services sociaux pertinents soient assurés sans discrimination fondée sur l'orientation sexuelle ou l'identité de genre. L'examen des réponses révèle qu'au moins dix-neuf pays ont affirmé que ce type de services est accordé sans discrimination sur la base de l'orientation sexuelle ou de l'identité de genre, six ont fait état de travaux en cours aux fins de l'élaboration de telles mesures

et deux autres prévoient d'y travailler dans un proche avenir. Certains des Etats ayant indiqué qu'ils ne sont pas dotés de dispositions pour protéger les personnes LGBT en particulier contre le risque de se retrouver sans abri, ont précisé que leur législation nationale applicable énonce le principe de non-discrimination. En conséquence, toute forme d'accès au logement est protégée par des lois antidiscriminatoires ou des lois relatives à la protection sociale.

65. Concernant les exemples de bonnes pratiques, les Pays-Bas ont indiqué que lorsque les services généraux ne sont pas en mesure de fournir une prestation adaptée à la demande spécifique d'une personne LGBT, une prestation sur mesure peut être proposée. A titre d'exemple, des refuges sont mis à disposition d'hommes susceptibles d'être victimes de violences infligées au nom de l'honneur parce qu'ils sont gays, bisexuels ou transgenres.

IX. Sports

66. Seuls **sept** Etats ont répondu par l'affirmative à la question de savoir si des mesures (notamment de sensibilisation) ont été prises pour combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre (y compris les insultes discriminatoires) dans le sport ou dans le cadre de manifestations sportives. Onze ont indiqué qu'ils travaillent à l'élaboration de telles mesures et quatre prévoient de le faire. Six autres ont expliqué qu'ils n'ont pas de mesures en place pour prévenir, combattre et sanctionner les insultes discriminatoires faisant référence à l'orientation sexuelle ou à l'identité de genre pendant un événement sportif ou en liaison avec celui-ci ; et quatre n'ont pas de position arrêtée sur la question. Il est à noter que, souvent, les initiatives menées dans le domaine du sport pour lutter contre toutes les formes de discrimination ne font pas de distinction entre les différents groupes cibles.

67. Concernant les exemples de bonnes pratiques, plusieurs des Etats qui ont déjà mis en œuvre des mesures spécifiques et de ceux qui sont en train de le faire ont mentionné l'élaboration et la diffusion de codes de conduite à l'attention des organisations et clubs sportifs (Danemark, Finlande, France, Irlande, Italie, Suède). Certains Etats ont évoqué le lancement de campagnes de sensibilisation pour lutter contre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre dans le sport et, notamment, l'organisation d'ateliers sur la diversité sexuelle dans les écoles, ou la mise en œuvre de plans d'action pour combattre l'homophobie dans le football (Belgique, France, Allemagne, Italie, Pays-Bas). Dans certains cas, ces campagnes englobaient aussi la lutte contre le discours homophobe dans tous les sports (France, Norvège). Par ailleurs, dans trois Etats, des partenariats ont été conclus entre des associations représentant les personnes LGBT et des clubs sportifs et une aide financière a été proposée à des clubs sportifs ouverts par des personnes LGBT (France, Allemagne, Pays-Bas), et le gouvernement du Monténégro a soutenu la participation d'une délégation aux Jeux Olympiques LGBT. Le Royaume-Uni a fait état d'une étude en cours destinée à comprendre la participation des personnes LGB au sport et de la création d'un réseau LGBT dans le sport pour identifier les axes de travail.

X. Droit de demander l'asile

68. **Trente-et-un** Etats ont indiqué que leur droit national reconnaît une crainte bien fondée de persécution motivée par l'orientation sexuelle ou l'identité de genre comme un motif valide d'octroi du statut de réfugié et de l'asile. Un autre a répondu que des travaux sont en cours dans ce domaine et un autre encore, qu'il a l'intention d'y travailler. Deux Etats ont expliqué que leur position sur cette question n'est pas définie. Seul un petit nombre d'Etats traitent de l'orientation sexuelle dans leur législation ou réglementation sur l'asile et ils sont encore moins nombreux à y aborder la question de l'identité de genre. En fait, plusieurs Etats ayant répondu par l'affirmative ont expliqué que dans leur législation nationale, la notion de « groupe social » est interprétée au sens large du terme et couvre donc les personnes LGBT lorsqu'il s'agit de trancher une demande de statut de réfugié sur la base d'une crainte bien fondée de persécution en vertu de l'article 1.A.2 de la Convention relative au statut des réfugiés de 1951.

69. Certains Etats ont indiqué ne pas avoir de pratique en place pour les demandeurs d'asile prétendant être victimes de persécution au motif qu'ils sont une personne lesbienne, gay, bisexuelle ou transgenre, tandis que d'autres ont signalé avoir émis des lignes directrices pour veiller à ce que les demandes d'asile soumises pour ce motif soient traitées avec tact et de façon appropriée (Norvège, Royaume-Uni). Concernant d'autres exemples de bonnes pratiques dans ce domaine, plusieurs Etats ont précisé que le personnel chargé d'examiner ces demandes a reçu des éléments d'orientation et suivi une formation sur les problèmes spécifiques rencontrés par les personnes LGBT réfugiés ou demandeurs d'asile (Belgique, France, Irlande, Slovaquie, Royaume-Uni). Cette formation incluait, entre autres, des techniques d'audition pour les personnes vulnérables. La France a en outre cité la mise en place de groupes de travail chargés de définir des outils pour améliorer les techniques d'audition et faciliter l'élaboration du processus de prise de décision dans ces dossiers. Cela étant, il est à noter qu'aucun Etat n'a mentionné de mesures destinées à assurer une protection contre les discriminations dans les centres de rétention.

70. Les Etats membres étaient priés d'expliquer s'ils s'assurent que les demandeurs d'asile ne sont pas envoyés dans un pays où leur vie ou leur liberté serait menacée en raison de leur orientation sexuelle ou de leur identité de genre. Une majorité de **vingt-neuf** Etats ont affirmé qu'ils respectent le principe de non-refoulement et qu'au lieu de renvoyer les personnes lorsqu'un tel risque existe, ils leur accordent la protection qu'elles demandent, même si dans certains cas, en l'absence de cas concrètes, cette réponse était donnée sur un plan général ; deux autres ont indiqué que des travaux sont en cours et un autre qu'il a l'intention d'y travailler. Un grand nombre des Etats ayant répondu par la positive ont fait remarquer que la plupart des structures nationales des droits de l'homme ont mené des actions en faveur de la défense des droits des personnes LGBT. Concernant les exemples de bonnes pratiques dans ce domaine, la Suède, par exemple, a cité plusieurs projets et activités de la Commission des migrations visant à renforcer la compétence sur les questions relatives aux personnes LGBT ainsi que l'adoption de déclarations juridiques sur la manière d'appliquer la législation pertinente dans les cas où le motif de la demande d'asile a un rapport avec le fait que le demandeur est une personne LGBT.

XI. Structures nationales des droits de l'homme

71. S'agissant de savoir si les structures nationales des droits de l'homme (organismes de promotion de l'égalité de traitement, médiateur et institutions nationales de protection des droits de l'homme) sont clairement mandatées pour examiner les discriminations, dont celles fondées sur l'orientation sexuelle ou l'identité de genre, et les discriminations reposant sur des motifs multiples, un grand nombre des Etats membres qui ont répondu (**vingt-neuf**) ont confirmé que ces structures sont chargées de traiter les problèmes liés à l'orientation sexuelle ; trois ont indiqué que des travaux sont en cours dans ce domaine et un autre qu'il a l'intention d'y travailler. Trois Etats ont répondu par la négative et deux autres n'ont encore rien décidé en la matière. Concernant la discrimination fondée sur l'identité de genre, un nombre plus restreint d'Etats (vingt-trois) a indiqué que les structures nationales des droits de l'homme sont clairement habilitées à traiter cette question, quatre **Etats** ont signalé que des travaux sont en cours dans ce domaine **et un qu'il a intention de travailler sur cette question**. Quatre autres Etats n'ont pas encore arrêté leur position sur cette question et quatre ont répondu que le mandat de leurs structures nationales des droits de l'homme ne couvre pas l'identité de genre.

72. Même si un grand nombre d'Etats a indiqué que leurs structures nationales des droits de l'homme n'agissent pas explicitement contre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre en tant que telle, ces structures garantissent une protection contre cette forme de discrimination comme contre tout autre type de discrimination. La Pologne a fait état de la mise en place d'un réseau de plénipotentiaires chargés de la protection des droits de l'homme au sein de la police, qui remplissent la fonction d'agents de liaison, entre autres, avec la communauté des personnes LGBT.

73. S'agissant des possibilités d'intervention prévues par le mandat des structures nationales des droits de l'homme, notamment eu égard à la discrimination multiple, la plupart des Etats ont expliqué que le champ d'action des organismes de promotion de l'égalité de traitement et du médiateur couvrent les éléments suivants : instruction indépendante des plaintes ou requêtes relatives à des allégations de discrimination ; assistance aux personnes victimes de discrimination dans le cadre des procédures judiciaires et autres, en les conseillant sur les voies de recours ; examen d'office des incidents de discrimination ; médiation, notamment en adressant des recommandations aux contrevenants sur la manière de mettre fin à la violation, sur ses causes et sur ses conséquences ; émission d'avis à caractère non contraignant indiquant s'il y a eu ou non discrimination ; imposition d'une amende ou octroi d'un dédommagement si la médiation ne permet pas de résoudre le problème ; procédure de demande d'injonction ; recours en révision judiciaire avec la possibilité d'introduire un recours constitutionnel ; formulation de recommandations sur des questions en lien avec la discrimination ; réalisation d'études et d'enquêtes ; collecte et analyse de données statistiques sur les cas de discrimination ; diffusion d'informations en publiant des rapports ou des communiqués dans les médias et en menant des campagnes publiques de lutte contre la discrimination ; mise en œuvre de

mesures à court terme pour contribuer à l'égalité entre les femmes et les hommes ; présentation au parlement et au gouvernement de rapports et de propositions de modifications à la législation ou à d'autres règlements.

74. La Serbie a indiqué qu'à titre exceptionnel, le médiateur peut décider de donner suite à une plainte même avant la fin de la procédure s'il considère que cela est nécessaire au vu du risque de conséquences préjudiciables inévitables. Le Danemark a précisé qu'aucune autorité administrative ne peut faire appel d'une décision prise par les structures nationales des droits de l'homme et que ces dernières peuvent être saisies gratuitement. La plupart des Etats ont en outre signalé que les structures nationales des droits de l'homme soutiennent et conseillent aussi les victimes de discrimination fondée sur l'orientation sexuelle après l'enquête (Autriche).

75. En revanche, les réponses au questionnaire révèlent que le mandat des organismes de promotion de l'égalité de traitement ne couvre pas pleinement la discrimination fondée sur l'orientation sexuelle dans tous les domaines de la vie dans tous les Etats.

XII. Discrimination multiple

76. Enfin, concernant le paragraphe 46 de l'annexe à la recommandation, les Etats devaient indiquer s'ils ont des mesures en place garantissant que les dispositions du droit national interdisant ou empêchant les discriminations protègent également contre les discriminations fondées sur des motifs multiples, y compris celles fondées sur l'orientation sexuelle ou l'identité de genre. Une majorité de **vingt-trois** Etats ont répondu par l'affirmative à cette question ; quatre ont indiqué que des travaux sont en cours dans ce domaine et trois ont fait part de leur intention d'y travailler. Cinq Etats n'ont pas de position sur la question et un a répondu négativement à la question. Certains des Etats ayant répondu par l'affirmative ont précisé que leur législation nationale comporte déjà des dispositions en vertu desquelles la discrimination directe fondée sur la combinaison de deux caractéristiques protégées est illégale. En outre, certains de ces Etats imposent aux autorités publiques de se préoccuper de la nécessité de promouvoir l'égalité des chances entre les personnes dans différentes catégories (jusqu'à 19 catégories), y compris l'orientation sexuelle. L'un des Etats n'ayant pas encore de position arrêtée a souligné que les personnes victimes de discrimination fondée sur une combinaison de plusieurs caractéristiques protégées peuvent continuer à déposer des plaintes distinctes pour chaque caractéristique. Un autre Etat ayant exprimé la même position a expliqué que, dans un tel cas, les plaintes sont traitées en fonction du motif de discrimination considéré comme le motif « principal ».

77. La Belgique a fait état d'actions menées conjointement avec d'autres autorités compétentes pour aider les victimes de discrimination fondée sur des motifs multiples. De façon similaire, l'Allemagne a mentionné des projets destinés à apporter une aide aux personnes LGBT issues de l'immigration. L'Irlande a indiqué qu'environ 20 à 25 % des plaintes déposées chaque année auprès du Tribunal national pour l'égalité invoquent des motifs multiples.

Section III – Suivi

78. Environ dix-sept Etats ont fait des propositions concernant des mesures du Conseil de l'Europe visant à garantir que les Etats membres s'inspirent, dans leur législation et pratique nationales, des principes énoncés dans la CM/Rec(2010)5 et son annexe. Certaines mesures ont été préconisées par plus d'un Etat, comme :
    - l'identification, la promotion et l'échange d'exemples de bonnes pratiques pour une meilleure mise en œuvre de la recommandation, notamment en constituant une liste de bonnes pratiques avec la contribution des institutions nationales des droits de l'homme et de la société civile ;
    - l'adoption d'une approche intégrée des questions LGBT au sein du Conseil de l'Europe et l'élaboration d'un plan d'action à long terme en faveur du respect des droits des personnes LGBT, ce qui pourrait exiger l'institutionnalisation d'une unité en charge des questions LGBT ;
    - la sensibilisation de l'opinion publique et la diffusion d'informations, par le biais du site internet et de publications, en particulier sur l'analyse de la mise en œuvre de la recommandation ;
    - le renforcement de la coopération avec les Etats membres et d'autres institutions internationales, dont l'UE, pour encourager les initiatives de formation, de sensibilisation, etc.

    D'autres propositions incluaient la collecte et l'analyse de données sur la situation socio-juridique des personnes LGBT ainsi qu'une analyse cyclique de ces données et de leur évolution ; la mise en œuvre de mesures de prévention de la violence, en particulier dans le contexte de manifestations pacifiques, et l'offre d'une assistance aux forces de l'ordre ; la création d'un observatoire sur la situation des personnes LGBT ; l'octroi d'une attention particulière aux groupes sensibles pour améliorer leur situation en formulant des indicateurs et en mettant en place un système de collecte et de contrôle des données pertinentes, le renforcement de la coopération avec le secteur non-gouvernemental.

79. Concernant la question relative à un examen périodique de la mise en œuvre de la recommandation CM/Rec (2010) 5, dix-sept Etats membres se sont exprimés en faveur d'un tel examen, quinze n'ont pas répondu à la question et un s'y est opposé, car il considère qu'il incombe aux Etats membres de veiller à ce que la recommandation soit dûment appliquée. Un Etat a indiqué que la réponse à cette question dépend des résultats du premier cycle d'évaluation. Parmi les réponses des Etats favorables à cet examen, certains éléments méritent d'être mis en avant : un examen périodique encouragerait des progrès continus dans ce domaine et devrait avoir lieu tous les trois à cinq ans. En outre, cet examen devrait, de préférence, couvrir l'ensemble de la recommandation plutôt que de porter sur des points spécifiques. Dans l'hypothèse où il se concentrerait sur des questions spécifiques, certains Etats ont cité les aspects qui leur semblent les plus actuels, à savoir, notamment, les crimes de haine (en particulier l'incitation par le biais d'internet et les mesures destinées à encourager les signalements), la liberté d'association, le droit à la liberté de réunion pacifique et à l'utilisation de l'espace public, les personnes transgenres et transsexuelles, les questions relatives à l'éducation, la santé et l'emploi, ainsi que la formation des institutions compétentes et du corps judiciaire.

80. Il a aussi été suggéré que cet examen pourrait être complété par la collecte et l'analyse de données sur la **jouissance des droits de l'homme par les personnes** LGBT (par exemple en **appliquant la méthodologie de** l'enquête de la FRA[2] à l'ensemble des 47 Etats membres) et que les institutions nationales des droits de l'homme et les ONG devraient intervenir dans ce cadre.

81. La plupart des réponses ne fait pas état de questions sur lesquelles la recommandation et son annexe devraient être modifiées ou complétées. Par contre, certains Etats préconisent que la recommandation englobe les personnes intersexuées et qu'elle aborde le niveau local et régional. Une solution à ces suggestions est donnée dans les informations fournies par la Finlande, où la recommandation est interprétée comme couvrant les autres expressions du genre et les personnes intersexuées, même si ces dernières ne sont pas explicitement citées dans le texte. Un Etat a indiqué explicitement que la recommandation ne devrait pas être modifiée, car elle est le fruit de négociations approfondies.

Conclusions

82. Le présent rapport vise à mettre en relief les principales tendances dans la mise en œuvre de la recommandation, telles qu'elles ressortent des réponses **des Etats membres** au questionnaire. Si certaines réponses examinées tout au long du rapport sont explicites, plusieurs aspects méritent plus ample réflexion, en particulier dans l'optique de la future mise en œuvre de la recommandation.

83. Le niveau de mise en œuvre est décrit par la plupart des Etats comme « satisfaisant » ou « pleinement satisfaisant ». Cette évaluation encourageante est étayée par les différentes initiatives et bonnes pratiques décrites dans les réponses. Les effets bénéfiques des programmes d'assistance dans les pays où ils existent sont aussi mis en évidence et constituent un exemple positif à poursuivre.

84. La lutte contre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre est une mission difficile. Le niveau global de mise en œuvre de la recommandation varie largement d'un Etat à l'autre et d'une question à l'autre au sein d'un même Etat. Comme l'a fait remarquer un Etat, l'application de la recommandation et son évaluation exigent une certaine souplesse. Toutes les réponses soulignent évidemment les réussites des différents Etats, dont certaines sont effectivement remarquables. Toutefois, l'appréciation par d'autres acteurs de la mise en œuvre générale de la recommandation est susceptible d'être différente **(voir par exemple les contributions figurant dans l'Annexe)**, quoique probablement complémentaire, et il est difficile d'évaluer dès à présent les répercussions des mesures prises.

[2] **Voir l'Annexe, paragraphe 20 de la contribution de la FRA.**

85. Il ressort des réponses que la recommandation a surtout contribué à identifier les améliorations que chaque Etat doit introduire pour permettre aux personnes LGBT de jouir pleinement de leurs droits de l'homme sans discrimination. De nombreux Etats ont indiqué avoir mis en place des mesures destinées à rectifier les dispositions discriminatoires de leur législation ou avoir adopté et mis en œuvre de nouvelles mesures. Concernant la collecte de données ventilées, il apparaît que les Etats dans lesquels ce type de données est disponible sont toujours relativement peu nombreux. Même si des voix de recours effectives pour les victimes et témoins de discrimination sont généralement en place dans l'ensemble des Etats, le nombre de plaintes reste faible. Il conviendrait donc probablement de s'interroger sur l'efficacité des mesures existantes pour renforcer la sensibilisation et faciliter l'accès des victimes à ces recours.

86. Plusieurs obstacles à la mise en œuvre de la recommandation ont été cités, dont : des difficultés pratiques et financières liées à des ressources et à un niveau de sensibilisation de l'opinion publique insuffisants ; l'absence de volonté politique d'adopter des lois pertinentes ; des difficultés dans la mise en place d'un système d'aide et d'assistance adapté pour les victimes de violations ; des opinions politiques divergentes au niveau parlementaire ; des stéréotypes motivés par des croyances religieuses et un manque de coordination efficace entre différents ministères. Certains Etats ont aussi expliqué que les dispositions législatives ne sont pas toujours appliquées et interprétées de la manière initialement prévue.

87. La recommandation a déjà été traduite dans au moins vingt-et-un Etats et différentes actions visant à sa diffusion ont déjà été menées. Ce rapport pourrait aussi être un bon moyen d'inviter tous les Etats à prendre les mesures nécessaires pour que la recommandation soit traduite et distribuée le plus largement possible.

88. Dans la plupart des cas, les réponses montrent que l'orientation sexuelle et l'identité de genre sont, explicitement ou implicitement, des motifs de discrimination interdits. Dans de nombreux domaines, il semble que même en l'absence de dispositions ou mesures spécifiques, les lois générales s'appliquent de fait et protègent les personnes LGBT de la discrimination. En outre, de nombreux Etats ont donné des exemples de nouvelles initiatives ou de bonnes pratiques intéressantes dans tous les domaines pris en compte par la recommandation, dont d'autres Etats pourraient s'inspirer.

89. Cela étant, les réponses ont aussi révélé plusieurs aspects méritant une attention particulière dans la mise en œuvre de la recommandation, dont la prévention et la sanction des crimes de haine fondés sur l'orientation sexuelle ou l'identité de genre, en particulier pour ce qui est de l'incitation à la haine et de la protection des victimes et des témoins. S'agissant de la liberté d'expression et de réunion pacifique, malgré une grande majorité de réponses positives concernant l'existence de mesures adaptées pour la protection des participants, des difficultés ont été signalées et devraient être abordées. Dans le domaine de l'éducation, des formations ou une assistance et des outils pédagogiques adaptées pour lutter contre la discrimination n'existent que dans un nombre relativement limité d'Etats, même si des mesures sont en préparation dans

beaucoup d'autres. Le sport se révèle aussi un domaine où seuls quelques Etats semblent avoir pris des mesures spécifiques.

90. Les réponses aux questions montrent que la situation des personnes transgenres et, notamment, divers aspects du changement de sexe méritent une attention particulière. Il convient de faire plus contre la discrimination fondée sur l'identité de genre et les difficultés qui s'ensuivent pour les personnes transgenres dans l'exercice de leurs droits fondamentaux. Ce point semble particulièrement pertinent, par exemple, pour l'analyse des réponses données dans la section I, notamment par comparaison avec les mesures prises contre les crimes de haine fondés sur l'orientation sexuelle et le discours de haine.

91. Au vu de ce qui précède, il est préconisé d'inviter le Comité des Ministres à prendre note du présent rapport et à encourager les Etats à poursuivre leurs efforts en faveur de la pleine mise en œuvre de la recommandation, de sa traduction et de sa diffusion la plus large possible.

92. En outre, étant donné que plusieurs Etats ont répondu qu'ils sont en train d'examiner différents aspects de la recommandation ou de mener une réforme législative, le Comité des Ministres pourrait envisager de mener **d'autres exercices de suivi sur une base régulière**, qui pourraient être **généraux**, pour permettre une comparaison intégrale avec le présent rapport, **ou** se centrer sur des questions précises comme indiqué ci-dessus.

93. Si la révision de la recommandation et l'adoption de nouvelles normes ne semblent pas nécessaire pour l'instant, l'élaboration d'un ensemble de bonnes pratiques pour faciliter la mise en œuvre de la recommandation pourrait **se révéler utile**.

94. De même, de nouveaux programmes de coopération s'inspirant des résultats intéressants des projets de coopération déjà en place et visant à répondre aux besoins spécifiques de certains Etats pour faciliter la mise en œuvre de la recommandation pourraient aussi être envisagés.

95. Si la situation est globalement encourageante, la pleine mise en œuvre de la recommandation dans l'ensemble des Etats membres est un objectif ambitieux, qui nécessite du temps et une action ciblée continue. Le Comité des Ministres pourrait prendre des dispositions pour intégrer les questions LGBT à tous les domaines d'activités du Conseil de l'Europe, éventuellement en élaborant un plan d'action à long terme, qui pourrait englober les différentes mesures décrites ci-dessus.

ANNEXE

(disponible uniquement en anglais)

Contributions by Amnesty International, ILGA Europe and the European Union Agency for Fundamental Rights

AMNESTY INTERNATIONAL

INTRODUCTION

Amnesty International submits this contribution to the Steering Committee for Human Rights (CDDH) in the context of the evaluation of the implementation of Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity (in appendix to this submission).

Amnesty International took part in the work of the Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT) that led to the Recommendation. We welcome the evaluation undertaken by the CDDH. However, we regret that civil society organisations have not been formally consulted in this process owing to opposition by some member states.

Despite discrimination being prohibited by European human rights law, including the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR, Article 14 and Protocol 12) and the Revised European Social Charter (ESC, Article E) lesbian, gay, bisexual, transgender and intersex individuals (LGBTI) in Europe are still discriminated against in the enjoyment of their human rights.

In recent years Amnesty International has documented multiple violations of the rights of LGBTI people across the Council of Europe member states including violations of the rights to freedom of expression (ECHR, Article 10), peaceful assembly and association (ECHR, Article 11), the right to life and to personal integrity (ECHR, Article 2), the right to be free from cruel, inhuman and degrading treatment (ECHR, Article 3), the right to private and family life (ECHR, Article 8), the right to enjoy human rights without discrimination (ECHR, Article 14 and Protocol 12) and the right to protection of health (ESC, Article 11).

Amnesty International defines, consistently with the Yogyakarta Principles on the application of international human rights law to sexual orientation and gender identity, sexual orientation as "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender*", and gender identity as "*each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms*".[1]

This submission contains our findings, concerns and recommendations to the CDDH, the Council of Europe member states and Committee of Ministers in respect of the right to life, security and protection from violence, freedom of expression and peaceful assembly, right to respect for private and family life, health and national human rights structures.

1. THE RIGHT TO LIFE, SECURITY AND PROTECTION FROM VIOLENCE

A. HATE CRIMES ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY

Hate crimes[2] perpetrated on the grounds of real or perceived sexual orientation or gender identity of the victims are a serious form of discrimination. According to human rights law, discrimination is a difference of treatment on

prohibited grounds without an objective and reasonable justification.[3]

Sexual orientation and gender identity are prohibited grounds of discrimination.[4] States must ensure their authorities do not discriminate against individuals on grounds of their sexual orientation and gender identity. They must also exercise due diligence to ensure that discrimination by non-state parties is effectively prevented and tackled. [5]

States have to provide comprehensive protection against discrimination on grounds of sexual orientation and gender identity in their civil anti-discrimination laws. In the instance of hate crime motivated by the victim's sexual orientation or gender identity, states must put in place legislation, policies and practices aimed at preventing and effectively investigating such crimes. It is crucial that states in their criminal law recognise sexual orientation and gender identity as specific motives for perpetration of a criminal offence. Any alleged homophobic and transphobic motive should always be registered by law enforcement agents and be the object of effective, thorough and impartial investigation and also duly taken into account in the prosecution phase.

The European Court of Human Rights has found that authorities have the duty to take all reasonable steps to unmask any racist motive that has allegedly played a role in the perpetration of a crime.[6] The same standards should be applied to hate crime perpetrated on other prohibited grounds such as religion or belief, age, disability, sexual orientation or gender identity.

The Council of Europe Commissioner for Human Rights has highlighted that protection gaps on grounds of sexual orientation and gender identity exist in many civil and criminal domestic legislative systems.[7] It is a source of particular concern that few countries in Europe have hate crime legislation explicitly addressing transphobic hate crime: Croatia, Hungary (as of 1 July 2013), Sweden and Scotland (UK). In recent years Amnesty International has documented instances where homophobic and transphobic violence perpetrated either by state authorities or by non-state parties has not been adequately tackled because of legislative gaps and/or flawed policies and practices. A few, non-exhaustive, examples are provided below.

On 8 May 2012, self-described "fascists" were caught on security cameras as they threw Molotov cocktails through the windows of the gay-friendly D.I.Y. bar in Yerevan, **Armenia**. The police reportedly only arrived at the scene of the arson attack 12 hours after the incident. Two young men were arrested, but were bailed soon after by two opposition parliamentarians from the national Dashnaktsutyun party (ARF). Instead of condemning the attacks, some politicians spoke in support of the arsonists, with the ruling Republican Party spokesperson and Vice Speaker of Parliament Eduard Sharmazanov stating that he considered the "*rebellion of two young Armenian people against homosexuals…completely right and justified*".[8] Armenia's Criminal Code recognises the perpetration of specific common crimes on grounds of ethnicity, nationality and religion, but not sexual orientation and gender identity, as an aggravating circumstance and therefore foresees enhancement of penalty in such situations.

Bulgaria's Criminal Code does not include sexual orientation and gender identity among the lists of hate motives on the basis of which a crime can be perpetrated. In the rare cases where homophobic attacks are reported and prosecuted, the suspects are often charged with "hooligan" motives under Article 131(2) of the Criminal Code; hate motives are not taken into account. Article 325 of the Criminal Code defines hooliganism as indecent acts, grossly violating the public order and expressing open disrespect for society.

Following an amendment to the Criminal Code in 2011, the crime of murder may attract a lengthier sentence if it results from "*hooliganism, racist or xenophobic motives*." However, hate motives on the basis of sexual orientation or gender identity are not acknowledged by the law.

Given these legislative gaps, police and judicial authorities often disregard alleged homophobic and transphobic hate motives in the investigation and prosecution phases. Official data on these forms of crime are not collected. Furthermore, the lack of guidelines on how to tackle these forms of crime coupled with prejudice against LGBTI people in the police make victims of homophobic and transphobic violence reluctant to file complaints.

For example, in the case of 25-year-old student Mihail Stoyanov, who was beaten to death in 2008, the alleged perpetrators were arrested for "*homicide with a hooligan motive*," a charge that does not accurately capture the reason behind the attack: Stoyanov's perceived sexual orientation.

A reform of the Criminal Code is underway at the time of writing. The draft amended Criminal Code explicitly acknowledges sexual orientation but not gender identity on the list of hate motives on the basis of which a crime can be perpetrated. [9]

In recent years **Croatia** has improved legal protection against homophobic and transphobic hate crimes. Following amendments of the Criminal Code, which entered into force in January 2003, hate crimes perpetrated on grounds of the victim's identity are explicitly acknowledged and punished. However, flaws persist about classification of crime and investigation and prosecution of alleged hate motives.[10] The police are responsible for deciding on the legal classification of an offence. Amnesty International has found that homophobic and transphobic hate crime are not classified consistently: at times they are registered as criminal offences, at others as a minor offence. Moreover, the alleged homophobic and transphobic hate motive is not consistently taken into account in the investigation and prosecution of minor offences owing to a legislative gap.

France has recently amended its legislation on sexual harassment (law 2012-954 of 6 August 2012) by introducing the ground of "sexual identity" (*identité sexuelle*) in both its Criminal and Labour Codes. These amendments included into French Criminal law the notion of hate crime perpetrated on grounds of "sexual identity.[11] Furthermore, it enshrined the prohibition of any discrimination on the ground of "sexual identity" in the area of employment (article 1132-1 of the French Labour Code). Amnesty International remains concerned over whether the notion of "sexual identity" will be construed as covering "gender identity", which is a prohibited ground of discrimination under international law.[12]

In **Germany**, the Criminal Code does not include a clear definition of hate crime.[13] Since 2001, the police criminal registration and definition system includes the category of "politically motivated crimes" (KPMD-PMK). [14] In this system, hate crime (with the two sub-categories: "xenophobic" and "anti-Semitic" crimes) constitutes a specific sub-category of politically motivated crimes.[15] These categories allow the collection of statistics relating to these forms of crime, though none of them is defined in the law. However, the German Criminal Code does not clearly define politically motivated crimes. According to section 46 *Strafgesetzbuch* (StGB), judges can take into account the circumstances in which a crime has been perpetrated in order to mitigate or aggravate the sentence. On this basis judges may take into account the hate motive when determining the penalty. The gaps in German criminal law raise concerns over the extent to which any alleged hate motive, including on grounds of sexual orientation and gender identity, can be thoroughly and effectively investigated and prosecuted.

In **Italy,** the Criminal Code considers the perpetration of an offence motivated by the race, ethnicity, religion or belief or the nationality of the victim, but not sexual orientation and gender identity, as an aggravating circumstance.[16] No legislative protection exists against homophobic and transphobic violence. The Italian parliament has rejected several legislative proposals aimed at providing protection against hate crime perpetrated on other grounds including disability or sexual orientation.[17]

In **Macedonia**, there is no provision in the law for the investigation and prosecution of hate crimes perpetrated on grounds of sexual orientation and gender identity. Moreover, the authorities have so far failed to include protection from discrimination on the grounds of sexual orientation and gender identity in the Law on prevention and protection against discrimination, which entered force in January 2011.[18]

In **Turkey**, no legislative or policy measures ensure that hate motives, including those on grounds of sexual orientation and gender identity, are systematically and thoroughly investigated and taken into account in prosecution and sentencing.[19] For instance, in the case of the killing of a gay man in 2008, Ahmet Yıldız, the investigating authorities failed to conduct an effective investigation into the murder, or examine all the available evidence and, critically, to issue arrest warrants against a family member despite strong *prima facie* evidence of his involvement in the crime.[20]

Homophobic and transphobic hate crimes are a serious form of discrimination against LGBTI individuals. Council of Europe member states have the duty to protect all individuals from discrimination, harassment and violence, regardless of their real or perceived sexual orientation or gender identity. Legislation tackling homophobic and transphobic hate crime should be adopted as well as other policy measures aimed at ensuring

that any alleged homophobic and transphobic hate motive is thoroughly and effectively investigated and prosecuted and duly taken into account in the sentencing. Data on homophobic and transphobic hate crime should be collected by state authorities and measures aimed at providing support and redress to victims adopted.

On the basis of loopholes in domestic legislation and other policies and practices across Council of Europe member states, Amnesty International submits that paragraphs 1, 2 and 4 of Rec CM/(2010)5 and paragraphs I.A1, I.A2 and I.A3 of the Recommendation's Appendix have not been effectively implemented, urges the CDDH to duly take this into account in its report and calls on the Committee of Ministers to address these concerns without further delay.

2. FREEDOM OF EXPRESSION AND PEACEFUL ASSEMBLY

2.1 RESTRICTIONS ON THE RIGHTS TO FREEDOM OF EXPRESSION AND PEACEFUL ASSEMBLY ON THE OCCASION OF LGBTI PRIDE MARCHES

The rights to freedom of expression and freedom of peaceful assembly are recognised by several human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (articles 10 and 11).

Restrictions on these rights are permissible only insofar as they are prescribed by law; purported at achieving a legitimate aim, such as the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others, and are proportionate and necessary to achieving that aim (Articles 10.2 and 11.2 ECHR).

Everyone should enjoy these rights without any discrimination (article 14 and Protocol 12 ECHR) which includes grounds of sexual orientation and gender identity. On several occasions the European Court of Human Rights has found that the ban on LGBTI Pride marches by state authorities amounted to a violation of the right to enjoy freedom of peaceful assembly without discrimination.[21] In the case of Bączkowski and others v Poland the Court observed that: "*Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the state not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms [...]. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.*"[22]

In recent years, LGBTI individuals and organisations have experienced various obstacles when organising Pride marches. Amnesty International has monitored such obstacles since 2006. On some occasions, the marches were banned by city authorities. On others, authorities including the police have failed to protect them adequately from violence. A few, non-exhaustive, examples are provided below.

In **Croatia,** the police did not adequately protect the LGBTI Split Pride in 2011. The peaceful march was attacked by counter-demonstrators and several people were injured. The Pride was adequately protected by police in 2012.[23]

In **Lithuania**, the first-ever Pride march[24] took place in 2010 with adequate protection by police although the authorities attempted several times to ban the march. In January 2013, Vilnius authorities denied authorisation for the march scheduled in July to follow the route submitted by the organisers.

In **Moldova**, Pride marches have been banned by the authorities since 2005, despite the European Court of Human Rights' ruling that the ban by Chişinău authorities of an LGBTI march in May 2005 amounted to a violation of the rights of LGBTI people to the right to peaceful assembly without discrimination.[25] The last attempt to organise a pro-equality march by LGBT and other anti-discrimination organisations was in 2010, when the Chişinău appeal court banned it for "*security and public morality concerns*". The court was seized by the Chişinău city authorities following many petitions from a range of anti-LGBT rights groups who had been calling for a ban and who held a counter-demonstration on the same day when the pro-equality march was supposed to take place.

In **The Russian Federation**, organisers of LGBTI cultural events usually face unnecessary and disproportionate bureaucratic obstacles from the authorities. The **Moscow** authorities have constantly banned Moscow Pride on security grounds. Despite the European Court of Human Rights' ruling in 2010 in the case Alekseyev v The Russian Federation, the authorities again banned LGBTI Prides in 2011 and 2012. In 2012 a small group of LGBTI activists protesting against the Pride ban in front of the Duma and the Moscow mayor's office were arrested, while other groups protesting against the Pride and shouting homophobic slogans were allowed to gather for at least one hour, despite their demonstration not having been authorised. The **Saint Petersburg** authorities also repeatedly banned LGBTI Pride events.

In **Serbia,** the Belgrade Pride was authorised only in 2010 when it took place with adequate protection by the police from 6,500 violent counter-demonstrators. The Pride was banned on security grounds in 2011 and 2012.

In **Ukraine**, no Pride march has been taken place to date. The first-ever Pride march organised in Kiev in May 2012 was cancelled owing to violent threats from non-state actors. The Kyiv police were reluctant to put in place adequate security measures to protect demonstrators.[26] The police advised organisers to cancel the event 30 minutes before the march. Two activists were beaten up and tear-gassed by a dozen youths in central Kyiv after those who had already gathered for the Pride march were evacuated by police.

The ban of LGBTI Pride marches and inadequate police protection described above amounted to a violation of the rights to freedom of expression and freedom of peaceful assembly. Although security may be a legitimate aim for restricting such rights, the authorities have failed to demonstrate that the bans were proportionate and necessary to achieve that aim. Amnesty International submits that paragraphs 1, 2 and 4 of Rec CM/(2010)5 and and paragraphs 13-16 of its Appendix have not been effectively implemented, urges the CDDH to duly take this into account in its report and calls on the Committee of Ministers to address these concerns without further delay. In particular, the Committee of Ministers should ensure the immediate and effective implementation of the relevant European Court of Human Rights judgments.

2.2. LEGISLATION RESTRICTING THE RIGHTS OF LGBTI PEOPLE TO FREEDOM OF EXPRESSION, PEACEFUL ASSEMBLY AND ASSOCIATION

Several Council of Europe member states, including **Lithuania, Moldova, the Russian Federation and Ukraine,** are debating or have introduced legislation aimed at "*banning the propaganda of homosexuality to minors*".

Such laws discriminate against lesbian, gay and bisexual individuals in the exercise of their human rights, including the rights to freedom of expression, association and assembly (ECHR, Articles 10 and 11) and the right to the protection of health (ESC, Article 11).

Any restriction on these rights should be prescribed by law, demonstrably proportionate and necessary to achieve a legitimate aim such as the protection of public safety, order, health or morals or the fundamental rights of the others. The European Court of Human Rights has made clear that the right to freedom of expression guarantees the expression of ideas or thoughts which might offend, shock or disturb some sections of the population.[27]

On 7 December 2012, the Parliamentary Assembly of the Council of Europe's Equality and Non-discrimination Committee requested an opinion from the Venice Commission on "*the issue of the prohibition of so-called 'propaganda of homosexuality' in the light of recent legislation in some Council of Europe member states, including Moldova, the Russian Federation and Ukraine."*

Amnesty International maintains that the restrictions such legislation (enacted or in draft form) imposes on human rights are not necessary to protect children, which is the principal stated purpose of the proposed legislation. Nor are these restrictions proportionate, particularly when they are balanced against the right not to be discriminated against. The other stated purposes of these proposals, to promote particular definitions of "family," "to overcome the demographic crisis", also fail the tests of necessity and proportionality.

By potentially restricting publication and dissemination of materials related to sexual orientation, these laws severely restrict access to information about health, support networks or social activities for countless young people.

Article 3 of the United Nations Convention on the Rights of the Child makes clear that the best interests of the child shall be a primary consideration in all actions taken concerning children, and Article 12 emphasises that a child who is capable of forming his or her own views has the right to express those views freely. The Committee on the Rights of the Child has made clear that respecting the principle of the best interest of the child requires giving children the opportunity to express their views in all matters concerning them.[28]

These laws assume that protecting children from information relating to homosexuality is conducive to the attainment of their healthy morals, spiritual and psychological development. However, having information about homosexuality can be helpful to children, and the principle of the best interest of the child does not require that children be shielded from such information.

The European Court of Human Rights has explicitly affirmed that a child's best interests are not served by denying custody arrangements that grant sole or joint custody to a lesbian, gay, bisexual or transgender parent. In the case *Salgueiro da Silva Mouta v Portugal,* the Court found that the best interest of the child could not be construed as the need to live in a "traditional Portuguese family"(different-sex family); consequently, the Court found discriminatory the withdrawal of the joint custody of a child from the father on account of his homosexuality. In the case *E.B. v France,* the Court found that the refusal of a request from a single homosexual woman to adopt a child on the sole account of her sexual orientation was discriminatory.

All these Court judgments affirm that the desire to "protect" children from information about homosexuality is not justified by the principle of the child's best interests; instead, such measures are discriminatory.

Moreover, children as well as adults have the right to seek, receive and impart information and ideas of all kinds, as established by article 13 of the CRC. The Committee on the Rights of the Child has interpreted this to include information about sexuality and sexual behaviour and has stressed that access to information on sexuality is key to the fulfilment of their rights to health.[29]

In **Lithuania,** the Law on the Protection of Minors against the Detrimental Effect of Public Information[30], in force since March 2010, classifies as detrimental to children any information which "denigrates family values" or encourages a concept of marriage other than the union of a man and a woman, and consequently bans such information from places accessible to children.[31]

In **Moldova,** measures aimed at forbidding any kind of promotion of homosexuality were introduced in 2012 by several local authorities including the local councils in the city of Bălți, the villages of Chetriş, and Hiliuți in Făleşti District and the Anenii Noi District. The Bălți city council proclaimed exclusive support for the Orthodox church, and banned "*aggressive propaganda of non-traditional sexual orientation*". The villages of Chetriş, and Hiliuți banned the "*promotion of homosexuality*".

Draft Federal Law No. 44554-6 "*On introducing amendments to the code on administrative offences of the **Russian Federation***" passed the first reading in the Duma on 25 January 2013. The law would make "*propaganda of homosexuality among minors*" an administrative offence in federal law, with fines up to 500,000 roubles (US$16,200). In February 2013, the PACE rapporteur on the Russian Federation expressed concern at the approval by the Russian Duma, at first reading, of the draft federal law on the "*propaganda of homosexuality to minors*" and called on members of the Duma not to support the draft law in the continuing legislative procedure.[32]

In October 2012, the UN Human Rights Committee found that the section of Ryazan Region Law on Administrative Offences, concerning "*public actions aimed at the propaganda of homosexuality*", had violated Irina Fedotova's right to freedom of expression and her right to non-discrimination under Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) in conjunction with Article 26.[33]

The vote in the state's Duma follows the approval of similar laws in other parts of the Russian Federation including Ryazan, Arkangelsk Kostroma, St Petersburg, Novosibirsk, Magadansk, Samar, Bashkortostan and Krasnodar. Some of these laws aimed at prohibiting "*propaganda of paedophilia amongst minors*" draw a parallel between the sexual abuse of children and consensual, private sexual activity and personal gender expression of adults. The law adopted in St Petersburg foresees administrative fines for the "*propaganda of homosexuality and trans-sexualism*".

In **Ukraine,** in October 2012 the parliament passed the first reading of draft law 8711 (now 0945). The law would ban any production or publication of products "promoting homosexuality", including: the use of media, TV or radio broadcasting; the printing or distribution of publications; the import, production or distribution of creative writings, cinematography or video materials. The law foresees fines or prison sentences of up to five years.

Another draft Law (No. 1155, formerly 10290) would introduce measures to "protect the rights of children, ensure the healthy moral, spiritual and psychological development of children, promote the idea that a family consists of a union between a man and a woman" and to "overcome the demographic crisis". The law would ban the promotion of homosexual relations, and provides an exhaustive list of activities that would fall under the ban, including: meetings, parades, actions, pickets, demonstrations and other mass gatherings aimed at disseminating positive information about homosexuality. The law also bans any educational activities regarding homosexuality or, presumably, the lives of lesbian, gay, bisexual and transgender individuals, and any messages, articles or appeals in the media. Draft law No. 1155 states that information relating to homosexuality may adversely affect the physical and mental health of children and assumes that protecting children from such information is conducive to the attainment of their healthy moral, spiritual and physical development.

Such laws violate the rights of LGBTI people to enjoy their rights without discrimination in contravention of Articles 10, 11 and 14 of the European Convention of Human Rights. Amnesty International submits that paragraphs 1 and 4 of CM/Rec (2010)5 and paragraphs II.9-10, III.13-14 and VII.33 of its Appendix have not been effectively implemented in various member states, urges the CDDH to consider these concerns in its report and the Committee of Ministers to call on member states to revoke or withdraw legislation which restricts the rights of LGBTI people to freedom of expression, peaceful assembly and association without further delay.

3 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

3.1 GENDER LEGAL RECOGNITION FOR TRANS PEOPLE[34]

Barriers in accessing legal gender recognition, including onerous requirements such as forced sterilisation, forced divorce and psychiatric diagnosis are major issues for trans individuals across the Council of Europe member states.

In many countries trans individuals either cannot seek legal recognition of their gender or they can only do so after having complied with compulsory criteria including psychiatric diagnosis, sterilisation, gender reassignment surgeries and divorce. As a consequence the gender indicated on their official documents including passports and birth certificates does not match their true gender identity, which makes them more vulnerable to discrimination at work or school.

Such situations violate a whole set of human rights including the rights to private and family life (ECHR, article 8). The European Court of Human Rights found that France (*B v France*, 1992) and the United Kingdom (*Christine Goodwin v the United Kingdom*, 2002) violated the right to private and family life of trans people by failing to put in place legislation on gender legal recognition.

Compulsory requirements to obtain legal gender recognition including psychiatric diagnosis, sterilisation and forced divorce, which are in force in almost all European countries, jeopardise the rights of trans people to protection of health (article 8, Revised European Social Charter) and the right to be free from cruel, inhuman and degrading treatment (ECHR, article 3).

In almost half the Council of Europe member states (24), the legal recognition of the gender change depends on the single status of the applicants; those who are married are indeed not entitled to it unless they divorce. In more than half of the Council of Europe member states (26), they must also provide proof of infertility.[35]

These mandatory requirements strengthen the gender binary system and result in the violation of many human rights including the right to privacy and family life, the right to be free from ill and degrading treatment and the right to the highest attainable standards of health. Such procedures exercise a particularly constraining power on those

who do not necessarily identify with the opposite gender to the one they were assigned at birth. A substantial share of transgender individuals identify themselves somewhere in the gender continuum between male and female or do not necessarily identify themselves with any specific gender. For instance, only around 68 per cent of the transgender women surveyed in Belgium felt either fully or mainly female. More than 23 per cent felt both male and female. According to the same study around 60 per cent of transgender men felt either fully or mainly male. The research concluded that a third of transgender people do not feel comfortable with the binary male/female identities.[36]

In **Ireland** trans individuals can change the name and, in some cases, gender status on official documents. However, there is no procedure to change gender status on birth certificates. Following the High Court's decision in the Foy case[37], the government appointed an advisory group that issued a proposal aimed at introducing a procedure on gender legal recognition for trans people excluding those who are married or in civil partnership and requiring psychiatric diagnosis but not sterilisation.[38]

In **France** there is no clear standardised procedure according to which the gender change can be legally recognised. Before the European Court of Human Rights' judgment B. v France (1992), trans people were not allowed to change their civil status. After this judgment, the court of cassation established the principle according to which "*transsexual people who lived already in the opposite sex*" and who had undergone reassignment surgery can change their legal gender.[39] However, the gender change can be obtained only via a legal procedure, based on case-law rather than principles set out by law. According to NGOs[40] the criteria applied varies depending on the specific court that assesses the request (Tribunal de Première Instance). Gender reassignment surgery and single status are usually mandatory requirements.

In **Germany**, the law on transsexuality, in force since 1981, entails both the possibility of changing the name (minor solution) and changing the gender status (major solution). The minor solution requires a decision by a court and the opinion of two experts. As a prerequisite, the applicant should have lived three years with the strong urge to live in the opposite gender. The major solution also required single status, the permanent incapacity to reproduce and gender reassignment surgery. In 2008 the German Constitutional Court found that the requirement concerning the single status was unconstitutional. In 2011 the Constitutional Court found that the other two requirements, gender reassignment surgery and sterilisation, are unconstitutional.[41] Following these judgments and pending amended legislation, these three requirements are currently not applied. What is more, trans people cannot seek gender legal recognition unless they have undergone psychiatric diagnosis.

In **Lithuania**, no procedure is available at all. Recently the Ministry of Justice presented a law proposal to allow transgender people who have undergone gender reassignment surgery to change gender markers on official documents. However, this proposal does not tackle the unavailability of gender reassignment surgery in the country despite the European Court of Human Rights' ruling, in the judgment L v Lithuania[42], that this situation amounted to a violation of article 8 of the ECHR.

Denying gender legal recognition or submitting it to onerous requirements such as psychiatric diagnosis, gender reassignment surgeries, sterilisation or divorce, violate the right of trans people to enjoy their right to family and private life without discrimination. Amnesty International submits that owing to the barriers to legal gender recognition experienced by trans people in many Council of Europe member states, paragraphs 1, 2 and 4 of CM/Rec (2010) 5 and IV.20-21 of its Appendix have not been effectively implemented. Amnesty International urges the CDDH to duly take this into account in its report and calls on the Committee of Ministers to address the issue of gender legal recognition in Council of Europe member states without further delay.

4. PROTECTION AGAINST DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN AREAS SUCH AS EMPLOYMENT

LGBTI people experience other forms of discrimination besides hate-based violence. Sometimes they are discriminated against and harassed at work or bullied at school because of their real or perceived sexual orientation

or gender identity, or are subject to degrading treatment by state authorities. In Turkey, for example, gay men are targeted by military authorities and trans people by the police.[43]

In many Council of Europe member states protection against discrimination on grounds of sexual orientation and gender identity is lacking or limited in scope. At present, no legislation explicitly prohibits discrimination on grounds of sexual orientation and gender identity in countries such as Azerbaijan, The Russian Federation, **Turkey** and Ukraine. In **Moldova**, new anti-discrimination legislation, introduced in May 2012, failed to provide comprehensive protection against discrimination on grounds of sexual orientation and gender identity.[44]

Belgium adopted two laws aimed at combating discrimination on grounds of sex[45] and other grounds including sexual orientation, religion or belief, age and disability in May 2007.[46] Another law already in force since 1981 aims at tackling discrimination on grounds of race and ethnicity.[47]The 2007 law aimed at combating discrimination on grounds of sex provides protection against discrimination against transgender individuals who have changed sex[48] (article 4.2). Amnesty International is concerned that such protection is narrower than the one that would be provided on the ground of "gender identity", which is prohibited grounds of discrimination in international law.[49]

In **Germany** the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) came into force in 2006. The law protects against discrimination on various grounds, including "sexual identity", in the fields of employment, social protection, social advantages, education and access to goods and services available to the public including housing. Amnesty International is concerned that the undefined term, "sexual identity", may not, in practice, provide adequate protection against discrimination on the ground of gender identity.

Several Council of Europe member states do not provide comprehensive protection against discrimination on grounds of sexual orientation and gender identity. Amnesty International submits that paragraph 2 of CM/Rec (2010)5 and paragraphs V.29, VI.31 and VII.33 of the Recommendation's Appendix have not been effectively implemented in many member states, and urges the CDDH to duly take this into account in its report and that the Committee of Ministers addresses this issue without further delay.

5. HEALTH

Trans people experience barriers in accessing specific **trans-health care** across the Council of Europe member states and are discriminated against in health care on grounds of their gender identity.

Existing research shows that general practitioners or other health professionals have low of awareness on trans-related health care. According to the Transgender Euro Study, analysing the health care experience of transgender people in the EU[50], one third of the respondents reported they were refused treatment because a medical practitioner did not approve the gender reassignment. A substantial percentage of transgender people (between 17 and 31%) perceived that their gender identity was affecting or had affected their access to non-trans-related health care.

Gender reassignment surgeries are not always available to trans people who would like to receive them, in some cases because of the lack of specialised health centres; in others because of legislative gaps (as in Lithuania, see above). Even where surgery and other medical treatments such as hormonal treatments are available, problems exist with regard to the costs' coverage. The transgender Euro Study found that 80% of transgender people are refused state funding for hormone treatment, and 86% are refused state funding for genital surgery. As a result, over 50% of transgender people pay for the procedures entirely on their own.

One of the main issues that continue to have a profound effect on treatment of and attitudes to trans individuals is the pathologisation of their gender identities, which are still classified as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association (APA) and the World Health Organisation (WHO) International Classification of Diseases and Related Health Problems (ICD). Amnesty International calls for the removal of trans identities from the list of mental health disorders and for reclassification of relevant aspect of trans health care in a non-stigmatising manner to facilitate access to health care and ensure

that specific trans health care is consistent with the recommendations of the World Professional Organisation for Transgender Health (WPATH).[51]

Intersex children[52] continue to be assigned either male or female sex at birth through genital surgery and hormonal treatments even where there is no medical necessity to intervene. Surgeries can be detrimental to sexual and reproductive health and there is no established evidence that ambiguous sex anatomy bears negative consequences on the mental health of intersex children.

International human rights treaty bodies have for instance criticised non-medically necessary surgery on intersex children in **Germany**. In 2011 the United Nations Committee Against Torture in the examination of Germany expressed its continued concern "*at cases where gonads have been removed and cosmetic surgeries of reproductive organs have been performed, implying lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians, where neither investigation, nor measures of redress have been introduced*."[53]

In 2009 the United Nations Committee on the Elimination of Discrimination against Women called on Germany to enter into dialogue with NGOs of intersexual and transsexual people in order to better understand their claims and take effective action to protect their human rights.[54]

As an aftermath the German Government asked the Ethics Council (Deutscher Ethikrat) to develop a position and possible recommendations on the issue. In its opinion, the Ethics Council stressed that irreversible surgery on intersex people interferes with their right to bodily integrity, the preservation of their gender and sexual identity and often harm their sexual and reproductive rights. The Ethics Council argued that surgery on intersex children who are not yet in a position to decide themselves should be performed only after thorough evaluation, taking into account assets, drawbacks and long-lasting consequences, has established that such surgery is absolutely necessary for the child's well-being.[55]

According to the information available to Amnesty International, it is not yet clear how the German Government intends to follow up on the Ethics Council's recommendations.

Amnesty International submits that such practices, including discrimination of trans people in the area of health and medical treatment, and surgery imposed on intersex children, are not in accordance with paragraphs 1, 2 and 4 of CM/Rec (2010) 5 and points VII.33 and 35 of the Recommendation's Appendix , Amnesty International urges the CDDH to duly take this into account in its report and calls on the Committee of Ministers to address these issues without further delay.

6. NATIONAL HUMAN RIGHTS STRUCTURES

In several European countries independent equality bodies do not exist or their mandate is limited in scope. Such bodies should be able to make recommendations on legislation and policies, raise public awareness, examine individual complaints about the private and public sector and initiate or participate in court proceedings. In many countries, including **Italy**, **Moldova**, **Spain** and **Switzerland,** the equality body's mandate does not fully cover discrimination on grounds of sexual orientation in all areas of life.

Amnesty International submits that paragraph 3 of CM/Rec (2010)5 has not been thoroughly implemented in various member states and urges the CDDH to reflect this in its Report to the Committee of Ministers.

7. OTHER ISSUES

7.1 DEFINITION OF FAMILY AND NON-DISCRIMINATION IN THE EXERCISE OF THE RIGHT TO MARRY AND FOUND A FAMILY

Amnesty International is concerned that the explicit articulation of family as between a married man and woman may lead to discrimination on grounds of marital status and sexual orientation, and would be in breach of Article 14 of the ECHR.

In **Lithuania,** a constitutional amendment is being examined by the parliament and is aimed at restricting the definition of family in the constitution. The proposed formulation of the constitution's Article 38 states that "*...family shall be created by marriage. Marriage shall be concluded upon the free mutual consent of man and woman. Family also arises from fatherhood and motherhood*".

In **Hungary**, article L of the new constitution adopted on 18 April 2011 stipulates that: "*Hungary protects the institution of marriage that is a voluntary union between a man and a woman, and the family which is the basis for the survival of the nation*."

Amnesty International also submits that restricting the right to marry and found a family, which is a well-established right in international human rights law, for instance by the International Covenant on Civil and Political Rights (Article 23) and the ECHR (Article 12), to different-sex couples is at odds with prohibiting discrimination.

The European Court of Human Rights found in the case Schalk and Kopf v Austria that the reference to "men and women" in the ECHR no longer means that "*the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex*". The court also stated that: "*it is artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8."*[56]

CONCLUSIONS AND FOLLOW-UP

Amnesty International remains concerned about discrimination experienced by LGBTI people in the exercise of their human rights across the Council of Europe member states.

Amnesty International strongly recommends that the Committee of Ministers regularly ensures a thorough assessment of implementation of the Recommendation by genuinely involving civil society organisations and identifying specific flaws at national level.

Such periodical assessments should not preclude the possibility of the Committee of Ministers holding urgent debates and taking appropriate measures against specific violations or threats of violation of the rights of LGBTI people in specific member states. Such urgent actions would be necessary for instance in the current context where laws directly discriminating against LGBTI people are discussed or adopted in certain member states.

The Committee of Ministers should also ensure that key European Court of Human Rights judgments concerning violations of the rights of LGBTI people are effectively implemented without delay, which includes the adoption of general measures to prevent further violations.

ENDNOTES

[1] The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, http://www.yogyakartaprinciples.org/ (accessed 14 February 2013).

[2] The OSCE defines hate crime as "A) Any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a group as defined in Part B. B) A group may be based upon a characteristic common to its members, such as real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or other similar factor".

[3] See The Russian Federation. for instance Human Rights Committee (HRC), General Comment no. 18: Non-discrimination, 1989, para. 13. European Court of Human Rights (ECtHR), *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, para. 72

[4] ***See HRC case-law: see for instance*** **Toonen v Australia*, no. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), and* Mr Edward Young v Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003).***

ECtHR case-law: see for instance **Schalk and Kopf v Austria*, no. 30141/04, 24 June 2010,* Lustig-Prean and Beckett v The United Kingdom*, 31417/96; 32377/96, 27 September 1999,* Smith and Grady v The United Kingdom*, nos. 33985/96 and 33986/96, 27 September 1999,* Salgueiro da Silva Mouta vs Portugal*, no.33290/96, 21 December 1999.***

See also CESCR, General comment No.20, on Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, 17 November 2011**.**

[5] Human Rights Committee, General Comment No. 31 on Article 2 [on non-discrimination] of the International Covenant on Civil and Political Rights: " (…) The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

[6] *Nachova and Others v Bulgaria*, Applications nos. 43577/98 and 43579/98, 6 July 2005, at paragraph 160, *Stoica v Romania*, Application no.42722/02, 4 March 2008, *Šečić v Croatia*, Application no. 40116/02, 31 May 2007.

[7] Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011.

[8] Amnesty International, *Virulent homophobic attacks put South Caucasus activists at risk*, http://www.amnesty.org/en/news/virulent-homophobic-attacks-put-south-caucasus-activists-risk-2012-05-18 ***(accessed 14 February 2013).***

[9] Amnesty International, *Changing Laws, Changing Minds – Challenging homophobic and transphobic hate crimes Bulgaria*, (AI Index: EUR 15/001/2012).

[10] Amnesty International, Inadequate *Protection: Homophobic and Transphobic Hate Crimes in Croatia* (AI Index: EUR 64/001/2012).

[11] Loi 2012-954 du 6 août 2012 relative à l'harcèlement sexuel, available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id (accessed 14 February 2013).

[12] Amnesty International, *Submission to the French Government on discrimination and violence on the ground of gender identity* (AI Index: EUR 21/001/2013).

[13] Amnesty International, *Germany: Submission to the European Commission against Racism and Intolerance on Germany* (AI Index: EUR 23/003/2012).

[14] Federal Ministry of the Interior, Lexikon, Meldesystems "Politisch motivierte Kriminalität" (KPM - PMK) – definition, available at:

http://www.bmi.bund.de/cln_104/DE/Service/Glossar/Functions/glossar.html?nn=105094&lv2=296444&lv3=151906 (accessed 14 February 2013).

[15] Federal Ministry of the Interior (BMI), Erster Periodischer Sicherheitsbericht, Berlin, 2001, pag. 263, available at

http://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/erster_periodischer_sicherheitsbericht_langfassung_de.pdf?__blob=publicationFile (accessed 14 January 2013).

[16] Law N°654/1975 as amended by Law N°205/1993 and by law N°85/2006

[17] Amnesty International, *Italy fails to adopt measures to tackle hate crime*, 26 July 2011, http://www.amnesty.org/en/for-media/press-releases/italy-fails-adopt-measures-tackle-hate-crimes-2011-07-26 (accessed 14 February 2013).

[18] Amnesty International, *Macedonia: Government must protect LGBTI people from discrimination* (AI Index: EUR 65/003/2012).

[19] Amnesty International, *Not an illness nor a crime: lesbian, gay, bisexual and transgender people in Turkey demand equality* (AI Index: EUR 44/001/2011).

[20] Amnesty International, *Whose morals? Equality now for Lesbians, Gay men, Bisexual and Transgender People in Turkey* (AI Index: EUR 44/010/2011).

[21] On 12 June 2012, the European Court of Human Rights found in the judgment *Genderdoc-M v Moldova* (Application no. 9106/06) that the ban by Chisinau authorities of the LGBTI march organised by the LGBT organisation GENDERDOC-M in May 2005 violated articles 11 and 13 in conjunction with article 14 of the ECHR. On 21 October 2010 the Court found in the ruling *Alekseyev v The Russian Federation* (Applications nos. 4916/07, 25924/08 and 14599/09) that the ban by Moscow authorities of the LGBTI march equally violated articles 11 and 13 in conjunction with article 14 of the ECHR. The Court reached similar conclusions in other cases where marches aimed at raising awareness of discrimination against LGBTI people were restricted by authorities including in the case *Baczkowski and others v Poland* (application 1543/06).

[22] Paragraph 64. *Bączkowski and others v Poland*.

[23] Amnesty International, *Inadequate Protection: homophobic and transphobic hate crime in Croatia* (AI Index: EUR 64/001/2011).

[24] Since 2009, the Baltic Pride has become a joint Pride organised by LGBTI organisations from Baltic countries (Estonia, Latvia and Lithuania) on a rotational basis. It took place in Lithuania in 2010 and is scheduled for Vilnius again on 27 July 2013.

[25] *Genderdoc-M v Moldova* (Application no. 9106/06).

[26] The Kyiv Pride organisers reported to Amnesty International that a senior Kyiv police official had told them he was not prepared to put his officers under threat for the LGBT community.

[27] See for instance ECtHR: *Handyside v United Kingdom,* judgment of 7 December 1976. Other international human rights bodies have highlighted this point, including the Human Rights Committee, see for instance *Ross v Canada,* Communication No. 736/97

[28] General Comment No. 12: the right of the child to be heard

[29] Committee on the Rights of the Child, General Comment No. 4 (2003). *Adolescent health and development in the Convention of the Rights of the Child*, para. 10.

[30] Translation from Lithuanian is available at: http://www.iglhrc.org/binarydata/ATTACHMENT/file/000/000/319-1.pdf (accessed 14 January 2013).

[31] Amnesty International, *Submission to the United nations Human rights Committee: Lithuania, For the 105th Session of the HRC (9-27 July 2012)* (AI index: EUR 53/002/2012), p.8.

[32] Council of Europe, *PACE rapporteur calls on Russian Duma not to support law banning 'gay propaganda',* http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8383&L=2 (accessed 14 February 2013).

[32] Human Rights Committee, *Fedotova v. The Russian Federationn Federation*, available at http://www2.ohchr.org/english/bodies/hrc/HRCommitteeCaseLaw.htm (accessed 14 January 2013).

[34] Amnesty International refers to transgender, or trans, people as individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. Trans is

a political umbrella term used to describe a wide range of identities, experiences, and people whose appearance seem to conflict with the binary gender norms of society, including transsexuals, transgender, travesti, gender queers, cross dressers, drag queens, drag kings, and many more.

[35] Council of Europe Commissioner of Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011, p.9.

[36] Joz Motmans, *Being transgender in Belgium. Mapping the social and legal situation of transgender people*. 2010.

[37] *Foy v. An t-Ard Chlaraitheoir & Others,* [2007] IEHC 470

[38] Report of the Gender Recognition Advisory Group (GRAG), July 2010, http://www.welfare.ie/en/Pages/Report-of-the-Gender-Recognition-Advisory-Group.aspx (accessed 14 February 2013).

[39] Cour de Cassation, B c France, arret 361.

[40] See for instance Inter-LGBT http://www.acthe.fr/upload/ministerejustice_chgt_EC.pdf

[41] Federal Constitutional Court, *Prerequisites for the statutory recognition of transsexuals according to § 8.1 nos. 3 and 4 of the Transsexuals Act are unconstitutional, 28 January 2011* (Order of 11 January 2011, 1 BVR 3295/07), http://www.bundesverfassungsgericht.de/en/press/bvg11-007en.html (accessed 13 February 2013).

[42] *L. v Lithuania*, application no. 27527/03

[43] Not an illness nor a crime, p. 12-20

[44] Amnesty International, *Towards Equality : discrimination in Moldova*, (AI Index: EUR 59/006/2012).

[45] Law of 10 May 2007 « tendant à lutter contre la discrimination entre les femmes et les homes ».

[46] Law of 10 May 2007 « tendant à lutter contre la discrimination entre les femmes et les homes ».

[47] Law of 30 July 1981 « tendant à réprimer certains actes inspires par le racism et la xénophobie. Protected grounds include : nationality, race, skin colour, national or ethnic origin».

[48] Article 4.2 states «Pour l'application de la présente loi, une distinction directe fondée sur le changement de sexe est assimilé à une distinction directe fondée sur le sexe ».

[49] Amnesty International, *Submission to the European Commission combating Racism and Intolerance on Belgium*, (AI Index: EUR 14/001/2013).

[50] Stephen Whittle, Lewis Turner, Ryan Combs, Stephenne Rhodes. *Transgender Eurostudy: legal survey and focus on the transgender experience of health care*, 2008.

[51] "The WPATH Board of Directors urges state health care providers and insurers throughout the world to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients including the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialised) is readily accessible" www.wpath.org/medical_necessity_statement.cfm (accessed 14 February 2013).

[52] Intersex individuals possess genital, chromosomal or hormonal characteristics which do not correspond to the given standard for 'male' or 'female' categories of sexual or reproductive anatomy. Intersexuality may take different forms and cover a wide range of embodiments. Intersexuality can also be a way of naming sexed bodily diversity

[53] Committee against Torture, Forty-seventh session, 31 October–25 November 2011, Consideration of reports submitted by States parties under article 19 of the Convention, *Concluding observations of the Committee against Torture*, CAT.C.DEU.CO.5.

[54] Committee on the Elimination of Discrimination against Women, Forty-third session, 19 January-6 February 2009, *Concluding observations of the Committee on the Elimination of Discrimination against Women*, CEDAW/C/DEU/CO/6, available at http://www2.ohchr.org/english/bodies/cedaw/cedaws43.htm (accessed 14 January 2013).

[55] German Ethics Council, *Deutscher Ethikrat, Intersexualität Stellungnahme*, 23 February 2012, available at http://www.ethikrat.org/dateien/pdf/stellungnahme-intersexualitaet.pdf (accessed 14 January 2013). p.174.

[56] *Schalk and Kopf v Austria,* Application no. 30141/04, para.94.

ILGA EUROPE - TGEU

The Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5)

A survey of progress towards implementation in 16 member states

at January 2013

Prepared by ILGA-Europe with the help of Transgender Europe

This report was financially supported by the Dutch Government Department for Gender & LGBT Emancipation of the Ministry of Education, Culture and Science.

The Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5)

A survey of progress towards implementation in 16 member states at January 2013

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Summary

This report summarises the findings of research in 16 Council of Europe member states[3] on the extent to which the Recommendation of the Committee of Ministers on combating discrimination on the grounds of sexual orientation or gender identity ("the Recommendation") has been implemented. Its main purpose is to provide input to the Council of Europe's review of implementation of this Recommendation.

In five of the countries studied work has started on implementing the Recommendation. In four of these, the development of action plans is to varying degrees under way, supported by a Council of Europe project designed to assist member states with implementation of the Recommendation. In the fifth a number of sexual orientation and gender identity related campaigns are already incorporated in a national plan for equality.

While this is positive, it has to be noted that in the other countries studied, little, if any, action has been taken to implement the Recommendation since its adoption in March 2010. Moreover, to the extent that there is compliance with the Recommendation in any of the countries under review, this arises largely from measures taken in the 5 to 10 years prior to its adoption. The majority of these measures are legislative, particularly anti-discrimination laws. While very important for establishing a framework, their practical benefits are, so far, limited, with poor enforcement and the absence of supporting programmes such as training, awareness raising and introduction of codes of practice and procedures.

The position of transgender persons is particularly disturbing, with sterilisation mandatory for legal gender recognition in most of the countries, and little evidence of plans to address this serious human rights violation.

Thus, while a start has been made in some of the countries under review, the development of comprehensive strategies and plans for implementation of the full range of issues addressed by the Recommendation over a realistic timeframe remains an essential first step in all of them. The Council of Europe has an important role to play in supporting this development.

The extent of implementation of the Recommendation in the 16 countries can be summarised as follows:

Introduction of comprehensive anti-discrimination legislation (CofE 3)[4]: for sexual orientation, introduced in seven of the 16 countries, and for gender identity, in four.

[3] Bosnia-Herzegovina, Cyprus, the Czech Republic, Estonia, Georgia, Hungary, Italy, Lithuania, FYR Macedonia, Montenegro, Poland, Portugal, Romania, the Russian Federation, Serbia, and Ukraine. Participating organisations were selected on the basis of a call for proposals open to NGOs in all Council of Europe member states.

[4] In December 2012 the Council of Europe's Steering Group for Human Rights (CDDH), as part of its survey of implementation of the Recommendation, sent a questionnaire to all member states. To facilitate comparison, summary headings in this report include a cross-reference to the question in the Council of Europe's questionnaire.

Adoption of measures such as an overall strategy, action plan etc (CofE 3): only one of the countries studied has an action plan in place, albeit of limited application, although action plans in one form or another are under development in four others.

Collection and analysis of relevant data (CofE 4)**:** data on hate crimes is collected in only three countries; research into the causes of negative attitudes and of levels of social acceptance is conducted in eight, although often in very limited form.

Existence of effective legal remedies (CofE 5)**:** Even where laws addressing discrimination, hate crimes and hate speech on grounds of sexual orientation or gender identity exist, absence of specific and effective training within the law-enforcement system, combined with failure to gain the confidence of LGBT persons in law-enforcement agencies, render any remedies that exist on paper largely ineffectual.

Translation and dissemination of the Recommendation and its Appendix (CofE 7/8): a translation of the Recommendation was made available by the national authorities in four countries, and dissemination was conducted in four countries.

Measures to address hate crimes (CofE 9 – 12)**:** six of the countries studied explicitly treat a sexual orientation related bias motive as an aggravating circumstance, and two do so in respect of gender identity. There was relatively little evidence of training to ensure effective, prompt and impartial investigations, and almost none of measures to encourage reporting by victims and witnesses. The same was true of specific measures to ensure the safety of LGBT persons in prison.

Measures to address hate speech (CofE 14)**:** four of the countries have laws that explicitly prohibit sexual orientation hate speech, and only one, gender identity. Seven have laws or guidelines addressing elements of the media, although none of these covers all three main fields, broadcast, electronic and print. In none of the countries reviewed have specific measures been taken to raise awareness of public authorities of their responsibility to refrain from homophobic or transphobic speech, and in many such statements by public figures are never or rarely repudiated. In one country cases challenging sexual orientation hate speech have been rejected by the courts.

Freedom of association (CofE 15+17)**:** on the positive side, in all the countries studied except one, LGBT organisations can be registered, in most cases without difficulty. They can also operate freely. However it was relatively rare for the authorities to consult them, and even rarer to act on their views.

Freedom of expression (CofE 18)**:** in most of the countries studied the authorities have, with relatively minor exceptions, respected the freedom of expression of LGBT people, although without taking any positive measures to ensure it. However, in three there are serious concerns with regard to existing or proposed legislation, particularly through laws banning so-called "propaganda for homosexuality".

Freedom of assembly (CofE 18/19)**:** exercise of this right remains contested and risky in most of the countries studied. Events have been banned by the authorities in three since the adoption of the Recommendation, and bans have been attempted in two others. Moreover, in around three quarters of these countries violent opposition, or the threat of it, inhibit enjoyment of this right. Indeed, it seems that in only four of the countries studied can freedom of assembly definitely be exercised freely, without danger of prohibition, and without the need for large-scale police protection.

Respect for private and family life (excluding transgender specific issues) (CofE 20/21+24/25)**:** while discriminatory criminal law provisions have all been repealed, there are serious concerns in two countries over the collection of personal data. Family rights remain a major area of discrimination. Of the eight countries studied that provide rights to unmarried couples, only three make them available to same-sex couples. Of the 13 that provide no form of legal recognition for same-sex couples, not one has taken steps to address the practical problems faced by same-sex couples in the absence of such recognition. When it comes to parenting, measures to prevent discrimination are virtually non-existent in any of these countries.

Respect for private and family life and access to healthcare for transgender persons (CofE 22/23 +30)**:** only one of the countries studied complies with the Recommendation in making legal gender recognition possible in a quick, transparent and accessible way. Moreover, 13 make such legal recognition abusively dependent on procedures such as sterilisation, other surgical treatment, or hormone treatment. For those transgender persons needing gender reassignment treatment, in only two countries were adequate services available, while in only five did public health insurance schemes make a proportionate contribution to the related costs on a largely consistent basis.

Employment (CofE 26)**:** 14 of the countries studied had anti-discrimination laws in this field in respect of sexual orientation, but only four in respect of gender identity. However, there was little evidence of any other measures to combat discrimination in the workplace. There was also little evidence of measures taken in respect of discrimination in the armed forces, and indeed, in three countries regulations permit the exclusion of transsexuals.

Education (CofE 27)**:** in eight of the countries studied anti-discrimination provisions exist in one form or another in relation to sexual orientation, and five in relation to gender identity, but there is little or no evidence in these or other countries of practical measures to address bullying and other forms of discrimination. Limited information in relation to sexual orientation and gender identity is included in the curricula of four of the countries studied. However in some others there was evidence of homophobic and transphobic teaching, and five of the reports identified textbooks which include homophobic or transphobic material. In no country were measures taken to meet the specific needs of transgender pupils.

Health (CofE 28)**:** with the exception of HIV/AIDS prevention measures, there was no evidence in any of the countries that national health plans and services take account of the specific needs of LGBT people. While homosexuality is no longer classified as a disease in any of the 16 countries,

it was reported that in three it is still at times treated as an illness or mental disorder by health professionals, or referred to as such in medical textbooks. Identification of a same-sex partner as next of kin is problematic in most of the countries studied.

Housing (CofE 31/32)**:** five of the countries studied prohibit sexual orientation discrimination in housing, and two do so on grounds of gender identity. Almost no other measures were identified in any of the 16 countries to prevent discrimination in this area.

Sports (CofE 33)**:** almost no measures were identified in any country.

Right to seek asylum (CofE 34/35)**:** only five of the countries studied explicitly refer to sexual orientation in their laws or regulations on asylum, and only one refers to gender identity; only four appear to have conducted any training in relation to LGBT asylum seekers, and none has taken measures to provide protection from discrimination in detention centres.

National human rights structures (CofE 36)**:** of the 16 countries studied, 13 had national human rights structures compliant with the Paris Principles. Of these, eight are mandated to address sexual orientation and five gender identity discrimination. In practice, most have made efforts to support the rights of LGBT people.

Recommendations

To member states:

To adopt comprehensive strategies and action plans designed to implement fully all aspects of the Recommendation, in close consultation with organisations working for the rights of LGBT persons.

To the Council of Europe:

To strengthen the capacity of the Secretariat so that it has the resources both to increase significantly the scale of its work supporting member states in implementing the relevant human rights standards, and to mainstream issues relating to sexual orientation and gender identity discrimination in the work of the Council of Europe;

To assist member states by identifying and publicising models of best practice under each of the headings of the Recommendation;

To conduct a survey of the situation of LGBT persons in non-EU Council of Europe member states using the methodology developed by the Fundamental Rights Agency for its survey in EU member states;[5]

To develop guidelines for member states on how to implement quick, transparent and accessible legal gender recognition of transgender persons in a manner consistent with human rights principles;

[5] For details of the Fundamental Rights Agency survey, see http://fra.europa.eu/en/theme/lgbt

To increase the allocation of resources to the European Commission against Racism and Intolerance to enable it to undertake effective monitoring of the full range of applicable human rights standards by member states;

To conduct further reviews of implementation of the Recommendation at three yearly intervals.

Background

The Recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity is a document of great importance for LGBT people and others working for equality in Europe. It reaffirms unequivocally that human rights apply to all persons without exception, including LGBT persons. It acknowledges the centuries-old discrimination experienced by LGBT people on account of their sexual orientation or gender identity and recognises that this discrimination continues and must be addressed. And, crucially, it sets out in detail the measures required of member state governments across a wide range of areas to combat this discrimination. Of particular relevance to this report, it stresses that the measures must be specific and targeted.

The Recommendation was agreed unanimously by the 47 member states. Although, as a Recommendation rather than a Convention, it is not legally binding, it is based solidly on existing legally binding international and European human rights obligations. Member states therefore have a clear duty to implement its measures.

When adopting the Recommendation in March 2010 member states agreed to review progress towards implementation after three years. The main purpose of this report is to provide information for that review. To this end, ILGA-Europe, working with Transgender Europe, has coordinated the preparation of reports by organisations in 16 member states assessing the progress made by the authorities towards implementation of the Recommendation, and highlighting the areas where further action is needed. This report summarises these findings.

Organisations in Bosnia-Herzegovina, Cyprus, the Czech Republic, Estonia, Georgia, Hungary, Italy, Lithuania, FYR Macedonia, Montenegro, Poland, Portugal, Romania, the Russian Federation, Serbia, and Ukraine applied to take part in the project in response to a call for participants open to NGOs in all Council of Europe member states. Details of the participating organisations are listed in Appendix 1. Their reports are available at the ILGA-Europe website,[6] http://www.ilga-europe.org/home/guide/council_of_europe/lgbt_rights/recommendation_com_lgbt/reports.

ILGA-Europe acknowledges with thanks the support for this project of the Dutch Government Department for Gender & LGBT Emancipation of the Ministry of Education, Culture and Science.

Methodology

[6] In the case of Georgia, the report has been produced in two versions, a shortened version, and an extended version. References in this report are to the extended version.

The assessment of progress by the respective member states in the 16 national reports and in this report is based on a standard checklist of specific detailed measures needed to implement the Recommendation. This list was derived from the text of the Recommendation and its Appendix, supplemented with additional measures recommended in the Explanatory Memorandum. The operative text of the Recommendation, its Appendix, and the associated checklist questions, are set out in Appendix 2.

Each of the national reports consists of two main elements: a Summary Report and a detailed Compliance Documentation Report. The latter is a completed version of the above standard checklist.

The data used by participating organisations to complete the checklist were obtained from a number of sources. Most importantly, information requests were sent to the responsible ministries and other agencies. These consisted of an explanation of the Recommendation, and a request to complete the relevant questions on the checklist. They were supplemented by data from published sources, and research and documentation assembled by the participating organisations.

The number of ministries and agencies approached varied from country to country, ranging from around a dozen up to approximately seventy in Bosnia-Herzegovina. The response rate was relatively high. We acknowledge with thanks the many ministries and agencies that took the time and trouble to reply.

A high proportion of the replies referred only to general anti-discrimination policies, programmes or other activities. Since the Recommendation is clear as to the need for specific and targeted measures, such general statements have been discounted in both the national reports and this report in assessing progress towards implementation.

This report

As noted, the main purpose of this report is to provide information for the review by the Council of Europe. It concentrates on whether or not the recommended measures have been taken. To that end it follows exactly the structure of the Recommendation and its Appendix in summarising the findings of the 16 national reports. Each sub-heading is referenced to the paragraph number of the Recommendation or the Appendix, and also to the associated checklist question or questions. Except where otherwise indicated by a footnote, the source for any information quoted is the response to the checklist question in the applicable national Compliance Documentation Report.

The main body of this report is supplemented with an appendix in which short summaries of the situation in each of the countries reviewed are presented.

This report does not seek to provide comprehensive documentation of the discrimination concerned, since the Recommendation itself acknowledges its existence and the need for action. Moreover the report by the Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, published in June

2011, documents this discrimination in great detail across the 47 member states. However some examples of discrimination, or additional commentary from the country reports, are included in the text by way of illustration. These necessarily relate to a particular country, but should not of themselves be taken to indicate that the situation in that country is worse than in another.

General findings

In assessing progress, it is important to recognise that the discrimination which the Recommendation seeks to address is deeply entrenched. The Recommendation is the first comprehensive intergovernmental agreement of its kind in the world. It is a start point, and it is inevitable that it will take time, effort and above all political will to implement.

Making due allowance for the above, it is nevertheless disappointing to see how little weight has been given to the Recommendation in most of the countries studied. To take one very simple indicator: of the 16 countries studied, in only four could it be stated with confidence that the Recommendation and its Appendix have even been translated by the national authorities. And in only four did there appear to have been real efforts to ensure its dissemination.

It is clear that such progress as has been made has little to do with the Recommendation in most countries. Indeed, a high proportion of the areas where there is a significant degree of compliance with the Recommendation (for example, decriminalisation of same-sex relationships, de-classification of homosexuality as an illness, or introduction of anti-discrimination legislation for sexual orientation in employment) reflects actions that pre-date the Recommendation.

Where actions have been taken since its adoption, they are often not part of any coherent overall plan. In some situations, laws or high-level policies exist in a vacuum, with no detailed implementation programme involving guidelines, codes of conduct, training, wider awareness-raising or data collection. In others, there is the occasional action, such as a training course which reaches a few police officers, but no overall policy and plan of the sort clearly indicated by the Recommendation.

A striking illustration of the need for a coherent approach is a lack of complaints in most of the countries where there is applicable anti-discrimination or hate crimes legislation. In the case of hate crimes, for example, these laws are not backed up with measures to ensure that the police recognise a sexual orientation or gender identity related bias motive and that they treat LGBT people with respect, nor with measures to raise awareness in the LGBT community and provide accessible mechanisms for reporting such crimes. As a result, LGBT people neither feel safe to make complaints nor are empowered to do so.

Transgender rights are a particular concern. Few of the countries studied have taken any steps to provide protection from discrimination on grounds of gender identity. Perhaps even more disturbingly, in the areas of legal gender recognition, and access to health, which are so critical for the well-being of transgender persons, official policies often violate basic human rights

principles. In only one of the 16 countries is legal gender recognition even close to being available in "a quick, transparent and accessible way", as prescribed by the Recommendation, while in no fewer than 13 invasive medical procedures, including frequently sterilisation, are a requirement for such recognition. Moreover, where transgender persons need to undergo reassignment treatment, in many of the countries reviewed the procedures and medical facilities are either inadequate or not available, and/or there is a failure to meet the costs of such treatment under public health insurance schemes in a manner that is proportionate and non-discriminatory.

If there has been little progress generally in implementing the Recommendation, it is even more disturbing that in some of the countries reviewed steps are being taken which directly contravene its provisions and, indeed, wider human rights obligations. This is most obvious in the case of the Russian Federation, where LGBT freedom of assembly events are routinely banned, numerous regional assemblies have introduced laws prohibiting so called "propaganda for homosexuality", and similar legislation was supported almost unopposed at first reading in the State Duma in January 2013; and Ukraine, where in October 2012 the national parliament supported "propaganda for homosexuality" legislation at first reading without the opposition of a single Member of Parliament.

But developments in these countries must be contrasted with the hopeful signs coming from countries such as Portugal, Montenegro, Italy, Poland and Serbia, where the research shows that plans involving a structured approach to combating sexual orientation and gender identity discrimination are under way, or at least being considered. Montenegro, particularly, must be commended for the initiatives that have been started in a range of areas. It is significant that Montenegro, Italy, Poland and Serbia are participating in a Council of Europe led project on implementation of the Recommendation. It is also a positive sign that national human rights structures are increasingly willing to support the rights of LGBT people. Recent actions by the current and previous Public Defender in Georgia and by the Commissioners for Human Rights in the Russian Federation and Ukraine have been encouraging.

These positive developments are no more than a beginning in what will inevitably be a long process. It is essential that implementation of the Recommendation be made a greater priority by member states, and that the Council of Europe be enabled to play a stronger role, both in supporting implementation and in reviewing progress.

The Recommendation

The operative text of the Recommendation includes five main requirements: a review of existing measures to eliminate any discrimination on grounds of sexual orientation or gender identity, introduction of comprehensive and effective legislative and other measures to combat such discrimination, collection and analysis of relevant data, ensuring that victims have access to effective legal remedies, and ensuring that the recommendation is translated and disseminated as widely as possible.

Reviews of existing legislative and other measures which could result in sexual orientation or gender identity discrimination (1 i):

These have been, or are being, conducted to a greater or lesser extent in only five of the countries studied, Italy, Montenegro, Poland, Portugal and Serbia.

Adoption of legislative measures (comprehensive anti-discrimination laws) (2 i):

Only Bosnia-Herzegovina, the Czech Republic, Hungary, Lithuania, Montenegro, Romania and Serbia have adopted comprehensive anti-discrimination laws explicitly covering the ground of sexual orientation.[7] Cyprus, Estonia, Georgia, Italy, Macedonia[8], Poland, and Portugal have introduced legislation providing protection from discrimination in employment (in the case of EU member states, consistent with their obligations under EU law).

In Macedonia there is also specific legislation covering aspects of health and education. However, as recently as 2010, proposals to include sexual orientation in the new comprehensive Law on Prevention and Protection against Discrimination were rejected. In Ukraine proposals to include sexual orientation in the non-discrimination article of the Code of Labour Laws were rejected in Parliament in 2011.[9] The Russian Federation has no specific legislation providing protection from discrimination on the ground of sexual orientation.

Only the Czech Republic, Hungary, Montenegro and Serbia have introduced comprehensive anti-discrimination legislation which explicitly addresses the ground of gender identity.[10] In addition, Estonia's Gender Equality Act has been interpreted by the Gender Equality and Equal Treatment Commissioner to include gender identity. However, it should be noted that other EU member

[7] Lithuania's Law on Equal Treatment extends the principle of equal treatment to the fields of employment and vocational training, provision of goods and services, education, and to the activities of State and municipal institutions and agencies, but it only covers the areas of social security, healthcare and housing indirectly through an article on consumer protection.

[8] The Macedonian Labour Relations Act uses the term "sexual inclination" rather than "sexual orientation"

[9] Ukraine Summary Report, Appendix, Section vi., Employment

[10] Bosnia-Herzegovina's Law on Prohibition of Discrimination includes prohibition of discrimination on the grounds of "sex, sexual expression (expression of sex) or orientation''. While there may have been an expectation that this would address gender identity, "sexual expression" does not cover the concept of "gender identity".

states have an obligation under EU law to provide comprehensive protection from discrimination on this ground, an obligation to which they have not given explicit effect.[11]

Adoption of other measures (strategies, action plans, awareness raising etc) (2 ii):

Of the countries studied, only Portugal has implemented plans for combating sexual orientation and gender identity discrimination. The *4th National Plan for Equality – Gender, Citizenship and Non-Discrimination (2011 – 2013)* includes four measures in relation to sexual orientation and gender identity: a campaign on non-discrimination, awareness-raising of strategic professionals, awareness raising among young people, and availability of related materials in public libraries.

There are also positive signs in four other countries, all of which are participating in the Council of Europe project on the implementation of the Recommendation. Montenegro has established a Governmental Working Group, which includes NGO representatives, as part of its work on developing its *Strategy against homophobia and transphobia*.[12] In Italy the remit of the National Office against Racial Elimination (UNAR) has been extended to cover sexual orientation and gender identity.[13] It has conducted a review of existing legislation and other measures, is monitoring sexual orientation and gender identity discrimination, and undertaking some awareness-raising. In Poland the recently established governmental Plenipotentiary for Equal Treatment is developing a National Action Plan, preparation of which has included consultations with LGBT activists.[14] In Serbia, work started on drafting a National Anti-Discrimination strategy in April 2012, with one of a number of thematic working groups addressing the position of LGBT people.

On the other hand, opportunities to implement a systematic approach have not been taken up in some countries. For example, in the case of Macedonia, there appears to have been a deliberate decision by the authorities to exclude sexual orientation and gender identity from its *2012 – 2015 National Strategy for Equality and Non-Discrimination*.[15] In Ukraine, the *Plan of Actions on Developing Civic Culture and Raising Level of Tolerance in the Society* adopted in April 2012 makes no mention of sexual orientation or gender identity.

[11] The Gender Recast Directive, Directive 2006/54/EC, introduced an explicit reference in relation to discrimination based on 'gender reassignment': Recital 3 of the Preamble of this Directive codifies the Court of Justice of the European Union's *P. v S*. decision by stating that "The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person". Two years before, Directive 2004/113/EC expanded the scope of application of the principle of equal treatment between men and women to access to and supply of goods and services. Although it does not mention discrimination based on gender identity in its text, the Council of the European Union and the Commission referred to the CJEU case-law in an associated document, indicating that transgender people are to be protected under its scope.

[12] Montenegro Summary Report, Executive Summary, and IV Findings – Recommendation;

[13] Italy Summary Report, Executive Summary

[14] Poland Summary Report, Executive Summary

[15] Macedonia Summary Report, IV Findings, the Recommendation

Collection and analysis of relevant data (Recommendation, 1, and Appendix, 5 i-iii):[16]

Regarding data on hate crimes and discriminatory incidents, only three of the countries studied take any action: Montenegro has recently established a system for recording of sexual orientation and gender identity discriminatory incidents, using the office of the Ombudsman. Lithuania collects such information in relation to sexual orientation related criminal offences, but not gender identity. In Poland systems for recording and publishing data on hate crimes and hate motivated incidents do not exist, but the Ombudsperson has taken measures to allow for the systematic collection and presentation of data in relation to discrimination on these grounds.

In the case of more general research into the nature and causes of negative attitudes, and surveys of social acceptance, there has been some (if often very limited) activity in the Czech Republic, Hungary, Italy, Lithuania, Montenegro, Poland and Portugal. In Romania the National Council for Combating Discrimination conducts an annual survey on discrimination, which, it reports, shows that LGBT people face the highest level of prejudice.

Effective legal remedies (3 i-iv):

In the countries studied, full access to *effective* legal remedies is in most cases very problematic. In many this reflects the absence of laws addressing discrimination, hate crimes and hate speech on grounds of sexual orientation or gender identity. But it also reflects the fact that, even where such laws exist, they are little used. This is not from lack of need, but because little or no action is taken to encourage victims to make use of them; and because, in the face of often pervasive discriminatory attitudes, many LGBT people are reluctant to identify publicly as such, and trust law-enforcement agencies neither to treat them with respect nor to implement laws effectively.

Translation and dissemination of the Recommendation (5 i–iii):

Of the countries studied, Hungary, Italy, Montenegro and Poland prepared official translations of the Recommendation. Estonia and Lithuania stated, in response to enquiries, that they have made translations, but none was available to the researchers. In the Czech Republic, the Recommendation, but not its Appendix, was translated. So far as dissemination is concerned, only Italy, Montenegro, Poland and Serbia[17] appear to have made any efforts in this regard.

"According to a Gallup survey conducted in 2010, 64.1% of BiH citizens think that homosexual relations are wrong" [18]

"One of the findings of the Eurobarometer 2012 on perceptions of discrimination in the EU, is that only 2% of Romanians are aware to have ever met a LGBT person." [19]

[16] Collection of data was addressed both in the first paragraph of the Recommendation proper, and in paragraph 4 of the Appendix. In the Compliance Documentation Report format, the information is presented under the latter heading.

[17] A translation of the Recommendation into Serbian has been prepared by the Council of Europe

[18] Bosnia-Herzegovina Summary Report, IV – Findings – The Recommendation

"Regular legal remedies do exist, but they are not effective….. LGBT people still have little confidence in the work of judiciary and security institutions and are unwilling to report cases of violence and discrimination…. Non-governmental reports demonstrate that, in most of the cases, the courts had either not initiated any legal actions or have endlessly put off the completion of such cases… The state authorities' actions have not contributed to the prevention of discriminatory conduct or encouraged the victims to turn to them for help." [20]

"It was common for agencies and authorities contacted to postulate that, since there is little to no indication of 'complaints' or issues raised, there is no issue of discrimination, or that no discrimination occurs." [21]

Appendix to Recommendation

i. Right to life, security and protection from violence

a. "Hate crimes" and other hate-motivated incidents

The key recommendations in Section I.A of the Appendix cover specific measures to ensure: an effective, prompt and impartial investigation into alleged cases of homophobic and transphobic crimes and other incidents; that a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance; that victims and witnesses of such hate crimes and incidents are encouraged to report them; the safety and dignity of LGBT persons in prison or other forms of detention.

Effective, prompt and impartial investigations (1 i):

Training is identified in the Explanatory Memorandum as a key means of achieving this objective. Some training of police has taken place in eight countries, but is tentative and limited in scope. In Cyprus, the first and apparently only training session on discrimination to include LGBT issues was conducted in December 2010, addressing over 70 officers of varying ranks. In Hungary some training on sexual orientation and gender identity was provided to police officers, but reached only a limited number of them. In Italy training for police forces on homophobic and transphobic crimes was apparently made a priority for 2012, but there does not appear to be an official policy document explicitly including this objective, and there is a lack of information regarding the content and timing of the training. In Macedonia, specific training on these issues was included in the academic curriculum of the Faculty of Security – Skopje, though not apparently elsewhere. In Montenegro, with the support of the Police Directorate, the NGO Juventas has conducted training and a survey of 245 police officers, which showed the necessity

[19] Romania Compliance Documentation Report – Appendix – paragraph 26 - Right to respect for private and family life
[20] Serbia Summary Report, IV – Findings – the Recommendation
[21] Cyprus Summary Report , I - Executive Summary

of constant education of police officers on the human rights of LGBT people. In Poland, mainly due to the network of police Commissioners for the Protection of Human Rights, LGBT topics are slowly being introduced into training programmes, although a lack of evaluation makes it impossible to determine clearly how far the content of training courses has translated into a change of attitudes and working practices. In Romania, the only reference to sexual orientation is in a training programme provided by the Institute of Studies for Public Order, but again there was no evidence of outcomes. In Serbia it seems that some element of training has recently been undertaken, although offers by the organisation Labris, author of the Serbia report, to help with such training in 2012, came to nothing. In the other countries studied there was little or no evidence of specific training in relation to these issues.

Bias motive as an aggravating circumstance (2 i-ii):

Of the countries studied, Georgia, Lithuania, Portugal, Romania and Serbia have legislation which explicitly allows for sexual orientation to be taken into account as an aggravating circumstance, as do the entities Republika Srpska and District Brcko within Bosnia-Herzegovina, but not that of the Federation of Bosnia-Herzegovina. Only Georgia and Serbia similarly allow for gender identity.

In Hungary the police and courts, as a matter of practice, treat sexual orientation and gender identity bias motives as aggravating circumstances, and from July 2013 the Criminal Code will be amended to include these grounds explicitly. In the other countries there are no such provisions, although in Estonia and Montenegro government supported proposals are pending.

Encourage reporting by victims and witnesses (3 i-vi): The research found very little evidence of relevant measures, such as training to provide victims and witnesses with adequate assistance and support, dissemination to the general public of a simple and comprehensible definition of "hate crimes" in respect of sexual orientation and gender identity (only in Portugal, the document itself being prepared by an NGO), or police liaison officers tasked with maintaining contact with local LGBT communities (there was some evidence of positive links in Montenegro and Poland).

Ensuring the safety of LGBT persons in prison or detention (4 i-iv): The researchers found little evidence of prison staff codes of conduct or training specifically addressing the treatment of LGBT prisoners. Amongst rare exceptions were codes of conduct that govern the treatment of prisoners in the Czech Republic and Lithuania which referenced sexual orientation, and training of prison officials in Italy, which is reported to have addressed sexual orientation and gender identity issues. There was also scant evidence of any specific measures to protect and respect the gender identity of transgender persons when in prison.

"The offices of the Novi Sad Lesbian Organization were violently attacked more than 10 times in 2011, and nobody was prosecuted even though the police had the attackers caught on tape, by the video surveillance system." [22]

"In 2006, 6 gay pride participants were beaten … by a group of young men. They filed a complaint to the police, provided pictures of the perpetrators, allegedly identified at the police station two of [them] ……. They did not hear back from the police. In reply to 3 info requests ….. police said the case was still pending. In August 2011 …. the police responded that ..they [had) forwarded to the prosecutor the proposal to close the case because of the 5 years statute of limitations." [23]

"[In 2011] Lisunov attacked Kostuchenko during the gay parade and inflicted bodily injuries as a result of which Kostuchenko had to spend a week in hospital. …the senior examining magistrate …. informed Kostuchenko's spokesman about closure of the criminal case against Lisunov due to the absence of characteristics of a legally defined crime …." [24]

"A survey …. revealed that in 2010/2011 41% of those polled experienced harassment from ordinary citizens …. Of those who contacted the police, and whose sexual orientation was known to or

suspected by the police, 77% experienced infringement of their rights by the police. " [25]

" .... of 136 participants [in a survey], 15% reported having experienced physical violence and 57% … psychological violence because of their sexual orientation. … none reported these incidents to the police, citing mistrust of the police force, and lack of awareness of rights as the main reasons..." [26]

".. there were sex abuses in prisons conducted by inmates and ignored by the guards; the complaint procedures in case of rape were not efficient; homosexuals were discriminated against by their fellow inmates and this treatment was tolerated by the management; there was no

[22] Serbia Compliance Documentation Report, Appendix I.A "Hate crimes" and other hate motivated incidents - paragraph 3
[23] Romania Compliance Documentation Report – Appendix I.A "Hate crimes" and other hate motivated incidents — paragraph 1
[24] Russia Summary Report, Appendix, Section i a
[25] Ukraine Summary Report – Appendix, Section i. a
[26] Cyprus Summary Report, Appendix, Section i. a

possibility for trans people to be accommodated with inmates having the same gender identity [nor] to continue hormonal treatment while imprisoned." [27]

b. "Hate speech"

Section I.B. of the Appendix requires measures to combat "hate speech" on grounds of sexual orientation or gender identity, including laws prohibiting such "hate speech", promotion of good practice within media organisations and by internet service providers, public disavowal of such speech by government officials, guidelines to government officials to refrain from such speech and to promote respect for the human rights of LGBT people.

Laws prohibiting "hate speech" (6 i):

In the countries studied the position regarding laws penalising "hate speech" is weak. Lithuania, Portugal and Romania have laws penalising sexual orientation "hate speech" (although it seems that the Romanian law has never been applied), but not that related to gender identity. Estonia has legislation covering both sexual orientation and gender identity, but the law is relatively ineffectual, as it applies only if there is a danger to life, health or property. From July 2013 Hungary will include sexual orientation and gender identity in its new Criminal Code under the crime of incitement against a community, but the law is restricted to incidents involving a clear and present danger of violence, so again, is of limited application. In Serbia, hate speech legislation does not explicitly include sexual orientation and gender identity, although such hate speech is explicitly forbidden by the Anti-Discrimination Law. The remaining countries have no legislation.

Good practices within media organisations and by internet service providers (6 ii): In Italy, the relevant legislation on television broadcasting explicitly states that audio-visual commercial communications cannot include or promote any discrimination based on sexual orientation, while Ukraine's law *On Television and Radio Broadcasting* obliges broadcasting companies to maintain certain standards regarding various social groups, including sexual minorities. Montenegro has similar provisions covering both print media and electronic media. Romania's Audiovisual Law and Audiovisual Code ban the use of sexual orientation related hate speech in broadcast programmes. Serbia's Law on Broadcasting and Law on Public Information prohibit hate speech based on sexual orientation, although this has not stopped exposure of the LGBT population to hate speech.

In Bosnia-Herzegovina the Press Council's guidelines on professional standards include gender identity, gender expression and sexual orientation in the non-discrimination article. It has also adopted a *Recommendation for media treatment of gender issues in media* which makes recommendations, through editorial policy, to assure respect for equality based on a number of characteristics including gender identity, gender expression and sexual orientation. In the Czech

[27] Romania Compliance Documentation Report, Appendix, I.A "Hate Crimes" and other hate motivated incidents – paragraph 4

Republic, the Code of Ethics for journalists stipulates that a journalist "may neither create nor depict an issue inciting discrimination of a race, colour, religion, sex, or sexual orientation." However, in the other countries under review, there was little evidence of good practice.

In Cyprus a recent legal reform proposal by the Cyprus Radio and Television Authority includes specific points safeguarding respect of sexual orientation and gender identity within the broadcasting framework, but remains to be ratified by the House of Representatives.

Measures specifically regarding the Internet (6 iii-iv):

The internet is of particular concern, as in many of the countries under review it is used extensively to disseminate homophobic and transphobic hate speech. In Georgia, for example, a group called "a brigade fighting against pederasts" has published at its website a video of LGBT community representatives being beaten. An accompanying statement reads "that's what they deserve", and "mistakes of nature should be murdered", while a related chat page includes discussion of the preferred method of killing LGBT people. The website was referred to the Chief Prosecutor of Georgia in July 2012, but to date no action has been taken.[28]

In almost all the countries studied, there is little or no evidence of steps by the authorities to address this problem. In Portugal the Regulatory Authority for the Media found four national newspapers guilty of exceeding limits to be respected by the media. They had allowed the posting of comments on an article relating to the murder of a known gay journalist which incited to hatred and violence on grounds of sexual orientation. In Lithuania, following a rapid increase from 2007 onwards in investigations of homophobic hate speech on the internet, several public events have been held which brought together representatives of the digital media, the Journalist Ethics Inspectorate Office, and NGOs. In Serbia the daily newspaper "Press" was successfully prosecuted for allowing hate speech in readers' comments on its news portal, although other measures have not been taken in this field.

Specific measures to raise awareness of public authorities/institutions of their responsibility to refrain from statements legitimising hatred or discrimination against LGBT persons and promote tolerance (7 i-ii, 8 i-ii):

In none of the countries under study was there any indication that such measures had been taken. Moreover, in many of the countries studied reactions by the state or its representatives when public figures made statements legitimising hatred or discrimination against LGBT persons were non-existent or rare. Examples where there was little or no evidence of any such reaction are as follows: in Cyprus, when a member of the House of Representatives likened homosexuality to bestiality and paedophilia during a live radio broadcast in 2010; in Bosnia-Herzegovina, when the Head of the Presidency stated in a magazine in October 2010 "we have to fight with all moral means against those who want to pervert high moral society. Everyone has the right to live his life as he pleases, but no right to represent to youth perverted things as normal, as they call it." Or in Ukraine, when in 2011/2012, Lviv, Ternopil, Ivano-Frankivsk city

[28] Georgia report, Appendix 4, case #18. Hate speech on Internet

councils, and Lviv, Volyn and Rivne regional councils appealed to the President to revoke the registration of the Council of LGBT Organisations of Ukraine, forbid gay pride events, and "to fight against homosexualism".

Regarding the Russian Federation, a report commissioned for the Council of Europe Commissioner for Human Rights commented that "acts of hate speech in relation to homosexual, bisexual and transgender persons remain virtually unpunished."[29] It cited the refusal of a Moscow district prosecutor's office to start a criminal case against Talgat Tadjuddin, the Chairman of the Central Muslim Spiritual Board of Russia, who had said, in a public statement opposing the proposed 2007 Gay Pride march, "if they still come out on the street, they just should be beaten. All normal people would do that ….. Gays have no rights." The Prosecutor's Office, in its decision, referred to an expert opinion of a professor at the Family, Sociology and Demography Department of Moscow State University, to the effect that "sexual minorities are not a social group, much less a gender-defined social group, they are part of the deviant social group together with criminals, drug addicts and other individuals with deviant behaviour."[30] A request to bring a criminal case against the Governor of the Tambov Region following his statement that "faggots must be torn apart and their pieces should be thrown in the wind" was also dismissed on the grounds that "the experts did not consider the statement abusive and gave a conclusion that homosexual persons were not a social group and could not be considered subject to incitement of hatred or enmity."[31] The Russian Federation is now defending this decision in a case before the European Court of Human Rights.[32]

The report on Serbia draws attention to another aspect of hate speech where the authorities take insufficient action, namely homophobic graffiti, which are widespread across the country. The Provincial Ombudsman and the Provincial Gender Equality Institute mapped graffiti in Novi Sad in May 2011. 224 were documented, of which 56% were hate speech against LGBT people such as: "Death to gays", "Gays to Concentration Camps", "Kill the Faggot!", "Only a dead faggot is a good faggot". Most dated from the period when Pride Parades were scheduled in 2009 and 2010 and most are still visible, despite the fact that the Provincial Ombudsman sent the data to the relevant city authorities, recommending their removal.

"[At the Budapest Pride March in June 2011] a group of activists ….. held up signs calling for the extermination of gays …. and shouting "Dirty faggots, dirty faggots!"….. the authorities argued that the incidents did not constitute incitement to hatred as "holding up the signs might have

[29] "Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – Legal Report: Russian Federation" paragraph 86

[30] "Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – Sociological Report: Russian Federation" paragraph 99, and "Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – Legal Report: Russian Federation" paragraphs 119 – 122

[31] "Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity – Legal Report: Russian Federation", paragraph 126

[32] Alekseyev et al v. Russia (Appn 39954/09)

incited hatred, but not active hatred" and thus the incident "does not reach the minimum level of criminal sanctioning".[33]

"Let's think about our state. I don't care what Europe thinks about. What is happening on the streets of our cities is much more important. So I, of course, support adoption of this law [prohibiting "propaganda of homosexualism"]. All these gay parades must be scattered, burnt down". (Mr Serhiy Kyi, a Ukrainian MP from the ruling Party of the Regions) [34]

ii. Freedom of association

Section II of the Appendix requires member states to take appropriate measures to ensure that: LGBT organisations can gain official registration and are able to operate freely; are able to access public funding earmarked for NGOs without discrimination; are protected effectively from hostility and aggression; and are consulted on the adoption and implementation of measures affecting the rights of LGBT persons.

Gain official registration and operate freely (9 i-iii):

In all but one of the countries studied LGBT organisations are able to obtain registration, and to operate freely. In the Russian Federation, a number of LGBT organisations have been refused registration. The refusal to register the Tyumen organisation, "Radujniy dom" ("Rainbow House") is the subject of a complaint to the European Court of Human Rights,[35] which the Russian authorities are defending on a number of grounds including that the organisation's "propaganda of untraditional sexual orientations" might undermine the safety of Russia, its government, its sovereignty and territorial integrity and its population, as well as provoking social and religious hatred and threatening the institutions of marriage and the stability of the family.[36]

In three other countries - Cyprus, Poland and Ukraine - registration of LGBT organisations can take considerably longer than would normally be expected. In the case of Cyprus, the registration of accept-LGBT Cyprus, the co-author of the study on that country, took almost 12 months. The authorities consulted the Greek Orthodox Church, and appeared overzealous in examining the registered premises and the people associated with the organisation. In the case of Ukraine, in 2010 an organisation had to resubmit its application after reducing the references to LGBT people.

Access to public funding without discrimination (10 i-ii):

While in theory access without discrimination exists in most countries, it is difficult to judge how far this applies in practice.

[33] Hungary – Summary Report – Appendix, Section ii, "Hate speech"
[34] Ukraine, Summary Report – Appendix, Section i.b "Hate speech"
[35] Alexander Zhdanov and Rainbow House v. Russia (12200/08)

[36] Russia Summary Report – Appendix, Section ii. Freedom of Association

Effective protection from hostility and aggression (11 i-iv):

While there continue to be serious concerns, these relate mostly to the context of freedom of assembly or other large-scale events, and are dealt with under that heading. In the case of Bosnia-Herzegovina it was reported that protection has improved since violent attacks on the Queer Sarajevo Festival in 2008. In Macedonia, following an attack on the LGBTI Support Centre on 23 October 2012, the police played an active role in protection and in calming the local community. In the case of Montenegro, it is reported that protection has been provided when requested. In the Russian Federation a recent practice of providing some protection for members of LGBT organisations during their activities is a positive development, although it is not applied in all regions, and is not always effective. In Serbia there has recently been significant progress in the way the police react to violence and threats of violence against LGBT human rights defenders, including effectively securing premises of organisations and events.

Consultation on measures affecting the rights of LGBT people (12 i-ii):

In most of the countries studied, it is clear that the authorities do not actively support LGBT organisations, and do not recognise work on combating discrimination against LGBT people as important. This was reflected in the extent of consultation and involvement of LGBT organisations in the implementation of relevant public policies. In Ukraine, outside the field of HIV/AIDS prevention, only one case was known where the authorities had consulted LGBT organisations, and their proposals (in relation to anti-discrimination legislation) were rejected, as indeed have all other proposals made by them before or since. In Romania, there has not been a single example of consultation in the last three years. In Georgia and Lithuania, LGBT NGOs are rarely consulted, while in Cyprus, the Czech Republic, Italy, Hungary and Macedonia, involvement in consultation processes produce little or nothing in the way of results.

This has been true also for Poland, although meetings with the Plenipotentiary for Equal Treatment on the draft *National Program for Equal Treatment*, and quarterly meetings of LGBT organisations with the Ombudsperson, are positive signs.

Montenegro and Portugal provide very positive examples by comparison with the other countries studied. There are also recent and encouraging developments in Serbia, where LGBT organisations were consulted on the Anti-Discrimination Law, and are involved in the process of drafting the National Anti-Discrimination Strategy, and in a working group on transgender issues established by the Commissioner for the Protection of Equality.

iii Freedom of expression and peaceful assembly

Section III of the Appendix requires member states to guarantee freedom of expression and peaceful assembly to LGBT people, ensuring the freedom to receive and transmit information on sexual orientation and gender identity, encouraging pluralism and non-discrimination in the media, protection of lawful assemblies, and condemnation by public authorities of any interference with the exercise of the right to freedom of expression and peaceful assembly by LGBT people.

Freedom of expression

Ensure the freedom to receive and transmit information (13 i-iii):

In three countries, the Russian Federation, Ukraine and Lithuania there are serious concerns with regard to freedom of expression.

In the Russian Federation, a number of regional assemblies have adopted laws banning "homosexual propaganda to minors" including Arkhangelsk, Kaliningrad,[37] Kostroma, Ryazan, St. Petersburg, Krasnodar, Samara, Novosibirsk, Magadan and the Republic of Bashkortostan. A proposal for such a law in the State Duma was supported at first reading in January 2013 by an overwhelming majority, with only one vote against, and one abstention.[38] The State Duma Committee on Family, Women and Children has proposed the following definition of propaganda: "holding public events with participation of homosexuals in places accessible for children, public appeals and approval of homosexual relationships on TV and radio during times available for children". The Committee justifies the proposed law as follows: "Propaganda of homosexualism has become widely spread in Russia: gay-parades, demonstrations, programmes supporting homosexual relationships broadcasted over all the TV and radio channels during daytime. Such a broad spreading propaganda of homosexualism harms the forming children's personalities, dissolves their conception of family as a relationship of a man and a woman, and practically creates a situation of limited freedom for their future sexual preferences before they come of age." [39]

In Ukraine three separate draft laws seeking to prohibit "propaganda of homosexualism" have been introduced into Parliament in the last two years. One of these, Draft Law No 0945,[40] proposes to ban any production, printing, publication or distribution of products “promoting” homosexuality, the use of media, TV or radio broadcasting for homosexuality “promotion”, the import, production or distribution of creative writings, cinematography or video materials “promoting” homosexuality. Such activities would be subject variously to fines or prison

[37] "Propaganda of homosexualism” among adults was prohibited in Kaliningrad, Russia" - media release by the Russian LGBT Network, 24 January 2013
[38] E-mail message from the Russian LGBT Network dated 25 January 2013. Of the 390 members of the State Duma present, 388 supported the measure. 52 were not present.
[39] Russia Summary Report, Appendix, Section iii, Freedom of expression and peaceful assembly
[40] Formerly Draft Law 8711

sentences of up to five years. At its first reading in the Ukrainian parliament in October 2012, 289 MPs voted in favour, one abstained, and none opposed.

There are also concerns over the activities of an advisory body, the National Expert Commission on the Protection of Public Morals. In recent years it has invoked a provision regarding protection of the health of the population to persuade the relevant authorities to place restrictions on LGBT material, for example, the banning of the film *Bruno* in Ukrainian cinemas, and the broadcasting of the film *Brokeback Mountain* only after 11 p.m.

In Lithuania the media have gradually started to present LGBT issues in a more respectful and objective way. However, this has not been a consequence of any attempt by public authorities to encourage pluralism and non-discrimination. On the contrary, a number of legislative initiatives have sought to limit LGBT people's right to freedom of expression, including amendments to three laws, the Law on the Protection of Minors against Detrimental Effect of Public Information ("the Law on the Protection of Minors"), the Code of Administrative Violations, and the Law on the Provision of Information to the Public. While the overtly discriminatory wording of some of these amendments was mitigated in the face of protests both from within Lithuania and abroad, provisions designed to restrict the rights of LGBT people remained. Thus, the Law on the Protection of Minors recognises information as having detrimental effects if it "expresses contempt for family values" or "encourages the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania". The Law on the Provision of Information in Public still contains the prohibition of advertising and audio-visual communication that could be regarded as "offensive to religious or political beliefs".

In Romania, local authorities in several cities insisted on the removal of billboards promoting the message that homosexuality is neither an illness nor a choice.

Serbia, however, has seen a very positive development. The new comprehensive Anti-Discrimination Law includes a provision that "Everyone shall have the right to declare his/her sexual orientation, and discriminatory treatment on account of such a declaration shall be forbidden."

In the other countries studied the authorities have neither, with relatively minor exceptions, interfered with the freedom of expression of LGBT people, nor taken any positive measures to ensure it. Thus, in general, no measures are taken to ensure an attitude of pluralism and non-discrimination in media reporting of LGBT issues. This matters because LGBT concerns are often not mainstreamed in general news reporting, being relegated to sensationalist forms of journalism that are homophobic or transphobic in tone. In Hungary a survey among LGBT persons in 2010 found that 91% of respondents agreed with the statement that "the media shows a distorted image of LGBT people." In the same country, media have a duty to respond to the needs of social minorities, but this does not explicitly include LGBT people.

"… in the context of a wider anti-discrimination campaign ... Public Service Announcement (PSA) radio spots were produced, targeting discrimination based on grounds such as age, ethnicity, and sexual orientation. The ….Cyprus Broadcasting Corporation….. refused to air the radio spot .. on sexual orientation…. [it] appears to adhere to an implicit policy whereby transmission, expression and/or news reporting on events, issues or incidents relating to LGBT are being suppressed." [41]

Freedom of assembly

Ensure the right to freedom of assembly, including protection of lawful assemblies (14, 15):

In the countries studied the position with regard to enjoyment of freedom of assembly by LGBT people is very mixed, with prohibition of assemblies in three since the adoption of the Recommendation, and serious concerns over the dangers involved in many more, particularly in the light of the failure of police in some countries to provide adequate protection.

In the Russian Federation, the situation is disturbing. In recent years Pride and other events in many Russian cities have been repeatedly banned. In September 2010 the European Court of Human Rights held unanimously that the Russian Federation had violated the right to freedom of assembly when banning events in Moscow in 2006, 2007, and 2008.[42] Despite this, such prohibitions have continued. In September 2012, when reviewing the record of the Russian authorities with regard to applications to hold such freedom of assembly events since 2010, the Committee of Ministers noted that "only a very limited number of such events could effectively take place" and that "in the vast majority of cases, the competent authorities, in particular in Moscow, refused to agree the time and place for such events".[43]

In Serbia, Pride events were banned in 2009, 2011 and 2012, in the face of threats of violence by extremist organisations. The decisions to ban the 2011 and 2012 events were not communicated to the organisers, who only learned of them from the media. As a consequence, access to normal legal remedies was denied, leaving an appeal to the Constitutional Court as the only remedy in the domestic courts.

In three countries, Cyprus, Macedonia and Montenegro, no large-scale events in public places that would test the position have been organised, reflecting concerns (at least in Macedonia and Montenegro) about the degree of hostility such events might meet. Plans for a Pride event in Montenegro in 2011 were cancelled due to fears for the safety of participants, following lack of support by government officials. A concert in a private venue organised for International Day Against Homophobia ("IDAHO")[44] 2011 showed weaknesses in police management of the security risks, and raised concerns about their ability to handle a larger scale event. 18 months

[41] Cyprus Summary Report, Appendix, Section iii - Freedom of expression and peaceful assembly
[42] *Alexeyev v. Russia (4916/07)*
[43] Committee of Ministers – *1150th meeting – 26 September 2012 - Decision on case no. 16 – Alekseyev*
[44] May 17th

later the police have still provided no information to the organisers on the measures taken to identify and prosecute those responsible for throwing a tear gas bomb into the concert.

In Bosnia-Herzegovina, the first attempt at a significant public LGBT event, the 2008 Queer Sarajevo Festival, was met with widespread hate speech and violence. Despite a police presence, eight people attempting to enter the building for the opening ceremony were injured, and the festival had to be cancelled. Only relatively small-scale events have been held since and have been protected by the police when requested by the organisers.

In Georgia an attempt to hold a march on IDAHO day in 2012 was met with violence, despite the presence of police. The Chief Prosecutor failed to respond to calls for an investigation and the prosecution of the attackers under the provision of the Criminal Code by which a homophobic or transphobic bias motive can count as an aggravating factor.

In Ukraine events were banned in Mykolaiv (2009) and Kharkiv (2010) on the grounds of public opposition. In 2012 the Kiev City administration supported a peaceful march, cooperating with the organisers despite opposition from hostile groups. This did not however prevent the organisers from having to cancel the march when the police proved unwilling to provide protection. Two organisers of the march were beaten up. Neither aggression against peaceful assemblies of LGBT people, nor repeated statements by local councillors, mayors and MPs opposing such events, has been repudiated by the government.

In Lithuania the 2010 Baltic Pride march was initially banned, but went ahead following a ruling by the Supreme Administrative Court. A significant police presence was required to protect demonstrators from a large hostile crowd.

In Estonia Pride marches were held between 2004 and 2007. A number of participants were injured in 2007, and no Pride event has been held since, although a concert in 2011 passed off without incident.

Hungary has seen a deterioration in the exercise of freedom of assembly. For many years LGBT events encountered difficulties neither from the authorities nor from counter-demonstrators. However since 2007 heavy security measures have been needed to protect marchers from violence. The police have reacted by trying to ban marches, but have been overruled by the courts. Statements by city councillors or MPs opposing LGBT events have not been repudiated by the authorities.

In Poland, after repeated prohibitions of public events in the period from 2004 to 2005, and following judgments in the national courts and by the European Court of Human Rights, freedom of assembly is generally guaranteed, although disproportionate restrictions relating to the route, or timing of marches are sometimes applied.

In Romania gay pride marches have been organised annually since 2005, together with various other cultural or political events. Each year a so-called Normality March organised by extreme right-wing groups is allowed to proceed, despite consistent use of slogans inciting discrimination

and violence against LGBT people. On the positive side, law-enforcement agencies have ensured effective protection of LGBT march participants, and acted with respect towards them.

In the Czech Republic, Italy and Portugal freedom of assembly is generally enjoyed, although in the first two there have been cases where public authorities have made homophobic statements, or sought to limit the route of parades or the use of public meeting places.

Condemnation by public authorities of interferences with the right to exercise freedom of expression and peaceful assembly (17 i-iii):

In general, it is relatively rare for public authorities to condemn unlawful interferences with the right to freedom of assembly, or to uphold this right in the face of public hostility. Indeed, in a number of countries where the right to freedom of assembly is exercised by LGBT people, senior public figures continue to express hostility to Pride events.

"In 2011 [President Václav Klaus] criticised the Mayor of Prague and the embassies of 13 countries for supporting the Prague Pride, considering such parades as demonstrations of "homosexualism" ideology, and marking LGBT people as "deviants".[45]

"A homosexual is a sick person. Why should these sick people demonstrate their illness to other people? But they do demonstrate it and, moreover, they even try to arrange Pride marches". "When the deviation percentage reaches beyond 7% the whole society is in danger. The promotion of homosexualism puts Russian people at threat of extinction." (Elena Babich, a former member of Saint-Petersburg Legislative Assembly). [46]

iv. Respect for private and family life (excluding specific transgender issues) (Section IV, paras 18, 19, and 23 – 27 of the Appendix)

These paragraphs of Section IV of the Appendix address criminalisation of same-sex sexual acts, collection of personal data, and discrimination in access to the rights of couples and parenting.

Criminal law and collection of personal data (18 i-iii and 19 i-iii):

In the countries studied there is no evidence of any provisions that continue specifically to criminalise same-sex sexual acts in a discriminatory manner. However, in Romania, the criminal code penalises "sexual perversion acts performed in public". Despite the fact that the High Court of Cassation and Justice has stated specifically that homosexual acts are not to be considered perversions, a gay man is currently under investigation for this offence.

Regarding collection of personal data, there are serious concerns in the case of Ukraine and Georgia. In the former, it is reported that some police gather such data during investigations in

[45] Czech Republic Summary Report, Appendix, Section iii - Freedom of expression and peaceful assembly
[46] Russia – Summary Report – Section iii, Freedom of expression and peaceful assembly

relation to LGBT people, and sometimes use them for purposes of blackmail, or to "out" individuals to relatives or employers. The Ministry of Internal Affairs claims that such information is not gathered. Recently reports have also emerged of an abusive practice by some police officers. Acting as *agents provocateurs*, they are reported to approach gay men on internet social networks or dating websites and persuade them to disclose intimate photographs and/or offer to pay for sex. They then prosecute them for distribution of pornography or for prostitution, or seek to blackmail them.

In the case of Georgia, a new Law on Personal Data Protection adopted in December 2011 introduced a position of Data Inspector, and obliged employers (public and private) to collect and send personal information about its employees to the Inspector, including information about their sexual orientation. The law further authorised the inspector to process, analyse, store and release such data without prior consent of the individual concerned, provided that such action was "in the public interest." The law failed to define "public interest" or to provide other safeguards against the abuse of these powers. A former MP from the (then) ruling party stated: "A kindergarten or any medical centre shall have information about a person, whether she/he has AIDS, or a kindergarten shall have information about the sexual orientation of the person."

Also in the case of Georgia, since finalisation of the report on that country, allegations have been made by the Prosecutor's Office that, under the previous government, the Military Police made dozens of secret video recordings of "publicly well-known men" engaging in homosexual sex. It is alleged that these were then used to coerce the individuals concerned into supporting the government publicly, and, in some cases, for extortion.[47] The Prosecutor's Office has released video footage of some of the recordings. Although the images were blurred, the Georgian Public Defender has expressed concern that sufficient details remain for the individuals to be identified.[48]

"… while investigating the murder of a gay man, officers from Halytsky District Police Department in Lviv interrogated more than 300 men whom they suspected to be homosexual. Without their consent and in breach of procedural provisions those men were photographed and fingerprinted and their mobile phone address lists were copied. About ten people needed medical treatment as a consequence of their treatment by the police…There is no information on destruction of the data which were collected …." [49]

Access to the rights of unmarried couples (23 i):

Of the countries studied, Bosnia-Herzegovina, the Czech Republic, Georgia, Hungary, Macedonia, Montenegro, Portugal and Ukraine provide rights (to varying degrees) to such couples. However, of these, only the Czech Republic, Hungary and Portugal make these rights

[47] Prosecutor's Office Reports of Military Police Gay 'Honey Traps' – Civil.ge website – 15 January 2013 - http://www.civil.ge/eng/article.php?id=25642
[48] The Public Defender's statement is at: http://www.ombudsman.ge/index.php?page=1001&lang=1&n=0&id=1627
[49] Ukraine Summary Report – Section iv. Respect for private and family life

available to same-sex couples.[50] In Cyprus certain rights are available on an informal basis to unmarried couples planning to marry, however these are denied to same-sex couples. In Poland, unmarried partners are recognised when it comes to "next of kin" status, but the rules are often interpreted to exclude same-sex couples. In Poland also, the Criminal Code, the Code of Criminal Procedure and the Criminal Executive Code include provisions whose content and method of application are discriminatory. Depending on interpretation, such terms as "a person in cohabitation" or "a person permanently residing and co-managing the household" may result in less favourable treatment when granting the right to refuse to testify, or visiting rights with a partner in prison.

Macedonia recently acted contrary to the Recommendation by excluding same-sex couples from provisions aimed at protecting couples that have or have had close personal relations from domestic violence.

"One of the partners applied for a social benefit ….. The response from the municipality was negative, stating that same-sex cohabitations are not considered families for the purposes of this local social benefit. The Chancellor of Justice found the refusal to be void as the decree regulating social benefits did not reserve it to married couples ….The local municipality then amended the decree so that it excluded same-sex cohabiting partnerships and rejected the couple's application again. The applicant turned to the court and the refusal was overturned by it." [51]

Access to legal recognition, and measures to address the practical problems faced by same-sex couples in the absence of such recognition (24 i and 25 i):

Of the countries studied, only three provide any legal recognition of same-sex couples: Portugal, which allows same-sex couples to marry, but excludes any parenting rights; Hungary, which has registered partnership rights equivalent to those of spouses in most areas except parenting, and the Czech Republic, where registered partnership provides only very limited rights. Of the remaining countries, none has taken any steps towards providing same-sex couples with legal or other means to address the practical problems arising from lack of legal recognition. However, in 2012 the Estonian authorities published a concept of a Cohabitation Act, which envisages provision for formal registration, and also for regulation of rights and obligations for certain unmarried and unregistered couples. In Montenegro the Institution of the Ombudsman has submitted a proposal for the adoption of a law on same-sex unions to the Parliament. In Poland, attempts to introduce registered partnership legislation in January 2013 were rejected by Parliament.[52]

In Poland, Civil Registry Offices often try to prevent the conclusion of same-sex unions by Polish citizens abroad, by refusing to issue a certificate stating the legal capacity to marry abroad, on

[50] In Italy courts have ruled in favour of same-sex couples in a number of areas. However, under Italy's legal system, such precedents are not legally binding. For more details, see the relevant section of the Italy Compliance Documentation Report.
[51] Estonia Summary Report –Section IV. Respect for private and family life (excluding specific transgender issues)
[52] E-mail message on behalf of the Board of the Campaign against Homophobia – 26 January 2013

the grounds that the wording of the Constitution provides only for the possibility of concluding a marriage between persons of different sex.[53] In Serbia there is evidence of similar problems.

Decisions regarding the parental responsibility for, or guardianship of a child, to be taken without discrimination (26 i-ii):

In the countries studied, only in the Czech Republic and Portugal was there clear evidence of measures to ensure decisions in these areas were taken without discrimination based on sexual orientation or gender identity. In Poland there are positive signs, with the first judgments explicitly stressing that sexual orientation cannot be raised as an argument against awarding parental responsibility to a parent. However, by contrast, in Macedonia, a person publicly declared as transgender had her right to see her children revoked by the Centre for Social Affairs, a decision confirmed by the Ministry of Labour and Social Affairs.

"I cannot see my children and I'm not sure if I will ever be able to see them again. As they are young, they will be taught that something is wrong with me, just because I'm a transgender person, so there will not be a possibility even in the future for me to see them. There is no protection in this country that can help us, the transgender persons. What is now happening to me with all the procedures and the attempt to make me guilty for things I have never done is just unacceptable…" [54]

Where national law permits adoption by single individuals, the law to be applied without discrimination (27 i-ii):

Of the countries studied, Estonia, Hungary, Macedonia, Montenegro, Poland, Portugal, Romania, the Russian Federation and Ukraine make general provision for adoption by single persons, while Cyprus, Lithuania and Serbia allow it in exceptional circumstances only. The Czech Republic allows single adoption regardless of sexual orientation. However, people who enter into registered partnership are excluded from access to single adoption since the law on registered partnership bans adoption for a registered person.

In none of these countries was there any evidence of specific measures to ensure that decisions on adoption are taken without discrimination on the grounds of sexual orientation or gender identity. In the case of Ukraine, the *Family Code* specifically prohibits adoption by persons with medical conditions on a list published by the Ministry of Health Care. This includes transsexualism.

Where national law permits assisted reproductive treatment for single women, access to such treatment to be without discrimination (28 i-ii):

Estonia, Georgia, Hungary, Macedonia, Montenegro, Romania,[55] the Russian Federation and Ukraine permit access to assisted reproductive treatment by single women. Serbia also does so,

[53] Poland Summary Report, Appendix, Section iv, Respect for private and family life
[54] Macedonia Summary Report - Appendix – Section v. Respect for private and family life and access to health care – specific transgender issues
[55] Romania Compliance Documentation Report – paragraph 23

but only in exceptional circumstances. However, again, there was no evidence of measures to ensure such access without discrimination on the grounds of sexual orientation or gender identity.

v. Respect for private and family life and access to health care – specific transgender issues **(Section IV of the Appendix, paras 20, 21 and 22, and Section VII, paras 35 and 36)**

These paragraphs of Section IV of the Appendix require member states to review prior requirements for legal recognition and remove any that are abusive, to guarantee the full legal recognition of a person's gender reassignment in a quick, transparent and accessible way (including in documents originated by non-state actors), and to ensure that transgender persons are able to marry once gender reassignment has been completed. The paragraphs of Section VII require member states to ensure that transgender persons have effective access to appropriate gender reassignment services, and that any decisions limiting the costs covered by health insurance are lawful, objective and proportionate.

Two of the processes associated with the reassignment of a person's gender are a legal process, in which the record of a person's sex and first name are changed in identity and other documents ("legal gender recognition"), and a medical process, in which the individual's physical characteristics may be brought in line with their preferred gender ("gender reassignment treatment"). The human rights principles on which the Recommendation is based require that the two processes should be separate and that the extent of any medical process should be determined by the medical needs and wishes of the individual. It can range from little or no medical intervention, through to extensive gender reassignment surgery. In all the countries studied these two processes are mixed together, with legal gender recognition being made conditional on a medical diagnosis and usually also medical treatment. While medical treatment is often desired by transgender persons, this is by no means always the case, resulting in a situation where some individuals are faced with the choice of undergoing medical treatment (including, often, sterilisation) they do not need or wish, or being unable to obtain legal gender recognition.

Review prior requirements for legal recognition and remove any that are abusive (20 i-ii):

The Explanatory Memorandum lists irreversible sterilisation, hormonal treatment, preliminary surgical procedures and proof of the person's ability to live for a long period of time in the new gender (the so called "real life experience") as examples of prior requirements which should be reviewed.[56]

Of the countries studied, only Hungary, Portugal and Ukraine can be considered to have conducted such a review, although in Serbia the Commissioner for Protection of Equality

[56] Explanatory Memorandum to the Recommendation, text addressing paragraphs 20 – 21 of the Appendix to the Recommendation

(together with the Ombudsman) has recently established a working group to analyse legislation affecting transgender persons. This is of considerable concern, since research shows that abusive prior requirements are widespread. For example, of the countries studied, only Estonia, Hungary and Portugal do not require medical interventions as a condition of legal gender recognition. All the other countries require surgical procedures, (including sterilisation in many, for example, Cyprus, the Czech Republic, Georgia, Italy (usually), Romania (sometimes), the Russian Federation (sometimes), Serbia and Ukraine) and sometimes also hormone treatment.

The Commissioner for Human Rights has commented: "It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state enforced sterilisation."

In Ukraine provisions exist which unreasonably exclude from gender reassignment persons with children younger than 18 and persons with homosexuality or transvestism "against a background of sexual role transformation".[57] The meaning of this latter phrase is unclear, but it would seem to invite discriminatory decisions.

Full legal gender recognition in a quick, transparent and accessible way (21 i-ii):

Of the countries studied, only Portugal approaches satisfying the requirement of making legal gender recognition possible in a quick, transparent and accessible way.[58] Many of the others have little or nothing in the way of procedures or regulations, giving rise to confusion as to conditions for recognition and arbitrary decisions. For example, in Serbia, almost every city or municipality has developed its own procedures. In many countries, absolute discretion is given to medical institutions, with no procedures for appeal or challenge. In Lithuania, Poland and Romania transgender persons must go to court in order to get a decision, a process unlikely to favour either speed or accessibility. As noted above, in almost all the countries the processes involve medical treatment, and can therefore take years during which the individual may be required to live with the documents of one gender, and the physical appearance of the other, creating serious practical problems, particularly in fields such as employment.

Issues in the following countries give cause for other concerns.

In Cyprus the original gender marker data on birth certificates cannot be deleted, resulting in possible exposure of the individual's gender identity status, and serious invasion of their right to respect for private life.

In Lithuania Article 2.27 of the Civil Code allows any non-married person to change his or her legal gender if this is medically possible, but it also requires that the procedures for changing gender should be established by law. Parliament has failed to enact these procedures, as a consequence of which transgender persons cannot receive the medical treatment required for

[57] The Ministry of Health Care Order "On improvement of medical assistance to persons needing change (correction) of sex" (2011)

[58] Even Portugal's procedure falls short of the standard of a "quick, transparent and accessible" process because it retains the requirement for a medical diagnosis.

legal recognition, making it necessary for them to seek such treatment abroad. Even when they have undergone treatment abroad, in the absence of any regulations, they are forced to apply to the courts to obtain a new personal code, passport and other identity documents. In 2007, in the case of L v. Lithuania the European Court of Human Rights found this situation to violate Article 8 of the Convention. However Lithuania has failed to implement the necessary general remedies to comply with the judgment. Indeed, on the contrary, MPs have tabled proposals to amend the Civil Code to remove the right to undergo gender reassignment treatment. Apparently they consider that this will nullify the legal basis for cases repeating the argumentation of L v. Lithuania.

In Serbia, a new draft of the Law on Amendments and Addendums of the Law on Extrajudicial Proceedings includes measures for introducing a new gender reassignment procedure which, far from making gender legal recognition available in a "quick, transparent and accessible way", would bring additional problems to the already difficult, lengthy and painful processes, including court permission.

"A.K., a trans man who obtained a final court decision allowing him to update his identity papers, underwent several surgical interventions (ovarectomy, hysterectomy and mastectomy) and then requested the forensic medical act stating his sex. The expert evaluating A.K. decided that his gender was "female", in spite of the surgery and of the fact that AK had been living as a man for years, commenting that AK continued to have "female secondary sexual characteristics"." [59]

"When approached by a transgender woman who wanted to change her documents [they decided] to determine whether the change has really taken place. During the exam they observed and measured her genitals and breasts, although she had all the necessary medical documents and even though this is not a standard procedure." [60]

"Although a transgender woman has been able to change all the other documents, the officials did not want to issue her a work permit with the new name, which has left her without work and money." [61]

"The applicant was diagnosed with gender identity disorder, got hormonal replacement therapy which led to irreversible changes and a mastectomy surgery…….. All the facts were proved by a medical assessment report. The Civil Registry Office refused to issue a new official document containing the person's new gender and name on grounds of "the absence of a document on the carrying out of all the necessary procedures including phalloplasty." [62]

[59] Romania Summary Report – Appendix, Section v. Respect for private and family life and access to health care – specific transgender issues
[60] Serbia Compliance Documentation Report, Appendix, Right to respect for private and family life, paragraph 21
[61] Serbia Compliance Documentation Report, Appendix, Right to respect for private and family life, paragraph 21
[62] Russia Summary Report, Appendix, Section v., Respect for private and family life and access to health care – specific transgender issues

Ensure corresponding recognition and changes to documents by non-state actors (21 iii-iv):

In none of the countries studied were there procedures covering changes to all documents issued by non-state actors, such as educational diplomas, certificates of employment and insurance or banking documents. While informal procedures appear to work in three countries, Italy, Hungary and Portugal, the absence of procedures puts the private life of transgender persons at risk, and may create difficulties in areas such as employment. In Serbia the Commissioner for Protection of Equality has recommended all universities to issue new certificates and other documents at the request of transgender persons following legal gender recognition.

Ensure the right of a legally recognised transgender person to marry (22 i):

There was no evidence of problems in this area, although there was also no evidence of specific measures to guarantee this right.

Ensure effective access to appropriate gender reassignment services (35 i-iii):

In only two of the countries under review, the Czech Republic and Portugal, was the access to appropriate gender reassignment services considered even approaching an adequate level. Problems identified included lack of procedures, lack of standards and guidelines regarding treatment, inadequate or non-existent training, absence of medical professionals with the necessary skills, particularly for surgery, and indeed, in some countries, the absence of any gender reassignment services at all. In Romania the only surgeon who publicly admits to have expertise in this domain has a waiting time of between 2 to 5 years. It is also reported that Romanian health professionals commonly recommend that transgender persons undergo psychiatric treatment in order to accept their birth gender. In Serbia gender reassignment treatment has been mostly confined to the private health sector, unregulated by legislation, creating circumstances in which transgender persons may be subjected to different kinds of abuse.

Montenegro, which, in view of its population size has a relatively small number of transgender patients, is addressing these problems by a policy of contributing to the cost of treatment abroad.

"…. this doctor sent me to the department's head. She gathered about 5-6 people who made me undress, show them my physical capabilities, and pressurise me morally… She told me that I am such a fool, that I don't understand what I am doing, that God will punish me, and that anyway I won't be a fully-fledged man…... When she had read that ….. my mother recently died, she said: "This is why your poor mother could not stand it and died!" [63]

Ensure that any decisions limiting the costs covered by health insurance are lawful, objective and proportionate (36 i-ii):

[63] Ukraine Summary Report, Appendix, Section vi, Respect for private and family life and access to health care (specific transgender issues)

The Explanatory Memorandum amplifies the above as follows: "Where legislation provides for coverage of necessary health care costs by public or private social insurance systems, such coverage should then be ensured in a reasonable, non-arbitrary and non-discriminatory manner, taking into account also the availability of resources." [64]

Of the countries studied, Montenegro's new Law on Health Insurance provides for the coverage of 80% of the costs of gender reassignment, although this has not yet come into effect. In Serbia legislation which came into effect in January 2012 stipulates that at least 65% of the cost of health-care services will be provided from health insurance, if the gender reassignment is made for medical reasons. The Czech Republic, Portugal and Italy also generally cover all or a significant part of such costs, although in the case of Italy hormone therapy is not covered in all regions.

In Hungary only 10% of the costs are covered. In Romania the picture is confused, with a few cases where transgender people have managed to secure coverage of costs by the public health insurance system. In the remaining nine countries there would appear to be no effective contribution to such costs.

vi. Employment

Section V of the Appendix requires Member States to provide effective protection against discrimination on grounds of sexual orientation and gender identity in employment, including legislation prohibiting discrimination, other policy related measures to combat discrimination, and specific measures in relation to the armed forces and transgender persons. It also requires Member States to protect the privacy of transgender individuals in employment.

Legislation specifically prohibiting discrimination on grounds of sexual orientation (29 i-ii):

Of the countries studied, only the Russian Federation and Ukraine have no legislation in this field. However, in two other countries the situation is not completely satisfactory: in Georgia legislation does not cover the process of recruitment or dismissal; in Macedonia the legislation uses a term – "sexual inclination" – which is not recognised internationally, potentially undermining its effectiveness.

Legislation specifically prohibiting discrimination on grounds of gender identity (29 i-ii):

Of the countries studied, only the Czech Republic, Hungary, Montenegro and Serbia have introduced such legislation.[65] In addition, Estonia's Gender Equality Act has been interpreted by the Gender Equality and Equal Treatment Commissioner to include gender identity. However, it should be noted that other EU member states have an obligation under EU law to provide

[64] Explanatory Memorandum to the Recommendation, text addressing paragraph 36 of the Appendix to the Recommendation

[65] Bosnia-Herzegovina's Law on Prohibition of Discrimination includes prohibition of discrimination on the grounds of "sex, sexual expression (expression of sex) or orientation''. While there may have been an expectation that this would address gender identity, "sexual expression" does not cover the concept of "gender identity".

protection from discrimination in employment on this ground, an obligation to which they have not given explicit effect.[66]

Other general measures to combat discrimination in employment (29 iii):

There was little evidence of other measures to combat discrimination in the workplace, and those that were identified were of questionable effect. Thus, in Hungary, a duty on certain public employers to adopt workplace and equal opportunity plans does not give rise to concrete measures promoting the inclusion LGBT people. In the case of Poland, where there are projects to combat employment discrimination in relation to age, sex or disability, it was noted that recognition of a need for projects to address discrimination faced by LGBT employees is only beginning to take shape.

Measures to combat discrimination in the Armed Forces (29 iv-v):

In the countries studied, there was little evidence of any measures taken in the Armed Forces to combat discrimination against LGBT persons and promote tolerance and respect. However, in 2010 Italy's Military Code incorporated a specific prohibition on all discrimination against LGBT military personnel in access, recruitment, duty assignments and transfers.

In Cyprus, although representatives of the Ministry of Defence maintain there is no issue of discrimination that needs to be addressed, recruits have reported serious instances of homophobic harassment, including taunts, physical attacks and rape.

It is also of concern that in three of the countries studied, the Czech Republic, Hungary and Poland, health and psychological eligibility provisions exist which permit the exclusion of transsexuals from the armed forces.

Measures to protect privacy of transgender individuals in employment (30 i):

There was no evidence in any of the countries studied of measures to protect the privacy of transgender individuals in employment.

"During my second year I decided to be more open in public about my identity and defend my rights freely…. My photo appeared on a cover of a magazine…… the manager of the café fired me as a lot of people …. would have negative attitudes towards me. I was in a very bad condition. I had financial difficulties and I nearly became a victim of prostitution … Fortunately my mother helped me." (21-year-old male to female transgender) [67]

[66] The Gender Recast Directive, Directive 2006/54/EC, introduced an explicit reference in relation to discrimination based on 'gender reassignment': Recital 3 of the Preamble of this Directive codifies the Court of Justice of the European Union's *P. v S*. decision by stating that "The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person".

[67] Georgia Summary Report – Appendix, Section V. Employment

"I was going to a job interview, and I rang at the intercom. They forgot to put back the receiver and I heard them saying that based on my voice I 'must be a faggot'. When I arrived at the office, the cleaning lady told me that there is no vacancy." [68]

"Following this [colleagues becoming aware of his sexual orientation], Maksim experienced unfriendly and humiliating attitude of his colleagues, and his boss bluntly said: "There is no place in our service for such ones as you! Do a favour for yourself – quit!" … Maksim had to voluntarily leave his job because he "did not want extremes" in his own words." [69]

"I told them several times that I am transsexual and my documents are under revision. I was told that this is unimportant, and everything is OK. When I had quit my previous job and the next day came to this company, they said: "Sorry, but we cannot employ you". [70]

vii. Education

Section VI of the Appendix requires member states to ensure that the right to education can be enjoyed without discrimination on grounds of sexual orientation or gender identity. These include measures to safeguard the right of children and youth to education in a safe environment such as equality and safety policies, codes of conduct and training programmes for staff; and measures to promote mutual tolerance and respect in schools, including objective information in school curricula and educational materials, specific information and support for LGBT pupils and students, and measures to meet the special needs of transgender students.

Ensure the right to education without discrimination (31):

Of the countries under review, general anti-discrimination laws in Bosnia-Herzegovina, the Czech Republic, Hungary, Lithuania, Montenegro, Romania and Serbia (referred to previously in relation to paragraph 2 of the Recommendation) cover sexual orientation discrimination in education, while this legislation in the Czech Republic, Hungary, Montenegro and Serbia also covers gender identity discrimination.

In Portugal, a new Student's Statute entered into force in 2012, prohibiting discrimination of any member of the school community on the grounds of their actual or perceived sexual orientation or gender identity. In Serbia, the Law on Higher Education prohibits sexual orientation discrimination.

However these legal provisions are only supported by practical measures of the kind proposed in the Recommendation in a few of the countries and then only to a limited extent: in the Czech Republic limited steps have been taken in relation to bullying and the content of curricula, but

[68] Hungary Summary Report, Appendix, Section vii. Employment
[69] Ukraine, Summary Report, Appendix, Section vi, Employment.
[70] Ukraine, Summary Report, Appendix, Section vi, Employment.

action does not extend to training of educational staff. In Macedonia, there are very limited provisions relating to some aspects of education, but again, no practical measures.

In the case of Georgia a Draft of the State Policy on Youth elaborated in 2011 makes express reference to the state's obligations towards LGBT youth. However there is no information on when the policy will be finalised, or regarding the implementation timetable and tools to be used.

In Poland a Regulation concerning training in different types of schools adopted in 2008 contained content aimed at preventing discrimination based on sexual orientation. However there is no evidence that it is being implemented.

Introduction of measures such as equality and safety policies and codes of conduct for educational staff (31 i):

There is little evidence of any measures taken under this heading in the countries studied.

Training programmes for educational staff to treat their LGBT pupils and students with respect, and respond to discrimination against them (31 ii):

There is very little evidence of training programmes in any of the countries concerned that would address the need to treat LGBT pupils with respect and help teachers analyse and respond effectively to discrimination against them. The best example comes from Macedonia, where a new programme, "Education for life skills" for secondary schools, addresses human rights and non-discrimination on different grounds including sexual orientation and gender identity. It includes material on marginalised groups in society, the stereotypes and prejudices that influence relationships between different social groups, and the right of everyone to equal opportunities and enjoyment of rights. The programme includes an implementation manual, and training for teachers. However, because this is a new programme, there are still no results regarding implementation by the teachers and its effect on pupils. In the Czech Republic a book "Homophobia in pupils groups" has been issued to local authorities for use by the regional professionals working at preventing bullying, but its use is voluntary, and extent of its use unknown.[71] In Italy, there is some in-service training on these questions, but it is not systematic, and often organised on the initiative of LGBT NGOs.

Support school campaigns and cultural events against homophobia and transphobia (31 iii):

In Italy, on International Day Against Homophobia (May 17th, 2012) the Ministry sent an official communication to all state schools asking for support for the mounting of campaigns and events against all forms of discrimination. The communication addressed the need to act against homophobia (but not transphobia) and highlighted some tools provided by the Ministry for this purpose. But it did not require specific actions.

Provide objective Information in curricula and sex and health education classes on sexual orientation and gender identity (32 i-iv):

[71] Czech Republic Summary Report, Appendix, Section vii, Education

Curricula

Of the countries studied, only Cyprus, the Czech Republic and Portugal included information on sexual orientation and gender identity in school curricula to any extent and in a reasonably objective manner. However, even then the information included was far from comprehensive. In the case of Romania, the Ministry of Education stated that sexual orientation and gender identity are addressed in health education. However, this is an optional subject, studied at the discretion of the school principal, and includes just one lesson on sexual orientation, in the grade for pupils for 18 – 19 years old.

In Cyprus an indicator for being able to “critically analyse diversity regarding sexual orientation" has recently been introduced in the secondary school sexual health education curriculum. In the Czech Republic information on sexual orientation and gender identity is incorporated in elementary and secondary school curricula, in the subjects, "People and Society", "People and their World", "Art and Culture".

In Hungary the National Basic Curriculum does not refer to information on sexual orientation or gender identity, schools being left to choose whether to incorporate such topics. Research shows that only a small minority do so. In Poland**,** information on sexual orientation appears in the school curriculum, but is frequently not communicated in an objective manner and with respect for LGBT people. It is not uncommon for students still to be taught that homosexuality is a ‘phase’ or a ‘disorder’ and can be altered or cured. The school curriculum also contains references to gender identity, but does not address it in a manner appropriate to current human rights standards.

Textbooks

It is of concern that textbooks in a number of the countries studied still include homophobic or transphobic material. These include Bosnia-Herzegovina, Hungary, Macedonia, Poland and Serbia. In Bosnia-Herzegovina some are reported to still define homosexuality as an illness and include it with a group of disorders such as paedophilia and drug addiction. In Macedonia, a university textbook, "Criminal Psychology", includes derogatory and misleading information about LGBT people. A complaint to the Commission for Protection against Discrimination was rejected on the grounds that the information represented a scientific position based on scientific research.

In Montenegro a working group is analysing the representation of LGBT human rights within the education system. Text books in primary and secondary schools do not include negative content, although they tend to ignore the subject. University textbooks are still to be analysed. Some are known to be outdated and contain incorrect and discriminatory information.

In Poland research indicates that some textbooks which treat homosexuality as a pathology, as a departure from socially accepted norms or even as a sexual deviation, are still being used. The Ministry of Science and Higher education has refused to take action, justifying its stand on the principle of school autonomy.

In Serbia, in July 2011, a Working Group formed by the Commissioner for Protection of Equality presented a set of Recommendations to the Ministry of Education and Science, the National Education Council and the Centre for Improving the Quality of Pedagogy and Education, for removing discriminatory content from teaching materials and practices and for promoting tolerance, respecting diversity and human rights. However, none of the recommendations has been implemented so far.

LGBT pupils and students provided with the necessary information to live in accordance with their sexual orientation and gender identity (32 iii):

Only in the Czech Republic was there any evidence of efforts to provide LGBT pupils and students with such information.

Measures taken to meet needs of transgender pupils (32 iv)

In not one of the countries studied was there any evidence of measures taken to meet the special needs of transgender pupils.

"Research conducted …… at the Institute of Social Sciences of University of Warsaw shows that 35% of [students] witnessed an LGBTQ person being publicly insulted." [72]

"21% of students surveyed admitted they had verbally attacked or threatened someone they thought was gay or "feminised", while 13% said they had actually helped beat them up. Some 60% of the respondents held that violence against homosexual persons was always justified……" [73]

"[research] among the LGBT population in 2007 found that 49% of respondents have suffered discrimination, prejudice, humiliation and/or aggression based on their sexual orientation and gender in secondary education. A similar research in 2010 found that respondents were quite critical about the level of support they received from their schools and teachers: 87% of respondents agreed with the statement that their teachers could have done more to make the school more liveable for a young LGBT person. As high as 65% reported that no information whatsoever was provided on homosexuality in the school curricula, with only 7% reporting detailed discussions; the situation was even worse for transsexuality: 86% and 2% respectively." [74]

"Even more serious are the cases of teachers intervention to support the bully and not the victim. When interviewed, teachers themselves report the need for training on sexual orientation and gender identity related issues…" [75]

[72] Poland Summary Report, Appendix, Section vii, Education
[73] Serbia Compliance Documentation Report, Appendix, Education, paragraph 32
[74] Hungary Summary Report, Appendix, Section ix, Education
[75] Italy Summary Report, Appendix, Section vii, Education

"*According to KPH's latest report 'Equality Lesson' ca. 50 % of the faculty admit that they need special skills to be able to tackle homophobic bullying in schools."* [76]

"They said I must go and change my clothes. And I just could not change my clothes, I only had clothes for boys. I was told to go and borrow my mom's. I came home in tears. My father went to the school with me, brought me into the classroom. I got a C for the exam." [77]

viii. Health - other than transgender specific health issues[78] (Section VII of the Appendix paragraphs 33, 34,)

These paragraphs of Section VII of the Appendix require member states to ensure that the highest attainable standard of health can be enjoyed without discrimination on grounds of sexual orientation or gender identity. Measures include taking account of the specific needs of LGBT people in the development of national health plans, including suicide prevention measures, health surveys, curricula and training courses, permitting patients to identify their "next of kin" without discrimination, removing homosexuality from the national classification of diseases, withdrawing medical textbooks and other documents that treat homosexuality as a disease, and ensuring no one is forced to undergo any medical treatment because of their sexual orientation or gender identity.

Inclusion of LGBT specific needs in national health plans, including suicide prevention measures and health surveys, curricula and training courses (33 i-iv):

With the exception of inclusion in HIV/AIDS prevention measures, there is no evidence in any of the countries studied that national health plans and services take account of the specific needs of LGBT people.

The only positive initiative identified was at regional level in Italy, where, for example, in Tuscany, health officials are mandated to develop appropriate measures to train health professionals in order to avoid discrimination on the grounds of sexual orientation and gender identity in the health sector, and to give appropriate information and services in the area of sexual and reproductive health to LGBT people and particularly to youth under 25 years old.

Identification of partner as next of kin (33 v)

In the absence of legal recognition of same-sex couples, identification of a patient's partner as next of kin is problematic in most of the countries studied. In Georgia, the legislation provides an exhaustive list of who can be regarded as "next of kin". This does not include same-sex partners. The situation in Romania and Serbia is similar. In Estonia, no rules stop someone defining their partner as next of kin, but experience shows that this does not prevent health care officials from

[76] Poland Summary Report, Appendix, Section vii, Education
[77] Ukraine, Summary Report, Appendix, Section vii, Education
[78] See Section v above

refusing to recognise them. In Poland a patient may indicate their "next of kin", but this does not help if the patient is unconscious, unless the partners have already granted each other a power of attorney. In Lithuania, also, powers of attorney are the only way to address this problem. In Cyprus there is no procedure, and the position is unclear. In Macedonia it is reported that, in practice, same-sex partners are often not recognised as next of kin by health workers, despite the fact that the Law for Patient's Rights provides specific protection against discrimination based on sexual orientation.

Removal of homosexuality from the national classification of diseases (34 i)

In all the countries studied homosexuality has been removed from the national classification of diseases.

Withdrawal of medical textbooks and training materials which treat homosexuality as a disease (34 ii)

Such textbooks and training materials still appear to be in use in a number of the countries studied. For example: in Macedonia, the textbooks “Medical pedagogy” and “Psychiatry” and “Development Psychology” of the Faculty of Medical Sciences at the University St. Ayril and Methodius; in Romania, where a reference book, “Clinical Sexology”, presents homosexuality under the heading "major sexual deviations (sexual perversions)", together with paedophilia, necrophilia, etc, and where the curriculum for psychiatry at the "Carol Davila" Medicine and Pharmacy University of Bucharest includes "homosexuality" and "transsexualism" under the topic "Behaviour and Personality Disorders in Adult Age (pathological personalities)"; and in Ukraine, where a recently published textbook recommended by the Ministry of Health Care classifies homosexuality as a mental disorder and recommends both psychological treatment and, in some cases, treatment with hormones.[79]

In Poland a training course for nurses and midwives is being revised to remove homophobic content, while in Georgia, following reports that homosexuality is treated as a disease in certain textbooks and by some medical practitioners, the Ministry of Health has advised that it plans to modify curricula for "further regulating of this issue".

“In particular, the survey of Our World Centre revealed that when medical staff knew or suspected the homosexuality of the patient 28% of the respondents met with discriminatory attitudes by the personnel.” [80]

"LGB persons experience unequal treatment, harassment or abusive behavior by health professionals. The Italian National Institute of Statistics has recently registered that 10,2% of LGB people have been discriminated in accessing the health care system by medical and non-medical staff.” [81]

[79] Since finalisation of the Ukraine Compliance Documentation Report, two more Ministry of Health Care recommended medical textbooks describing homosexuality as a "sexual perversion" have been identified.
[80] Ukraine Summary Report, Appendix, Section viii, Health

"LGB persons' special needs are not recognized as a consequence of their social invisibility. The 17,6% of gay and bisexual men and the 21% of lesbians and bisexual women having psychological therapy do not reveal their sexual orientation to their psychologist. This data greatly increase if related to the relation with doctors in general: the 78% of men and 86,8% of women included in the survey do not reveal their sexual orientation to their doctor." [82]

"Since the treatment was long and tiring she was often accompanied ….by her female partner…. she was asked by the head nurse in the company of several other nurses to stop intimately touching her as several other elderly patients had complained about their behaviour. The intimate touching referred to was holding hands and stroking the others shoulder/face every once in a while." [83]

"Cases include a second mother being prohibited from being present at birth and a doctor stating that it was probably good that a miscarriage occurred since the baby would have had a difficult life with homosexual parents." [84]

"My local doctor insisted that I should be treated for homosexualism, prescribed for me some injections and drugs that I decided not to take." [85]

ix. Housing

Section VIII of the Appendix requires that access to adequate housing can be enjoyed without discrimination on the grounds of sexual orientation or gender identity through such measures as prohibiting discrimination in the sale or rent of housing, in provision of loans for purchase of housing, in recognition of the rights of a tenant's partner, and in the case of evictions; also, provision of related information to landlords and tenants, and measures to ensure non-discriminatory access to shelter and emergency accommodation, and to address the risks of homelessness faced by LGBT people, including young persons excluded by their families.

Legislation prohibiting discrimination in housing (37 i):

Of the countries surveyed, only Bosnia-Herzegovina, the Czech Republic, Hungary, Lithuania and Romania specifically prohibit discrimination in these fields on grounds of sexual orientation, and only the Czech Republic and Hungary do so on grounds of gender identity. In Cyprus, the general

[81] Italy Summary Report, Appendix, Section viii, Health
[82] Italy Summary Report, Appendix, Section viii, Health
[83] Hungary Summary Report, Appendix, Section x, Health
[84] Estonia Compliance Documentation Report, Appendix, VII, Health, paragraph 33
[85] Ukraine, Summary Report, Appendix, Section viii, Health

anti-discrimination (Commissioner) Law covers sexual orientation discrimination in housing, although departments dealing with housing did not appear to be aware of this. In Macedonia, although the Law on Prevention and Protection from Discrimination does not cover discrimination based on sexual orientation, the Commission for Protection against Discrimination can address housing related sexual orientation discrimination. In Portugal the constitution can be read to provide protection in principle from sexual orientation related discrimination in housing (taking Article 13, non-discrimination, in conjunction with Article 65, right to adequate housing), but there is no detailed implementing legislation.

Provision of information to landlords and tenants (37 iii)

Only in the Czech Republic has such information been made generally available.

Measures to ensure non-discriminatory access to shelter and emergency accommodation and to address the risks of homelessness faced by LGBT people, including young persons excluded by their families (37 ii and 38 i)

There is no evidence that any of the countries studied had taken any measures in respect of the above.

"The study of attitudes toward LGBT persons held by the National Institute of Statistics shows that 8% of respondents justify landlord refusal to rent to LGB persons; the average is 24,8% when it comes to rent to a transgender person. 14,3% of LGBT persons have been discriminated while searching an house to rent or to buy." [86]

"On December 1st2011 LGBT Forum Progress, LGBT organization from Podgorica, opened its very own shelter for LGBT persons in conflict with their families and evicted from their homes." [87]

"In 2011 I decided to leave home because of the conflict with my parents and wanted to rent an apartment together with my friend. The owner of the apartment suspected we were gay and was therefore aggressive. He said he would not allow men dressed like us to live in his house. He even threatened us with physical violence if we would not leave the apartment immediately." [88]

[86] Italy, Summary Report, Appendix, Section ix, Housing
[87] Montenegro, Summary Report, Appendix, Section ix, Housing
[88] Georgia, Summary Report – Appendix, Section VIII – Housing

x. Sports

Section IX of the Appendix requires member states to combat sexual orientation or gender identity discrimination in sports through measures to counteract and punish the use of discriminatory insults, codes of conduct for sports organisations, encouragement of partnerships between LGBT organisations and sports clubs, and anti-discrimination campaigns, and to put an end to the exclusion of transgender persons from sports activity.

The research revealed the following few specific measures to combat sexual orientation or gender identity discrimination in sports.

General measures to prevent the risk of exclusion from participation in sports (39)

In Portugal Law nº 5/2007 states that everyone is entitled to physical activity and sport regardless of their sexual orientation,[89] regulates the principle of ethics in sports and establishes that it is for the State to adopt measures to prevent and punish unsportsmanlike demonstrations, including all forms of discrimination. There is also a National Plan for Ethics in Sports, and an Ombudsman for Ethics in Sports. However, neither the National Plan nor the Ombudsman's mission mention sexual orientation or gender identity issues.

Other measures

In the Czech Republic, the Olympic Committee, together with the Ministry of Education, Youth and Sports published a handbook, *The Prevention of Abuse in Sports Environment in ČR in 2005* which defined abuse as "*sexual proposals, comments, and questions on someone's body, clothing, private life, sexual orientation etc*." It was distributed widely to sports organisations and schools.

In Italy, some LGBT sports groups have received public funding to take part in sports events. In the case of Montenegro, members of an LGBT organisation, LGBT Forum Progress, were able to take part in the LGBT Eurogames 2012, thanks to the support of the Montenegrin government.

"Research in 2007 among LGBT people found that every fourth respondent (23%) have suffered discrimination, prejudice, humiliation and/or aggression in sports clubs. The homo- and transphobic culture in sports is also demonstrated well by the fact that not a single known sportsperson have come out of the closet in Hungary." [90]

"I don't discuss this. Let the physicians talk about it. It's not my business. I don't have anything with them but I don't understand them. It's like they don't exist for me." (Mitica Dragomir, the President of the Professional Football League) [91]

[89] although gender identity is not mentioned
[90] Hungary, Summary Report, Appendix Section xii, Sports
[91] Romania, Compliance Documentation Report, Appendix, IX, Sports, paragraph 40

"On June 28, 2010 I participated in a sporting competition – "Cheerful Starts" in Tbilisi. I heard someone cursing at me from the hall: "you fucking Lesbian" as they could not understand whether I was a girl or a boy… While we were talking with them a guy came to their support and slapped me in the face. I did not call police because I was afraid of homophobic reaction." [92]

xi. Right to seek asylum

Section X of the Appendix requires member states, where they have international obligations in this respect, to recognise a well-founded fear of persecution based on sexual orientation or gender identity as a valid ground for the granting of refugee status and to ensure that asylum seekers are not sent to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment on grounds of sexual orientation or gender identity ("non-refoulement"). It also requires that asylum seekers be protected from any discriminatory policies or practices on these grounds, and that staff responsible for processing asylum requests are provided with training in the specific problems encountered by LGBT asylum seekers.

Recognition of a well-founded fear of persecution based on sexual orientation or gender identity as a valid ground for the granting of refugee status; and *non-refoulement* obligations (42 i, 43 i-ii)

It proved difficult for researchers to get a clear picture of the extent to which these requirements are met. It seems that, of the countries studied, only Cyprus, Hungary, Italy, Portugal and Romania explicitly refer to sexual orientation in their laws or regulations on asylum, and that only Portugal explicitly refers to gender identity. However in a number of other states case law or ministerial policy would appear to confirm that LGBT asylum applicants may be covered as members of a "particular social group".

Concerns were raised by many of the national reports as to the practical application of obligations with regard to LGBT asylum seekers including absence of official guidelines relating to sexual orientation and gender identity, refusing LGBT people asylum on the basis that persecution can be avoided if they conceal their sexual orientation or gender identity, and failure to adequately research country of origin information.

In short, if the requirements of the Recommendation are to be met, there is a clear need in most of the states concerned for legislation or regulations to explicitly recognise LGBT persons as members of a "particular social group" for asylum determination purposes, and for guidelines for immigration and asylum officials to enable them to address the specific circumstances of LGBT asylum seekers.

Training of staff responsible for asylum requests (42 ii)

[92] Georgia Summary Report – Appendix, Section IX, Sports

In only four countries, Cyprus, the Czech Republic, Hungary and Romania did there appear to have been any specific training for immigration staff in relation to LGBT asylum seekers.

Protection from discriminatory policies or practices in administrative detention centres (44 i-ii)

In none of the countries studied was there any evidence of specific measures to protect LGBT asylum seekers from discriminatory policies or practices when in detention.

"Even if criminal sanctions against homosexuals or homosexual behaviour are in force, the sexual orientation can be practised in a hidden, discreet way, which prevents eventual attacks". (Office of Immigration and Nationality in the case of an Algerian asylum-seeker.) [93]

xii. National human rights structures

Section XI of the Appendix requires member states to ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity, and in particular should be able to make recommendations on legislation and policies, raise awareness amongst the general public, and – as far as national law provides – examine individual complaints and participate in court proceedings.

National human rights structures clearly mandated to address discrimination on grounds of sexual orientation or gender identity (45 i)

Of the countries under review, national human rights structures are clearly mandated to address sexual orientation discrimination in Bosnia-Herzegovina, Cyprus, the Czech Republic, Hungary, Montenegro, Poland, and Romania, but not in Georgia, Macedonia, Portugal, the Russian Federation or Ukraine; and they are clearly mandated to address gender identity discrimination in the Czech Republic, Hungary, Montenegro, and Poland, but not in Bosnia-Herzegovina, Cyprus, Georgia, Macedonia, Portugal, Romania, the Russian Federation or Ukraine.

Serbia has several state institutions for human rights that deal to a greater or lesser extent with LGBT rights. Of these, only one, the Commissioner for the Protection of Equality, is clearly mandated to deal with sexual orientation and gender identity.

Estonia, Italy and Lithuania do not have bodies compliant with the Paris principles. However, Italy's National Office Against Racial Discrimination (UNAR) has been mandated to combat discrimination against LGBT persons, while Lithuania's Equal Opportunities Ombudsperson is empowered to address sexual orientation discrimination, but not, explicitly, gender identity discrimination.

National human rights structures to make recommendations, raise awareness, and support individual complaints (45 ii)

[93] Hungary, Summary Report, Appendix, Section xiii, Right to seek asylum

In practice, most national human rights structures in the countries reviewed have, to a greater or lesser extent, taken action in support of the rights of LGBT people, although there are reservations in this respect with regard to Lithuania and Macedonia. In Ukraine, the former Commissioner for Human Rights failed to take up discrimination on grounds of sexual orientation or gender identity, but her successor, Ms Valeria Lutkovska, has, since her appointment in April 2012, shown a willingness to cooperate with LGBT human rights organisations. In September 2012 she wrote to the Chairman of the Ukrainian parliament opposing the draft laws on "prohibition of propaganda for homosexualism". There are also positive developments in Georgia, where the Public Defender has made strong statements in relation to homophobic comments in Parliament, and in the Russian Federation, where for the first time LGBT issues have been mentioned in the annual report of the Commissioner for Human Rights.

In Serbia the Commissioner for the Protection of Equality, the Provincial Ombudsman of the Autonomous Province of Vojvodina, and the Gender Equality Institute of the Autonomous Province of Vojvodina are considered to have worked systematically for the rights of the LGBT population, although the national Ombudsman has shown significantly less commitment.

However, in most of the countries under review the activities of national human rights structures in support of LGBT people are limited and short-term in nature. A number of the reports note, in fairness, that these organisations are seriously under resourced.

“I consider the statements [regarding a proposal for a constitutional ban on same-sex marriage] made by the leader and members of the parliamentary minority were fraught with homophobic spirit no less worrisome than the proposed changes. Unfortunately, a part of their statements contained hate speech, …. creating a danger that sexual minorities may be assaulted and ostracized from the society." (Statement by Public Defender of Georgia) [94]

[94] Georgia, Summary Report, Appendix, Section XI, National human rights structures

Appendix 1 – Participating organisations

Bosnia-Herzegovina	Sarajevo Open Centre
Cyprus	Cyprus Family Planning Association
	accept-LGBT Cyprus
Czech Republic	Platform for equality, recognition and diversity (PROUD)
Estonia	Estonian Human Rights Centre
Georgia	Women's Initiatives Supporting Group (WISG)
Hungary	Háttér Support Society for LGBT People in Hungary
Italy	Centro Risorse LGBTI
Lithuania	Lithuania Gay League (LGL)
Macedonia	Macedonia Helsinki Committee for Human Rights
Montenegro	Juventas
Poland	Campaign Against Homophobia (KPH)
	Trans-Fuzja
Portugal	ILGA Portugal
Romania	ACCEPT Association
The Russian Federation	Russian LGBT Network
Serbia	Labris - Organization for Lesbian Human Rights
	Gayten-LGBT
Ukraine	Nash Mir (Our World) Gay and Lesbian Centre

Appendix 2 - The Recommendation, its Appendix, and the associated checklist questions used in the Compliance Documentation Reports

Recommendation

1. **examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity**;

    i. Has a review been conducted of existing legislative and other measures which could result directly or indirectly in (a) sexual orientation or (b) gender identity discrimination?

    ii. Are processes in place to ensure that the discrimination thus identified is redressed?

2. **ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;**

    i. Has legislation against discrimination on the grounds of (a) sexual orientation and (b) gender identity covering employment, social security and health care, education, access to and supply of goods and services, including housing, been introduced?

    ii. Has a comprehensive strategy, including long-term education and awareness raising programmes, aimed at tackling discriminatory or biased attitudes and behaviour within the general public and correcting prejudices and stereotypes, been implemented?

3. **ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination;**

    i. Do effective legal remedies for victims of (a) sexual orientation or (b) gender identity discrimination exist at national level?

    ii. Are there effective procedures to make victims aware of, and able to access, such remedies, even where a violation is committed by a person acting in an official capacity?

    iii. Are the remedies effective, proportionate and dissuasive?

iv. Do the remedies include, where appropriate, adequate reparation for victims?

4. be guided in their legislation, policies and practices by the principles and measures contained in the appendix to this recommendation;

5. ensure by appropriate means and action that this recommendation, including its appendix, is translated and disseminated as widely as possible

i. What steps have been taken to ensure as wide as possible dissemination of the Recommendation and its appendix?

ii. Have the Recommendation and its appendix been translated?

iii. Have they been disseminated:

- *within the lesbian, gay, bisexual and transgender communities?*
- *throughout public administration?*
- *throughout law-enforcement structures, including the judiciary and penitentiary system?*
- *to national human rights protection structures (including equality bodies)?*
- *throughout the educational system?*
- *throughout the health-care system?*
- *to representatives of public and private sector employees and employers?*
- *to the media?*
- *to relevant non-governmental organisations?*

Appendix to Recommendation CM/Rec(2010)5

I. Right to life, security and protection from violence

A. "Hate crimes" and other hate-motivated incidents

1. **Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that**

particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity.

i. Does the training of police officers ensure that they are aware of the need to make special efforts to investigate any (a) homophobic or (b) transphobic connotations in hate crimes or hate motivated incidents effectively, promptly and impartially, particularly where violence is involved?

ii. *Is there an independent and effective machinery for receiving and investigating reports of hate crimes or hate motivated incidents allegedly committed by law-enforcement staff, particularly where sexual orientation or gender identity constitute one of the motives?*

2. Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.

i. Do legislative measures to combat "hate crimes" and other hate motivated incidents exist? Do these measures recognise (a) sexual orientation and (b) gender identity

as a possible motive in such crimes or incidents?

ii. Does this legislation ensure that a bias motive related to (a) sexual orientation (b) gender identity may be taken into account as an aggravating circumstance when determining sanctions?

3. Member states should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related "hate crimes" and other hate-motivated incidents are encouraged to report these crimes and incidents; for this purpose, member states should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses.

i. Has a simple and comprehensible definition of "hate crimes", which includes the motive of (a) sexual orientation and (b) gender identity been disseminated to the general public?[95]

[95] e.g. through police websites or leaflets distributed in the community.

ii. Do training programmes and procedures ensure that the police and judiciary possess the knowledge and skills to identify such crimes and incidents and provide victims and witnesses with adequate assistance and support?

iii. Do training programmes and codes of conduct for the police and judiciary ensure that LGBT persons are treated in a non-discriminatory and respectful manner so that they feel safe to report hate crimes or other hate motivated incidents, whether as victims or witnesses, in relation to their (a) sexual orientation and (b) gender identity?

iv. Are units within the police tasked specifically with investigating crimes and incidents linked to sexual orientation and (b) gender identity?

v. Are there special police liaison officers tasked with maintaining contact with local LGBT communities in order to foster a relationship of trust?

vi. Is there a system of anonymous complaints or on-line complaints, or using other means of easy access, which allow reporting by third parties in order to gather information on the incidence and nature of these incidents?

4. Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons.

i. Do training programmes and codes of conduct for prison staff ensure that prisoners are treated with respect and without discrimination in relation to their (a) sexual orientation and (b) gender identity?

ii. Are there effective measures to minimise the dangers of physical assault, rape and other forms of sexual abuse, including effective procedures for determining the disciplinary or criminal liability of those responsible, including for failure of supervision?

iii. Is there an independent and effective machinery for receiving and investigating reports of such crimes by prison staff?

iv. *In the case of transgender prisoners, are there procedures to ensure that the gender identity of the individual is respected in regard to interactions with prison staff such as body searches and also* particularly in the decisions taken on the placement of a prisoner in a male or female prison*?*

5. **Member states should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on "hate crimes" and hate-motivated incidents related to sexual orientation or gender identity.**

   i. Is there research into the nature and causes of hostile and negative attitudes to LGBT people, with a view to developing effective policies to combat these phenomena?

   ii. *Are there regular surveys into levels of social acceptance of / hostility towards LGBT people?*

   iii. Is there an effective system for recording and publishing statistics on hate crimes and hate-motivated incidents related to (a) sexual orientation and (b) gender identity?

B. "Hate speech"

6. **Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such "hate speech" should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.**

   i. Do legislative measures penalising "hate speech" on certain grounds exist? Do these measures penalise (a) homophobic and (b) transphobic "hate speech"?

   ii. Are media organisations, including those operating on the internet, encouraged to promote in their own practices (e.g. through codes of practice):

   - *a culture of respect, tolerance and diversity, and*
   - *to avoid negative and stereotyped representations of LGBT people?*

   iii. Has legislation for criminalising "hate speech" on the internet been implemented, and does this cover (a) homophobic and (b) transphobic "hate speech"?

   iv. Have internet service providers been encouraged to take measures to prevent the dissemination of (a) homophobic and (b) transphobic material, threats and insults?

   v. If there are incidents of "hate speech", are they publicly disavowed by leading public officials?

7. **Member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination.**

   i. Have guidelines been issued or other measures been taken to raise awareness of public authorities/ institutions of their responsibility to refrain from such statements?

   ii. *Have there been cases of statements by representatives of public authorities and institutions which may reasonably be understood as legitimising such hatred or discrimination?*

8. **Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.**

   i. Has guidance been issued to public officials and state representatives in this respect?

   ii. If so, is there evidence of public officials and other state representatives promoting tolerance for LGBT people in their dialogue with civil society, and encouraging the use of responsible and non-violent speech?

II. Freedom of association

9. **Member states should take appropriate measures to ensure, in accordance with Article 11 of the Convention, that the right to freedom of association can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, discriminatory administrative procedures, this including excessive formalities for the registration and practical functioning of associations, should be prevented and removed; measures should also be taken to prevent the abuse of legal and administrative provisions, such as those related to restrictions based on public health, public morality and public order.**

   i. Are organisations whose publicly stated purpose is to work for the well-being of LGBT people, whether for their human rights, or in other ways, prevented from gaining official registration?

   ii. If so, is this through the use of discriminatory administrative procedures, through restrictions based on public health, public morality or public order, or through other means?

iii. Are there examples of measures taken to:

- *ensure that LGBT organisations can operate freely,*
- *defend their interests when necessary,*
- *facilitate and encourage their work?*

iv. *Are LGBT organisations involved on a partnership basis when framing and implementing public policies which affect LGBT persons?*

10. Access to public funding available for non-governmental organisations should be secured without discrimination on grounds of sexual orientation or gender identity.

i. Is public funding earmarked for NGOs accessible to LGBT organisations without discrimination?

ii. Has such funding been made available to LGBT organisations?

11. Member states should take appropriate measures to effectively protect defenders of human rights of lesbian, gay, bisexual and transgender persons against hostility and aggression to which they may be exposed, including when allegedly committed by state agents, in order to enable them to freely carry out their activities in accordance with the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities.

i. Does the state provide effective protection from hostility and aggression for LGBT human rights organisations?

ii. Are there examples of measures taken by the state to create an environment conducive to the work of such organisations, enabling them freely to conduct their activities, and promoting respect for their work?

iii. Are LGBT human rights organisations able to work with

- *national human rights institutions and ombudsmen,*
- *the media,*
- *other human rights organisations?*

iv. *Are they able to take part in training sessions, international conferences and other human rights activities?*

12. Member states should ensure that non-governmental organisations defending the human rights of lesbian, gay, bisexual and transgender

persons are appropriately consulted on the adoption and implementation of measures that may have an impact on the human rights of these persons.

i. Are LGBT organisations consulted on the adoption and implementation of measures affecting the rights of LGBT persons?

ii. Have there been such consultations regarding the implementation of this Recommendation?

III. Freedom of expression and peaceful assembly

13. Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.

i. Have the authorities ensured the freedom to receive and transmit information and ideas relating to sexual orientation and gender identity, including:

- *activities that support the human rights of LGBT persons*
- *publication of material*
- *media coverage*
- *organisation of/participation in conferences*
- *dissemination/access to information on safe sexual practices?*

ii. Or, on the contrary, have there been cases where restrictions have been placed on freedom of expression?

iii. Have the authorities encouraged pluralism and non-discrimination in the media in respect of issues of (a) sexual orientation or (b) gender identity?

14. Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.

i. Have the authorities ensured freedom of peaceful assembly for LGBT people?

15. Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender

persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.

i. If there has been hostility to LGBT freedom of assembly events, have the law enforcement authorities taken reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully?

ii. In particular, have the police protected participants in peaceful LGBT demonstrations effectively?

iii. Have the police acted with integrity and respect towards LGBT people and their supporters when policing LGBT freedom of assembly events?

16. Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order.

i. Have the authorities placed restrictions on freedom of assembly events? If so, what have been the grounds?

ii. Have conditions been placed, for example, with regard to the route or timing of demonstrations, which are not generally applied to other demonstrators?

iii. If restrictions have been placed on freedom of assembly events, has it been possible to challenge them in the courts or through other independent review mechanisms?

17. Public authorities at all levels should be encouraged to publicly condemn, notably in the media, any unlawful interferences with the right of individuals and groups of individuals to exercise their freedom of expression and peaceful assembly, notably when related to the human rights of lesbian, gay, bisexual and transgender persons.

i. If there have been unlawful interferences with the right to freedom of expression and peaceful assembly,

a. Has there been encouragement to public authorities to condemn such interferences?

b. Have public authorities actually condemned such interferences?

ii. Where there has been public hostility towards the exercise of freedom of assembly by LGBT people, have the authorities upheld this right publicly?

iii. Or, on the contrary, have the authorities endorsed or supported hostility towards LGBT freedom of assembly events?

IV. Right to respect for private and family life

18. Member states should ensure that any discriminatory legislation criminalising same-sex sexual acts between consenting adults, including any differences with respect to the age of consent for same-sex sexual acts and heterosexual acts, are repealed; they should also take appropriate measures to ensure that criminal law provisions which, because of their wording, may lead to a discriminatory application are either repealed, amended or applied in a manner which is compatible with the principle of non-discrimination.

i. Does legislation criminalise same-sex sexual acts? Are there any differences in the age of consent? If either applies, what steps are the authorities taking to repeal the legislation?

ii. Are there any criminal law provisions which, because of their wording or scope are liable to be applied in a discriminatory manner regarding

(a) sexual orientation or

(b) gender identity?

iii. *If so, what steps are the authorities taking to remedy this situation?*

19. Member states should ensure that personal data referring to a person's sexual orientation or gender identity are not collected, stored or otherwise used by public institutions including in particular within law enforcement structures, except where this is necessary for the performance of specific, lawful and legitimate purposes; existing records which do not comply with these principles should be destroyed.

i. What steps have been taken to ensure that public authorities comply with this requirement, in respect of (a) sexual orientation and (b) gender identity particularly with regard to records held by law enforcement authorities?

ii. What steps have the authorities taken to ensure that existing records are destroyed?

iii. Have these steps been effective?

Is there any evidence of:

- *the continued existence of such records*
- *the continuing collection of such data?*

20. Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.

i. Has a review of such prior requirements been conducted?

ii. Are there still requirements which might be considered disproportionate or even abusive,

such as:

- *irreversible sterilisation,*
- *hormonal treatment,*
- *preliminary surgical procedures, or proof of a person's ability to live for a long period of time in the new gender?*

21. Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.

i. Are there procedures in operation which ensure the full legal recognition of a person's gender reassignment?

ii. Do these make possible the change of name and gender in official documents including birth certificates, identity papers, driving licences, passports, social insurance cards and numbers, electoral, land and text registers in a quick, transparent and accessible way?

iii. Are there procedures to ensure corresponding changes in key documents originated by non-state actors, such as

- *diplomas,*
- *certificates of employment, and*
- *insurance or banking documents?*

iv. If yes, do these procedures include the protection of the person's private life, so that no third party can become aware of the gender reassignment?

22. Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in

accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed.

i. Is the right of a legally recognised transgender person to marry a person of the sex opposite to their reassigned sex effectively guaranteed?

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.

i. Does legislation confer rights and obligations on unmarried couples? If so, have steps been taken to ensure that these rights and obligations apply to same-sex couples?

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

i. Does legislation recognise registered same-sex partnerships? If so, have steps been taken to ensure that their legal status and rights and obligations are equivalent to those of heterosexual couples?

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

i. If same-sex couples enjoy no rights or obligations, either through access to registered partnership or through their status as unmarried couples, have the authorities considered the possibility of implementing legal or other means to address the practical problems arising from this lack of recognition?

26. Taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.

i. What steps have been taken to ensure that decisions regarding the parental responsibility for, or guardianship of a child, are taken without discrimination based on (a) sexual orientation or (b) gender identity?

ii. In practice, are such decisions taken on a non-discriminatory basis?

27. Taking into account that the child's best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.

i. What steps have been taken to ensure that decisions regarding adoption of a child by a single person (where such adoption is permitted by national legislation), are taken without discrimination based on (a) sexual orientation (b) gender identity?

ii. In practice, are such decisions taken on a non-discriminatory basis?

28. Where national law permits assisted reproductive treatment for single women, member states should seek to ensure access to such treatment without discrimination on grounds of sexual orientation.

i. What steps have been taken to ensure that access by single women to assisted reproductive treatment (where permitted by national legislation), is without discrimination based on sexual orientation?

ii. In practice, is such access granted on a non-discriminatory basis?

V. Employment

29. Member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation.

i. Does legislation exist which prohibits discrimination in employment in the public and private sector on grounds of (a) sexual orientation and (b) gender identity?

ii. Does it cover:

- *access to employment (including recruitment); promotion,*
- *dismissals,*
- *pay,*
- *harassment and other forms of victimisation?*

iii. Have the authorities promoted other measures to combat discrimination, harassment and victimisation, in both the public and private sectors, for example:

- *adoption of codes of conduct for both employers and employees;*
- *training and awareness raising programmes for both employers and employees;*
- *distribution to employees of materials explaining their rights, complaints mechanisms and remedies;*
- *recruitment efforts directed at LGBT persons;*
- *the adoption of non-discrimination policies explicitly referencing sexual orientation and gender identity;*
- *co-operation with and support for employee groupings of LGBT persons?*

iv. Have steps been taken to abolish laws, regulations and practices which discriminate on grounds of (a) sexual orientation and (b) gender identity in access to and career advancement within certain professions and occupations, including particularly the armed forces?

v. Specifically in relation to the armed forces:

- *Have measures been taken to provide protection for LGBT persons against investigations, warnings, harassment, bullying, cruel initiation rites, humiliation and other forms of ill-treatment?*
- *Do codes of conduct and training address the need to combat discrimination against LGBT persons and promote tolerance and respect?*

vi. Do measures designed to combat discrimination in employment fully and effectively cover transgender persons?

vii. *Have employment programmes focusing specifically on employment opportunities for transgender persons been developed?*

30. Particular attention should be paid to providing effective protection of the right to privacy of transgender individuals in the context of employment, in particular regarding employment applications, to avoid any irrelevant disclosure of their gender history or their former name to the employer and other employees.

i. Have measures been taken to avoid disclosure of transgender persons' gender history or former name in the context of employment?

VI. Education

31. Taking into due account the over-riding interests of the child, member states should take appropriate legislative and other measures, addressed to educational staff and pupils, to ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.

i. Have

- *equality and safety policies,*
- *codes of conduct and*
- *handbooks*

for educational staff been introduced or updated to ensure that LGBT pupils and students receive their education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment?

ii. Do initial and in-service training programmes for teachers and other educational staff address the need for them to

a. treat their LGBT pupils and students with respect

b. be able to detect, analyse and effectively respond to and combat discrimination on these grounds in schools?

iii. Is there support for the mounting of school campaigns and cultural events against homophobia and transphobia, including the participation, where appropriate, of representatives of LGBT organisations?

32. Taking into due account the over-riding interests of the child, appropriate measures should be taken to this effect at all levels to promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity. This should include providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity. Furthermore, member states may design and implement school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Such measures should take into account the rights of parents regarding education of their children.

i. Is information on

a. sexual orientation

b. gender identity

provided in school curricula and sex and health education classes?

ii. Is it provided in a respectful and objective manner?

iii. Are LGBT pupils and students provided with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity?

iv. Are measures taken to adequately meet the special needs of transgender students in their school life, for example with regard to change of name or gender in school documents?

VII. Health

33. Member states should take appropriate legislative and other measures to ensure that the highest attainable standard of health can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, they should take into account the specific needs of lesbian, gay, bisexual and transgender persons in the development of national health plans including suicide prevention measures, health surveys, medical curricula, training courses and materials, and when monitoring and evaluating the quality of health-care services.

i. Do

a. the design of national health plans,

b. health surveys,

c. suicide prevention programmes,

d. medical training programmes,

e. training courses and materials

f. the monitoring and quality assessment of health-care services

take into account specific needs in relation to (a) sexual orientation and (b) gender identity?

ii. Do training programmes for health professionals enable them to deliver the highest attainable standard of health-care to all persons, with full respect for (a) sexual orientation and (b) gender identity?

iii. Are education, prevention, care and treatment programmes and services in the area of sexual and reproductive health available to LGBT people, and do they respect their needs?

iv. Are health professionals and social workers encouraged to create an environment that is reassuring and open to young LGBT persons, for example through information campaigns?

v. Are patients in hospital or otherwise the subject of medical emergencies, free to identify their "next of kin", and are rules on issues regarding "next of kin" applied without discrimination on grounds of (a) sexual orientation and (b) gender identity?

34. Appropriate measures should be taken in order to avoid the classification of homosexuality as an illness, in accordance with the standards of the World Health Organisation.

i. Has homosexuality been removed from the national classification of diseases?

ii. Have all policy documents, medical textbooks and training materials which may previously have treated homosexuality as a disease been corrected or withdrawn?

iii. Are measures in place to ensure that no one is forced to undergo any form of treatment, protocol or medical or psychological test or confined in a medical institution because of their sexual orientation or gender identity?

35. Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and

surgical expertise in the field of transgender health care, without being subject to unreasonable requirements; no person should be subjected to gender reassignment procedures without his or her consent.

i. Do transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise?

ii. If it was the practice to make transgender persons undergo therapy to accept their birth gender, has this practice now been abandoned?

iii. Have measures been adopted to ensure that no child has their body irreversibly changed by medical practices designed to impose a gender identity without his or her full, free and informed consent, in accordance with his or her age and maturity?

36. Member states should take appropriate legislative and other measures to ensure that any decisions limiting the costs covered by health insurance for gender reassignment procedures should be lawful, objective and proportionate.

i. Where legislation provides for the coverage of necessary health-care costs by public or private social insurance systems, is such coverage for gender reassignment treatment ensured?

ii. If yes, is it ensured in a reasonable, non-arbitrary and non-discriminatory manner?

VIII. Housing

37. Measures should be taken to ensure that access to adequate housing can be effectively and equally enjoyed by all persons, without discrimination on grounds of sexual orientation or gender identity; such measures should in particular seek to provide protection against discriminatory evictions, and to guarantee equal rights to acquire and retain ownership of land and other property.

i. Does legislation prohibit discrimination in such areas as:

- *the sale or rent of housing;*
- *the provision of loans for purchase of housing;*
- *the recognition of the rights of a tenant's partner;*

- *evictions*

on the grounds of (a) sexual orientation and (b) gender identity?

ii. Are provisions in place to ensure non-discriminatory access to shelter and other emergency accommodation is provided in regard to (a) sexual orientation and (b) gender identity?

iii. Is information available to landlords and tenants aimed at preventing such discrimination?

iv. Are adequate and effective legal or other remedies available to victims of such discrimination?

v. Are any awareness raising campaigns conducted among housing agencies in order to level-up their knowledge on anti-discrimination provisions?

38. Appropriate attention should be paid to the risks of homelessness faced by lesbian, gay, bisexual and transgender persons, including young persons and children who may be particularly vulnerable to social exclusion, including from their own families; in this respect, the relevant social services should be provided on the basis of an objective assessment of the needs of every individual, without discrimination.

i. Have social programmes, including support programmes, been established to address factors which increase the vulnerability to homelessness of LGBT people, especially children and young people, including schemes of neighbourhood support and security?

ii. *Have the relevant agencies been provided with training and awareness-raising programmes to ensure that they are aware of and sensitive to the needs of LGBT people facing homelessness, particularly young persons?*

IX. Sports

39. Homophobia, transphobia and discrimination on grounds of sexual orientation or gender identity in sports are, like racism and other forms of discrimination, unacceptable and should be combated.

40. Sport activities and facilities should be open to all without discrimination on grounds of sexual orientation or gender identity; in particular, effective measures should be taken to prevent, counteract and punish the use of

discriminatory insults with reference to sexual orientation or gender identity during and in connection with sports events.

i. What measures have been taken to prevent the risk of exclusion from participation in sports on grounds of (a) sexual orientation and (b) gender identity?

ii. By encouraging, for example:

- *the drawing up and dissemination of codes of conduct on questions relating to sport and sexual orientation or gender identity for sports organisations and clubs,*
- *partnerships between associations representing lesbian, gay, bisexual and transgender persons and sports clubs,*
- *anti-discrimination campaigns in the sports world,*
- *support for sports clubs set up by lesbian, gay, bisexual and transgender persons themselves.*

iii. Have effective measures been taken to prevent, counteract and punish the use of discriminatory insults during and in connection with sports events?

iv. In particular:

- *Has homophobic and transphobic chanting at or around sports events been made a criminal offence?*
- *Have the relevant provisions of the European Convention on Spectator Violence and Misbehaviour at Sports Events, the European Sports Charter*
- *and ECRI's General Policy Recommendation No.12 been implemented in respect of (a) sexual orientation and (b) gender identity?*

v. Have specific appropriate measures been taken to:

- *put an end to the exclusion of transgender persons from sports activity or competitions,*
- *remove the obstacles encountered by them in participating in sport (dressing room access),*
- *recognize their preferred gender?*

41. Member states should encourage dialogue with and support sports associations and fan clubs in developing awareness-raising activities regarding discrimination against lesbian, gay, bisexual and transgender

persons in sport and in condemning manifestations of intolerance towards them.

i. Have steps been taken to encourage dialogue with, and support for sports associations and fan clubs in

- *developing awareness-raising activities*
- *condemning homophobic and transphobic behaviour during and in connection with sports events?*

X. Right to seek asylum

42. In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.

i. Is a well founded fear of persecution based on (a) sexual orientation and (b) gender identity recognized as a valid ground for the granting of refugee status and asylum?

ii. Are staff responsible for processing asylum requests provided with training in the specific problems encountered by LGBT refugees or asylum seekers?

iii. Are asylum requests turned down on the ground that the claimant can escape persecution in the country of origin by keeping his or her sexual orientation or gender identity secret?

43. Member states should ensure particularly that asylum seekers are not sent to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity.

i. What procedures are in place to ensure compliance with this obligation?

ii. Are there documented cases where asylum seekers have been returned to such a country?

44. Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of

harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.

i. What measures have been taken to comply with this requirement?

ii. In particular, have the staff of administrative detention centres, police and medical staff and voluntary organisations with access to such cases, received appropriate training and information on issues regarding (a) sexual orientation and (b) gender identity?

XI. National human rights structures

45. Member states should ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity; in particular, they should be able to make recommendations on legislation and policies, raise awareness amongst the general public, as well as – as far as national law so provides – examine individual complaints regarding both the private and public sector and initiate or participate in court proceedings.

i. Are national human rights structures clearly mandated to address discrimination on grounds of (a) sexual orientation or (b) gender identity?

ii. In practice do they

- *make recommendations on legislation and policies,*
- *conduct awareness-raising among the general public*
- *examine individual complaints*
- *participate in court proceedings*
- *speak out in support of the exercise of rights by LGBT people, for example, when freedom of assembly events are opposed,*

in relation to (a) sexual orientation or (b) gender identity?

Appendix 3 – Country summaries

Short summaries of the NGO country reports on compliance with the Council of Europe Recommendation on combating discrimination on grounds of sexual orientation and gender identity

Bosnia-Herzegovina

While BiH has basic anti-discrimination legislation in place that covers sexual orientation and gender identity discrimination, in practice this appears to be little used, and there is almost no detailed implementing legislation to cover the different issues in the Recommendation, except for employment and housing. Little or no effort is made to implement the practical aspects of the Recommendation through guidelines or codes of conduct or training. There is virtually no information on the Recommendations measures for public officials, or the general public. While there is gradual recognition of sexual orientation discrimination, especially on the part of human rights institutions, when it concerns gender identity, this is scarcely recognised at all.

Cyprus

Cyprus has made very limited progress in complying with the Recommendation. It does not appear to be widely known among public officials and has had little or no impact in guiding policy and practice. Apart from employment, there is very little legislation prohibiting discrimination on grounds of sexual orientation and gender identity. While to date there is little overt discrimination, this is mainly due to the fact that LGBT visibility is very weak. As a result, few people feel able to challenge discrimination when it does occur, and religious and political figures do not champion LGBT equality, with the notable exception of the Ombudswoman. The failures in regard to gender identity are even more marked, with no public assistance for gender reassignment and almost no anti-discrimination protection.

Czech Republic

The legislative framework of the Czech Republic now outlaws discrimination in many of the areas in the Recommendation. NGOs are free to operate and to cooperate with public officials. The police behave correctly when dealing with LGBT people. However, some politicians continue publicly to express hostility towards LGBT groups and events. Gender identity discrimination is not as well addressed as sexual orientation, and transgender people still have to suffer abusive procedures before surgery, although there is very effective recognition of change once reassignment has taken place. Health remains one of the less developed areas in terms of LGBT equality, as do the needs of young LGBT people in schools. Overall, though, progress has been relatively good.

Estonia

Estonia's legislation is very largely compliant with the Recommendation, except in the field of family law, where issues like partnership, adoption and financial benefits have yet to be addressed. State and public officials still sometimes manifest homophobia and transphobia that

are not adequately addressed in training, guidelines and codes of conduct. The remedies for discrimination are not yet sufficiently broad and robust to deter discrimination, even in some areas like employment, where anti-discrimination norms are comprehensive. A few areas, like sport and housing, still require considerable attention. But in general Estonian LGBT individuals and groups enjoy a relatively high level of non-discrimination protection.

Georgia

While Georgia has basic constitutional provisions in place that guarantee equality, it has failed to translate these into concrete legal and practical steps in most areas, except for freedom of speech and assembly. Little or no progress has been made in employment, health, education or sport. The State authorities are reluctant to co-operate with LGBT organisations and it is still politically acceptable to use hate speech. Very little has been done, outside the Ministry of Justice, to train officials to carry out their duties in a non-discriminatory and respectful way. Even less has been done to comply with the recommendations on gender identity.

Hungary

Hungary has transposed much of the Recommendation into a legislative framework that functions well, especially in relation to freedoms of assembly and information. There is still a need for changes in practice and attitudes in regard to education, sport, and family life, including adoption. While gender identity is included in anti-discrimination provisions, there remain considerable practical obstacles for transgender people to obtain their identity of choice. Public authorities in Hungary are subject to political pressure so the commitment to equality and discrimination depends on the political outlook of the prevailing government rather than on European human rights principles and values. The judiciary, however, is willing to uphold these, even in the face of political hostility. There is insufficient training at all levels.

Italy

Overall, Italy has not made significant progress in complying with the Recommendation. Apart from the area of employment, discrimination has not been outlawed in the recommended areas. There are few training programmes or guidelines for public officials. However, homophobic hate speech is outlawed and the media are encouraged to promote tolerance and respect. Freedom of assembly and expression are respected, and LGBT NGOs can operate freely and engage with government, but there remains public hostility from some politicians, religious leaders and public officials. Little effort has been made to implement the Recommendation in areas like education and sport, as well as services. While transgender people can get access to adequate health care and can change their legal status in several important respects, they are not covered by general anti-discrimination provisions and little effort is currently being made to redress this.

Lithuania

Lithuania has carried out a number of important legal reforms to outlaw discrimination on the grounds of sexual orientation, but has not to date carried out similar reforms in respect of

gender identity. When it comes to implementing the reforms, there is still much work to do. No measures have been adopted in employment, education, housing or sports. In the field of health protection the specific needs of LGBT persons remain largely disregarded.

State authorities are reluctant to actively promote LGBT equality, and in some cases work to frustrate it. Few public services have taken steps to implement the Recommendation in their fields. It is not known if asylum is granted based on sexual orientation and gender identity persecution. Recognition of the needs of transgender people is almost non-existent. There is an active NGO community that is free to advocate for equality and challenge discrimination when it occurs, despite some political hostility and lack of support from the State. However, public officials do not initiate consultations with LGBT groups on issues that affect their rights.

Macedonia

Macedonia has made very little progress in implementing the Recommendation in almost all the fields it covers. The general anti-discrimination law that covers most issues does not specifically include sexual orientation and gender identity. There is little or no implementing legislation and public officials are given little information, training or encouragement to promote equality. Many politicians are openly hostile to LGBT equality. While LGBT organisations can operate freely, they do not feel strong enough at present to organise Gay Pride marches or similar events. In areas like family life, access to health, education and sport, much progress reemains to be made. The situation of transgender people is very poor, with no medical facilities and a hostile environment.

Montenegro

Montenegro has made some advances in complying with the Recommendation as regards sexual orientation, but still has some way to go as regards gender identity.

The constitution does not specifically mention sexual orientation and gender identity discrimination, but there is a chapter on this in the 2010 discrimination law. There do not appear to be effective remedies in the event of discrimination. Specific measures to implement the Recommendation are meagre. Hate crimes are not outlawed; nor is hate speech. LGBT groups can operate freely and play a role with human rights organisations in working to prevent sexual orientation and gender identity discrimination. Few of the other recommendations have been implemented.

While there is some training for relevant officials (mainly by LGBT NGOs), this is not systematic. There is employment protection against sexual orientation discrimination, but this does not apply to gender identity. The armed forces are included in anti-discrimination provisions, but they receive no training on the issue. Compliance in areas like housing, family life, sport and asylum is weak or non-existent. The issue of discrimination on gender identity grounds seems barely to have been addressed either by the legislation or by practice.

Poland

Poland has made some advances in complying with the Recommendation. While there are no specific protections against sexual orientation and gender identity discrimination, except in employment, the general constitutional provisions, if interpreted correctly, apply to these grounds. However, remedies for discrimination are largely ineffective. The most current problem is unwillingness to provide adequate protection to hate crime victims, despite the urgent need to do so. Data collection on sexual orientation and gender identity discrimination is poor so it is not possible to evaluate training of public officials on behaviour. Although more efforts are made to promote equality policies across the public sector, they are still weak and ineffective. Basic human rights are guaranteed, including freedom of assembly and expression. Gender identity issues, such as recorded gender data, remain to be resolved in several cases. Much still remains to be done to ensure compliance with the Recommendation in other areas, such as education, health, housing, sport and asylum.

Portugal

As regards sexual orientation, the Portuguese constitutional and legal framework is broadly complaint with the Recommendation concerning criminal law, freedoms of expression and of assembly and non-discrimination in employment and access to public goods, although access to services is not so well covered. LGBT organisations enjoy rights to operate freely and are consulted regularly on policies and their implementation. Family law is largely neutral as regards sexual orientation, except as regards assisted reproduction that is only available to heterosexual couples.

As regards gender identity, the Portuguese legal framework is largely compliant with the Recommendation.

Portugal still has work to do to ensure that the Recommendation becomes fully operative among public officials and service providers in almost all areas through codes of conduct, training programmes and daily practice so as to take account of the particular circumstances and needs of LGBT people. For especially vulnerable groups, like young people, both regarding their sexual orientation and gender identity, there need to be tailored programmes.

Romania

The legislation in Romania has gone some way to outlaw sexual orientation and gender identity discrimination, but its implementation falls well short of what is called for in the Recommendation. There has been no review of laws and practices. Public officials do not receive specific training or guidance. The Recommendation has not been translated or distributed. Hate crimes include sexual orientation, but not gender identity. There has been almost no implementation of any measures to cover gender identity. In the fields of education, health, housing and sports, no measures have been taken in the light of the Recommendation. LGBT NGOs can operate freely, but they receive little or no support from public figures; Romania remains a deeply homo- and transphobic society where LGBT people have little confidence in

public authorities protecting their right to non-discrimination, although the national human rights mechanism is becoming more willing to advocate for LGBT equality.

Russian Federation

Russia has made no changes in law or practice to implement the Recommendation in any of the fields that it covers. Public authorities are deeply homophobic and transphobic, reflecting the views of society generally, and make no effort to change their own or public views in favour of non-discrimination. If anything, attitudes in Russia have hardened since the Recommendation was adopted, encouraged both by religious and political figures. Even the officials charged with promoting and protecting human rights generally fail to act when it comes to issues of sexual orientation and gender identity discrimination. However, there is an active and growing LGBT NGO sector that enjoys limited freedom of expression, but still faces severe practical restrictions on freedoms of association and of assembly, in common with most other civil society groups in Russia that focus on human rights.

Serbia

Serbia has reasonably comprehensive anti-discrimination legislation that includes gender identity in limited areas. It is currently drafting a national anti-discrimination strategy that includes LGBT people. However, implementation of the legislation is poor and LGBT people have little confidence in the justice system to remedy anti-LGBT violence and other forms of discrimination. Very few of the specific measures in the Recommendation have been implemented. Hate speech by media and public officials remains a serious concern. There is no guidance or training to promote tolerance. LGBT organisations can operate freely, but they do not enjoy freedom of assembly. Although they can change gender, transgender people experience serious difficulties in obtaining legal gender recognition and getting documents changed. There is no recognition of same-sex partners and access to reproductive assistance and adoption is denied to them. Discrimination in employment is widespread and unremedied. In other areas of education, health, housing and sport, the Recommendation has had no influence on policies or practices.

Ukraine

The public authorities in Ukraine have taken no steps to implement the Recommendation in any fields, starting with its translation to reviewing laws and practices to reduce discrimination. Indeed, public authorities at all levels tolerate if not encourage sexual orientation and gender identity discrimination and make no effort to combat it. There have been efforts in the Parliament to restrict freedom of expression of LGBT groups (condemned by the Ombudsman) and public authorities place obstacles in the exercise of freedom of assembly, as well as the registration of LGBT NGOs. Transgender people face abusive requirements before gender re-assignment can take place, but this is in any case very difficult to obtain. Apart from HIV/AIDS prevention work, there is no recognition of the specific needs of LGBT people in the field of

health, and many health practitioners and officials continue to regard homosexuality as a disease to be cured.

Appendix 4 – Glossary

The definitions below are taken from the report *Discrimination on grounds of sexual orientation and gender identity in Europe* published by the Commissioner for Human Rights of the Council of Europe in 2011.[96]

Discrimination is legally defined as unjustified, unequal treatment:

– **Direct discrimination** occurs when for a reason related to one or more prohibited grounds (for example, sexual orientation and gender identity) a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when, for a reason related to one or more prohibited grounds, a person or group of persons is subjected to a detriment.

– **Indirect discrimination** occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds (including sexual orientation and gender identity) at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Gender identity refers to a person's deeply felt individual experience of gender, which may or may not correspond with the sex assigned at birth, and includes the personal sense of the body and other expressions of gender (that is, "gender expression") such as dress, speech and mannerisms. The sex of a person is usually assigned at birth and becomes a social and legal fact from there on. However, some people experience problems identifying with the sex assigned at birth – these persons are referred to as "transgender" persons. Gender identity is not the same as sexual orientation, and transgender persons may identify as heterosexual, bisexual or homosexual.

Gender reassignment treatment refers to different medical and non-medical treatments which some transgender persons may wish to undergo. However, such treatments may also often be required for the legal recognition of one's preferred gender, including hormonal treatment, sex or gender reassignment surgery (such as facial surgery, chest/breast surgery, different kinds of genital surgery and hysterectomy), sterilisation (leading to infertility). Some of these treatments are considered and experienced as invasive for the body integrity of the persons. Harassment constitutes discrimination when unwanted conduct related to any prohibited ground (including sexual orientation and gender identity) takes place with the purpose or effect of violating the

[96] *Discrimination on grounds of sexual orientation and gender identity in Europe (second edition)* (pp. 129 – 132)© *Council of Europe* - http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf

dignity of a person or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Hate crimes include intimidation, threats, property damage, assault, murder or any other criminal offence where the victim, premises or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership of an LGBT group. There should be a reasonable suspicion that the motive of the perpetrator is the sexual orientation or gender identity of the victim.

Hate-motivated incident are incidents, acts or manifestations of intolerance committed with a bias motive that may not reach the threshold of hate crimes, due to insufficient proof in a court of law for the criminal offence or bias motivation, or because the act itself may not have been a criminal offence under national legislation.

Hate speech against LGBT people refers to public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards LGBT people – for example, statements made by political and religious leaders or other opinion leaders circulated by the press or the Internet which aim to incite hatred.

Homophobia is defined as an irrational fear of, and aversion to, homosexuality and to lesbian, gay, bisexual and transgender persons based on prejudice. **Transphobia** refers to a similar phenomenon, but specifically to the fear of, and aversion to, transgender persons or gender non-conformity. Manifestations of homophobia and transphobia include discrimination, criminalisation, marginalisation, social exclusion and violence on grounds of sexual orientation or gender identity.

LGBT people or **LGBT persons** is an umbrella term used to encompass lesbian, gay, bisexual, and transgender persons. It is a heterogeneous group that is often bundled together under the LGBT heading in social and political arenas. Sometimes LGBT is extended to include intersex and queer persons (LGBTIQ).

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender (heterosexual) or the same gender (homosexual, lesbian, gay) or more than one gender (bisexual).

Transgender persons include persons who have a gender identity which is different from the gender assigned to them at birth and those people who wish to portray their gender identity in a different way from the gender assigned at birth. It includes those people who feel they have to, prefer to, or choose to, whether by clothing, accessories, mannerisms, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth. This includes, among many others, persons who do not identify with the labels "male" or "female", transsexuals, transvestites and cross-dressers. A transgender man is a person who was assigned "female" at birth but has a gender identity which is "male" or within a masculine gender identity spectrum. A transgender woman is a person who

was assigned “male” at birth but has a gender identity which is female or within a feminine gender identity spectrum. Analogous labels for sexual orientation of transgender people are used according to their gender identity rather than the gender assigned to them at birth. A heterosexual transgender man, for example, is a transgender man who is attracted to female partners. A lesbian transgender woman is attracted to female partners.

Transsexual refers to a person who has a gender identity which does not correspond to the sex assigned at birth and consequently feels a profound need to permanently correct that sex and to modify bodily appearance or function by undergoing gender reassignment treatment.

The European Union Agency for Fundamental Rights (FRA)

Contribution of the European Union Agency for Fundamental Rights (FRA) to the "follow-up to Committee of Ministers' Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity"

A. INTRODUCTION

In the context of the planned review of application of CM Recommendation (2010)5, the FRA hereby shares a selection of relevant FRA Opinions. These Opinions have been formulated based on independent, reliable and comparable socio-legal research conducted in all EU Member States in the period 2008-2011. In order to facilitate the review process, the Opinions are grouped in section B according to the paragraphs of the CM Recommendation. In section C, a short overview is provided on FRA activities in the area of fundamental rights of lesbian, gay, bisexual and transgender (LGBT) persons. Further data which form the basis for the Opinions can be provided by FRA upon request of the Council of Europe.

B. FRA OPINIONS IN THE AREA OF FUNDAMENTAL RIGHTS OF LGBT PERSONS

Right to life, security and protection from violence

1. Member States should take practical measures to raise awareness among law enforcement authorities on LGBT issues, and to provide adequate training to police in dealing effectively with

hate crime incidents, particularly concerning victim support and the systematic recording of incidents.[97]

2. Member States and EU institutions, as provided for by the treaties, should take appropriate measures to combat all forms of expression inciting, spreading or promoting hatred or other forms of discrimination against LGBT people, as well as incidents and crimes motivated by prejudice against LGBT persons. Equally, renewed commitment to countering anti-LGBT crimes and violence should lead to more effective action, exploring the potential of the new EU Treaties for the development of legal provisions at EU and national level. Such legal provisions should grant the same level of protection as the one granted to hate speech and crime motivated by racism or xenophobia.[98]

Freedom of expression and peaceful assembly

3. Authorities in Member States should not rely on general provisions such as those relating to the preservation of 'public order' to impose undue restrictions on LGBT related events and other manifestations of LGBT identities or relationships.[99]

4. The right to receive unbiased information about LGBT persons and their relationships and to live in an open and inclusive environment needs to be respected, protected, promoted and fulfilled across the EU. This is particularly important for LGBT children.[100]

Right to respect for private and family life

5. In relevant areas of EU law, in particular employment related partner benefits, free movement of EU citizens, and family reunification of refugees and third country nationals, EU institutions and Member States should consider explicitly incorporating same-sex partners, whether married, registered, or in a de facto union, within the definitions of 'family member'. In particular in the context of free movement, this could be achieved by explicitly adopting the 'country of origin' principle already firmly established in other areas of EU law.[101]

Employment

[97] Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II – The Social Situation (2009). (Report 2009)
[98] Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. 2010 update. (Report 2010)
[99] Report 2010
[100] Report 2010
[101] Report 2010

6. Social partners should facilitate the active participation of LGBT persons in their organisations and encourage public and private sector employers to adopt and implement diversity and equal treatment policies in the workplace.[102]

7. A substantial number of EU Member States already ban discrimination based on sexual orientation beyond the sphere of employment, to include some or all of those areas covered by the Racial Equality Directive. However, different forms of discrimination are still not equally addressed within the EU. The adoption of the European Commission's proposal for a 'horizontal directive', in order to address the existing 'hierarchy of grounds' in EU Law, would significantly improve equal protection against discrimination on all grounds across the EU.[103]

Education

8. Member States should ensure that schools provide a climate of safety, support and affirmation for LGBT youth, combating stigmatisation and marginalisation of homosexuality and different gender identities. In this respect, school authorities should put in place concrete anti-bullying policies stating clearly that homophobic name-calling, bullying and harassment will not be tolerated. School authorities should also provide access to support mechanisms and information for young people identifying themselves as LGB.[104]

9. Member States should ensure that school curricula do not ignore issues of sexual orientation, and that LGBT persons are represented with respect and dignity in accordance with the European Union's fundamental values of equal treatment, non-discrimination and respect for diversity.[105]

Health

10. Member states should examine the situation regarding access to health services and the specific issues facing LGBT persons, particularly their ability to claim 'next of kin' status, together with representatives of healthcare professionals and LGBT organisations. In this respect such multi-agency partnerships would facilitate the development of targeted policies to provide quality health care corresponding to the specific needs of LGBT persons.[106]

[102] Report 2009
[103] Report 2010
[104] Report 2009
[105] Report 2009
[106] Report 2009

11. Member states should also ensure that health care providers inform and train their medical and non-medical staff on ethnical and diversity issues in order to raise their awareness of LGBT issues, and improve the provision of services to LGBT persons.[107]

Sports

12. Member States are encouraged to work with sports organisations and fan clubs to combat homophobic incidents and hate speech in sports events, supporting them in developing awareness-raising campaigns and applying the rule of 'zero tolerance for hate incidents'.[108]

13. Sports organisations or institutions should consider developing awareness raising programmes on LGBT issues for staff, coaches and athletes, as well as diversity policies and, in particular, harassment policies in relation to sexual orientation and gender identity.[109]

Right to seek asylum

14. EU institutions and Member States should consider explicitly recognising gender identity as a ground of persecution in the current reform of the Qualification Directive in the context of the 'asylum package'.[110]

15. The UNHCR Guidance note on Refugee Claims relating to Sexual Orientation and Gender Identity of 2008 is of particular relevance in assessing asylum claims particularly regarding an individual's assertion of orientation or identity, irrespective of marital status, children, or conformity with stereotypes. Current uses of degrading and intrusive assessments of credibility of asylum claims based on sexual orientation and gender identity should be discontinued.[111]

Discrimination on multiple grounds

16. Where Member states have multiple national equality bodies for different grounds of discrimination, strategies could be developed for dealing effectively and appropriately with complaints on multiple grounds.[112]

[107] Report 2009
[108] Report 2009
[109] Report 2009
[110] Report 2010
[111] Report 2010
[112] Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States. Synthesis Report (2009).

C. ACTIVITIES BY FRA IN THE AREA OF FUNDAMENTAL RIGHTS OF LGBT PERSONS

17. Following a request by the European Parliament, FRA collected data on discrimination against LGBT persons and the situation regarding homophobia in the EU. The first publication[113] contained a comprehensive legal analysis of the situation in the EU member states. The legal analysis was based on 27 national legal studies that EU Member States drafted on the basis of detailed guidelines provided by FRA. The second publication[114] was a comparative social analysis based on available data throughout the EU, as well as fieldwork research with relevant key actors.

18. At the request of the Council of Europe's Commissioner for Human Rights the FRA updated its 2008 comparative legal analysis report for all EU Member States.[115] This legal update, and the national background information which it was based on, was used as input by the Council of Europe Commissioner for Human Rights for his 2011 report on homophobia and transphobia in all 47 Council of Europe Member States.

19. In 2011 FRA published a summary of the socio-legal findings, including an analysis of trends, challenges and promising practices.[116] The publication linked FRA's research findings with the standards to which the EU Member States have agreed, including Council of Europe CM Recommendation (2010)5.

20. Acting upon a request by the European Commission, the FRA conducted in 2012 a specific survey on hate crimes and discrimination against LGBT persons in all member states and Croatia. The survey consisted of large-scale empirical data collected via an online questionnaire. Over 93.000 respondents participated in the survey. The overall aim of the survey was to provide reliable and comparable data on the fundamental rights situation of LGBT persons in the EU and Croatia, with particular reference to the extent and nature of discrimination, violence and verbal abuse or hate speech on the grounds of sexual orientation and/or gender identity in the EU.[117] The survey results and FRA Opinions will be presented on the International Day Against Homophobia and Transphobia 2013.

[113] Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis (2008).
[114] Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II – The Social Situation (2009).
[115] Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Comparative legal analysis, update (2010).
[116] Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States. Summary of findings, trends, challenges and promising practices (2011).
[117] EU LGBT Survey: Main results (unpublished 2013), EU LGBT Survey: At a glance (unpublished 2013).

21. In 2012 FRA launched a new research project on public authorities and duty bearers vis-à-vis fundamental rights of LGBT persons. The research is of qualitative nature and will provide information on policy and policy measures by Member States to combat discrimination, focusing on key areas of employment, education, health, law enforcement and public policies. Results are foreseen for 2014.

22. More information on FRA's activities in this area, as well as links to reports on the fundamental rights of LGBT persons can be found at http://fra.europa.eu/en/theme/lgbt.