



Discrimination on grounds of sexual orientation and gender identity in Europe

Background document



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Discrimination on grounds of sexual orientation and gender identity in Europe

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On 23 June 2011, the Office of the Commissioner for Human Rights published the report “Discrimination on grounds of sexual orientation and gender identity in Europe”. The report was the result of a comprehensive empirical study concerning homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the 47 member states of the Council of Europe. It contains a socio-legal analysis of the human rights situation of lesbian, gay, bisexual and transgender (LGBT) persons across member states and is underpinned by data and information made available by public authorities, national human rights structures, non-governmental organisations (NGOs) and academic experts in the member states.

This background document has been prepared for the benefit of experts, NGOs, national human rights structures, government officials and others who wish to access more detailed information on discrimination on grounds of sexual orientation and gender identity.

The 12 thematic chapters of the background document present the data used in the preparation of the report “Discrimination on grounds of sexual orientation and gender identity in Europe”. The Commissioner’s recommendations laid out in the report can also be found at the beginning of this document.

Summary of the report "Discrimination on grounds of sexual orientation and gender identity in Europe"

The report is the result of the largest study ever made on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the 47 member states of the Council of Europe. The findings in this background document are presented in eleven thematic chapters followed by a chapter on methodology. The Commissioner's recommendations on the issues emerging from the findings of the study can be found at the beginning of the report.

Attitudes and perceptions

Homophobic and transphobic attitudes have been identified in all 47 member states, though attitudes vary significantly among and within the countries. Biased, outdated and incorrect information on what constitutes sexual orientation and gender identity as well as stereotypical portrayals of LGBT persons in the media and in textbooks contribute to the shaping of negative attitudes. Inflammatory and aggressive discourse against LGBT persons, occasionally amounting to hatred, has also been identified in several member states. LGBT persons have often been portrayed as a threat to the nation, religion, and traditional notions of gender and the family. Such speech has rarely been officially condemned.

The invisibility of LGBT persons and the absence of a serious discussion about their human rights situation are recurring themes in this report. Many LGBT individuals conceal their sexual orientation or gender identity in everyday life out of fear of negative reactions at school, at work, in their neighbourhood or in their family. They fear that public knowledge of their sexual orientation and gender identity will lead to discrimination, harassment, rejection and even violence.

Legal standards and their implementation

A large number of member states have adopted legislative and other measures to prohibit discrimination against individuals on grounds of their sexual orientation and, though in fewer cases, also on grounds of gender identity. The majority of member states (38) have recognised, in line with international and European standards, that sexual orientation is one of the grounds of discrimination in comprehensive or sectoral non-discrimination legislation. Some nine member states do not appear to protect LGB persons against discrimination. A lesser number, 20 out of 47 member states cover discrimination based on gender identity in their non-discrimination legislation, either as gender identity explicitly or as a recognised interpretation of the terms "sex", "gender" or "other ground of discrimination". For the other 27 member states, the non-discrimination legislation remains silent or is unclear on the protection of transgender persons.

Official statistics and data regarding discrimination on grounds of sexual orientation and gender identity are scarce in member states. National structures for promoting equality do not always have an explicit mandate to receive complaints of discrimination based on sexual orientation and even fewer have a clear mandate to cover gender identity as a ground of discrimination.

Protection: violence and asylum

LGBT persons run a serious risk of becoming victims of a hate crime or a hate-motivated incident, especially in public places. Violence may also take place within a family setting. Moreover, some state agents, such as the police, have been involved in blackmailing and harassing LGBT persons. Often LGBT persons do not report such violence to the competent authorities due to lack of trust in law-enforcement agencies, who may have no training in investigating effectively such hate-motivated crimes and incidents.

Homophobic and transphobic incidents or hate crimes are not reflected in official hate crime statistics in most of the member states. The incitement of hatred, violence or discrimination on grounds of sexual orientation is considered as a criminal offence in only 18 member states. Similarly, homophobic intent is accepted as an aggravating factor in common crimes in only 15 member states. In only two member states is gender identity or transphobic hate crime explicitly addressed in hate crime legislation.

Owing to criminalisation and persecution on grounds of sexual orientation and/or gender identity, a number of LGBT persons have sought to flee their country of origin. Thirty-three member states recognise sexual orientation as a ground for persecution in asylum claims, while only six member states do so for gender identity. LGBT persons encounter particular difficulties in the process of seeking asylum, often owing to inadequate knowledge by immigration authorities about conditions for LGBT persons in countries of origin. Some authorities appear to consider that if LGBT persons kept their sexual orientation or gender identity secret, they would not be at risk. LGBT asylum seekers also face difficulties in asylum centres and may be exposed to harassment from other applicants.

Participation: freedoms of assembly, expression and association

Violent and discriminatory reactions have occurred when LGBT persons have collectively attempted to express their views, freely associate or gather for public demonstrations. In most member states the freedoms of association, expression and assembly of LGBT persons are respected. However, in a few states they have been infringed upon. Bans or administrative impediments imposed on public LGBT demonstrations were identified in 12 member states, and in some instances the police have failed to protect peaceful demonstrators from violent assaults. Obstructions and/or refusal of attempts to register LGBT associations have been identified in five member states, though in some instances courts have overturned such bans at a later stage. Infringement of the freedom of expression has been reported in three member states, whereas attempts to criminalise “propaganda of homosexuality” were identified in three member states.

Privacy: gender recognition and family life

Transgender persons face significant problems in the process of their legal gender recognition. In at least 10 member states no legislation regulating it was identified. In 14 other member states no or only partial legislation was identified, but transgender persons are able to have their new gender legally recognised, either through court decisions or by certain administrative practices. Twenty-nine member states require, as a precondition for legal gender recognition, surgery leading to infertility, whereas 15 member states require the transgender person to be unmarried or divorced, which can leave couples without a legally recognised relationship after divorce.

Same-sex couples wishing to marry can do so in seven member states (gender-neutral marriage) and in 14 other member states they can enter a registered partnership which provides a form of recognition. The lack of access to marriage or registered partnership deprives same-sex couples of rights and benefits granted to different-sex relationships. It has also consequences for same-sex couples having children as one of the partners may not have custody rights, inheritance and next-of-kin status, which need to be assured in the best interests of the child. Ten member states allow second-parent adoption to same-sex couples, while 35 countries provide no access to it. Two member states give only some parental authority and responsibilities to registered same-sex partnerships, but no adoption is available.

Access to health care, education and employment and goods and services

LGBT persons are more prone to suffer from depression, anxiety, and anguish. Suicide and attempted suicide rates are significantly higher for LGBT persons than their heterosexual peers, especially young people. LGBT persons also experience problems when accessing health care, caused by mistrust between patients and doctors, problematic attitudes of medical staff, as well as outdated approaches to homosexuality and transgenderism. Contrary to international medical classifications, some official textbooks contain references to homosexuality as an illness. Transsexuality continues to be considered a mental disorder according to some international classifications. In 13 member states medical facilities for gender reassignment treatment are non-existent or insufficient. Health care insurance coverage of gender reassignment treatment is problematic in at least 16 countries. In the remaining states there is partial or full reimbursement.

Bullying of LGBT persons within the educational system is a reality. Objective information on sexual orientation and gender identity is rarely imparted in schools. Discrimination and harassment of LGBT persons also occurs in the employment sector. Even though the majority of member states include sexual orientation in non-discrimination legislation for employment, gender identity is usually only partially included under the sex or gender ground. Trade unions and employers in some member

states have taken measures to combat these practices. Transgender persons face particular problems when accessing the labour market, as privacy of personally sensitive data related to their gender identity history is rarely ensured. Finally, incidents of discrimination in access to goods and services, including housing, have also been identified in this study. Access to housing is particularly problematic for LGBT youth who may not be able to live with their family, because of the lack of acceptance by their parents. Homophobia or transphobia in the family may thus lead to homelessness.

Recommendations of the report "Discrimination on grounds of sexual orientation and gender identity in Europe"

The Commissioner's recommendations build on the findings of the report and provide policy-oriented advice to member states to prevent and address homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity.

The Commissioner for Human Rights recommends that authorities in Council of Europe member states should:

1. Attitudes and perceptions

- 1) Take a strong public position against violations of the human rights of LGBT persons and promote respect on issues related to sexual orientation and gender identity, for example through human rights education and awareness-raising campaigns.
- 2) Take steps to encourage factual, objective and professional reporting by the media on LGBT persons and issues related to sexual orientation and gender identity.

2. Legal standards and their implementation

- 1) Implement international human rights obligations without discrimination on grounds of sexual orientation and gender identity. The Yogyakarta Principles are a useful tool to provide guidance for implementing international human rights standards in relation to sexual orientation and gender identity. Member states are also encouraged to sign and ratify Protocol No. 12 to the European Convention on Human Rights on the general prohibition of discrimination.
- 2) Enact comprehensive national legislation on non-discrimination and include sexual orientation and gender identity among the prohibited grounds of discrimination. NGOs representing LGBT persons should be consulted and involved in the legislative process and in the preparation of policy measures for the implementation of the legislation.
- 3) Screen national legislation to detect and correct possible inconsistencies with non-discrimination legislation in force to prevent discrimination on grounds of sexual orientation and gender identity. Eliminate any discriminatory criminalisation of same-sex sexual activity if this is still present in the legislation.
- 4) Set up independent national structures for promoting equality and non-discrimination. The scope of their mandate should include discrimination on grounds of sexual orientation and gender identity.
- 5) Monitor the effectiveness of the implementation of national non-discrimination legislation and involve national human rights structures, including national structures for promoting equality, and organisations representing LGBT persons in the monitoring process. A regular monitoring mechanism should be put in place to this end.

3. Protection: violence and asylum

- 1) Include homophobic and transphobic hatred explicitly as possible motives in national legislation on bias-motivated crime and hate speech. Crimes targeting individuals or groups of people because of their perceived or real sexual orientation or gender identity should be punished and the bias motive taken into account as an aggravating circumstance.
- 2) Investigate effectively bias-motivated crimes, speech and incidents related to homophobia and transphobia. Specific training for law enforcement officials and members of the judiciary should be provided for this purpose.

- 3) Improve systematic data collection on hate-motivated crimes, speech and incidents related to homophobia and transphobia. Data on homophobic and transphobic crimes, speech, incidents and complaints should be clearly disaggregated from other hate-motivated crimes, speech and incidents.
- 4) Recognise that persecution or a well-founded fear of persecution on the basis of sexual orientation or gender identity may be valid grounds for granting refugee status and asylum. Unnecessarily invasive tests for LGBT asylum seekers for giving proof of their sexual orientation or gender identity should be avoided.
- 5) Provide expertise and training to asylum officers and other related professionals in order to ensure that LGBT asylum seekers are met in a respectful, informed and sensitive way during the asylum procedure. Procedures should be set up in a way that LGBT asylum seekers feel safe to disclose their sexual orientation or gender identity.
- 6) Address social isolation, violence and discrimination experienced by LGBT asylum seekers in asylum centres, and provide for their specific health care needs.

4. *Participation: freedoms of assembly, expression and association*

- 1) Respect the effective right to freedom of assembly of LGBT persons by ensuring that peaceful Pride festivals and other public events organised by LGBT people or focusing on issues related to sexual orientation and gender identity can take place without being subjected to discriminatory measures by the public authorities. Practices amounting to misuse of legal or administrative provisions in order to hinder the organisation of such events should be prevented.
- 2) Provide effective protection to participants of peaceful Pride demonstrations or public events organised by and for LGBT persons from attacks and violent counter-demonstrations.
- 3) Respect the effective right to freedom of association of LGBT persons by ensuring, in particular, that non-governmental organisations representing LGBT persons or working on issues related to sexual orientation and gender identity can be set up and operate without being subjected to discriminatory measures by the public authorities. Administrative procedures which render the registration of these NGOs disproportionately lengthy or difficult should be prevented.
- 4) Respect the effective right to freedom of expression by safeguarding the possibility to receive and impart information on issues related to sexual orientation and gender identity in any form of expression such as the press, publications, oral and written statements, art and other media. Any discriminatory provision criminalising the dissemination and diffusion of factual information concerning sexual orientation and gender identity should be abolished. Unlawful interferences in the enjoyment of the right to freedom of expression by LGBT persons should be subject to criminal proceedings.

5. *Privacy: gender recognition and family life*

- 1) Grant legal recognition for the preferred gender of transgender persons and develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, civil registers, identity cards, passports, educational certificates and other similar documents.
- 2) Abolish sterilisation and other compulsory medical treatment which may seriously impair the autonomy, health or well-being of the individual, as necessary requirements for the legal recognition of a transgender person's preferred gender.
- 3) Remove the requirement of being unmarried, or divorce for already married persons, as a necessary condition for the legal recognition of a transgender person's preferred gender.
- 4) Respect the right of transgender persons to effectively exercise their right to marry in accordance with their legally recognised gender.
- 5) Enact legislation recognising same-sex partnerships by granting such partnerships the same rights and benefits as different-sex partnerships or marriage, for example in the areas of social

security, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.

6) Grant same-sex couples and LGBT individuals, in compliance with the principle of the best interests of the child, similar opportunities as other applicants to be considered without discrimination as adoptive parents for a child.

7) Recognise the parental rights of same-sex parents, individually or jointly, including their rights of guardianship and custody without discrimination on grounds of their sexual orientation or gender identity. The parental rights of transgender persons should continue to be respected after the legal recognition of their preferred gender.

8) Allow access to assisted reproduction to LGBT persons without discrimination on grounds of their sexual orientation or gender identity.

9) Seek to provide adequate support for families with LGBT members in order to foster inclusion, respect and safety.

6. Access to health care, education and employment

1) Abolish outdated classification systems which portray homosexuality as an illness or disease.

2) Review any requirements of a diagnosis of mental disorder for accessing transgender health care in view of eliminating obstacles to the effective enjoyment, by transgender persons, of the rights to self-determination and the highest attainable standard of health.

3) Include in the education and training of health care professionals the importance of respecting the dignity of LGBT persons as well as their specific health care needs and choices.

4) Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible to transgender persons subject to informed consent and ensure that they are reimbursed by health insurance.

5) Promote respect and inclusion of LGBT persons at school and foster objective knowledge on issues concerning sexual orientation and gender identity in schools and other educational settings.

6) Combat bullying and harassment of LGBT students and staff. Schools should be a safe environment for LGBT students and staff, and teachers should be provided with tools to respond effectively to bullying and harassment of LGBT students.

7) Promote policies and practices aimed at combating discrimination based on sexual orientation or gender identity; also promote policies to foster diversity in the workplace together with initiatives which encourage the full inclusion and respect of LGBT staff in the work environment.

8) Respect the right of transgender persons to access the labour market by guaranteeing the respect of their privacy concerning the disclosure of personally sensitive data related to their gender identity and by promoting measures aimed at ending the exclusion and discrimination of transgender persons in the workplace.

7. Research and data collection

1) Encourage systematic research and disaggregated data collection concerning discrimination on grounds of sexual orientation and gender identity in all areas of life. LGBT-related questions should be included in general attitude surveys and public opinion polls.

2) Apply safeguards protecting the right to respect for private life of LGBT persons in the collection of any sensitive data.

Introduction

The report "Discrimination on grounds of sexual orientation and gender identity in Europe" presents the results of the largest study ever made on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in Europe.¹ It is published by the Commissioner for Human Rights of the Council of Europe and covers the 47 member states of the Council of Europe. The report is based on research and data collection primarily focused on the period 2004-2010 although some important data preceding this period have been included as well. Changes in policy and legislation in Council of Europe member states which took place after 31 December 2010 have not been systematically taken into account.

There have been two phases in the research and data-collection process. The first phase focused on the collection and comparative analysis of information and data of a legal nature (legislation and case law). This research was conducted through desk research and by national legal experts. The second phase focused on the collection and comparative analysis of data of a sociological nature. The aim of the sociological part of the study was to collect data on the everyday life of lesbian, gay, bisexual and transgender (LGBT) persons in the 47 member states. This part of the research was conducted by desk research and field visits in the member states. The research and data-collection process was co-ordinated by the international consultancy firm COWI.

During the field visits, semi-structured qualitative interviews were conducted with key stakeholders in each member state.² The relevant stakeholders provided oral statements as well as written materials, which gave a broad overview of the issues at stake. To start with, representatives of national authorities, in most instances officials working in the Ministry of Justice, Ministry of the Interior, Ministry of Foreign Affairs or Ministry of Health were met in order to access available official data and statistics. This could include information regarding discrimination on grounds of sexual orientation and gender identity and incidents of homophobia and transphobia as well as information on the relevant national policies, action plans and "good practice" related to combating discrimination and promoting human rights. These interviews aimed to collect information but also to gauge awareness of the national situation with regard to homophobia, transphobia and discrimination among the interlocutors. Many interlocutors emphasised the usefulness of this study and engaged constructively in the data-collection process, though on many occasions there were not many statistics or data to share. Public authorities have generally been co-operative in their contribution to the study.

Organisations representing LGBT persons were also met, usually LGBT organisations as well as human rights non-governmental organisations. Representatives of LGBT organisations provided their perspectives on the information collected and directed attention to further materials. LGBT organisations, having hands-on experience and knowledge of various aspects of the situation for LGBT persons, have been a valuable source of data. This is particularly the case when research and/or official data have been scarce. The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transgender Europe (TGEU) provided additional information. In addition, consultations regarding the research design and implementation took place at regular intervals with ILGA-Europe and Transgender Europe.

Furthermore, representatives of national human rights structures (that is, national human rights institutions, ombudsman institutions and equality bodies) were met during the field trips. Whereas this report shows that not all these structures are currently engaged in combating discrimination based on sexual orientation and gender identity, the meetings turned out to be useful. Once again, on most occasions, representatives of these national structures emphasised the need for more engagement in this area.

Based on the information and data collected for each country, a legal and a sociological report were drafted for each Council of Europe member state. Regarding the 27 member states of the European Union, the report draws primarily from research conducted by the European Union Agency for

1. Voluntary contributions for this project were provided by Belgium (Flemish Government), Finland, Germany, the Netherlands, Norway, the Swedish International Development Cooperation Agency (SIDA), Switzerland and the United Kingdom.

2. With the exception of Andorra, where no field visit took place (phone interviews were conducted instead). Furthermore, meetings with the Russian authorities during the field visit in the Russian Federation did not take place. In the national contributions (sociological reports) a precise overview per country is given regarding the interlocutors interviewed.

Fundamental Rights (FRA). Relevant FRA publications from 2008, 2009 and 2010³ as well as data from primary research as published in the FRA's national contributions (reports on the social situation and – updated – legal reports) were key resource documents. In line with the co-operation agreement between the FRA and the Council of Europe,⁴ these reports and data were shared by the FRA with the Office of the Commissioner for Human Rights. The Commissioner's Office was also able to benefit from the technical expertise of the FRA throughout the research process.

As regards the other 20 member states of the Council of Europe, the legal and sociological reports were drafted by consultants and national experts. All reports have been quality assured by independent reviewers. However, any views or opinions expressed in the national country reports do not necessarily represent those of the Office of the Commissioner for Human Rights. These two sets of 47 national reports form the basis for the comparative report. The national reports will be made available separately. Information provided by the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the Office of the United Nations High Commissioner for Refugees (UNHCR) was also used in the compilation of this report.

It should be pointed out that research for the report was conducted in areas which face serious challenges regarding data availability. Systematically collected data on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in most member states remain scarce or simply non-existent. The lack of data requires serious scrutiny, a conclusion backed by the fact that many of the public authorities met during field visits expressed the need for improving the collection and handling of data. Significant improvements in data collection would be needed in order to acquire comprehensive data sets on the socio-legal position of LGBT persons.

The background document is structured in the following manner. It consists of 11 thematic chapters with conclusions and a final chapter on the methodology of the study. In each chapter positive examples identified in member states are presented as "practical initiatives".

The Commissioner's Recommendations to member states, which build on the findings of the report, can be found at the beginning of the volume.

Chapter 1 gives an overview of attitudes and public opinion towards LGBT persons. The analysis is based on social research conducted in the Council of Europe member states. This chapter serves as a general background for the chapters to follow.

Chapter 2 outlines the applicable international and European human rights standards from the perspective of non-discrimination followed by a summary of the relevant national legal frameworks with reference to sexual orientation and gender identity as prohibited grounds of discrimination. The chapter also analyses national systems for regulating the legal recognition of gender reassignment and the change of name by transgender persons.

Chapter 3 focuses on freedom of assembly and association. It draws attention to restrictions imposed on LGBT associations in some Council of Europe member states as regards the organisation of LGBT events and Pride festivals as well as interference in the registration of NGOs and access to premises.

Chapter 4 discusses freedom of expression and refers to restrictions faced by LGBT persons in the dissemination of information on issues concerning sexual orientation and gender identity.

Chapter 5 focuses on hate-motivated crime and speech. It presents data on hate crimes and explores the national and European protection mechanisms against hate crime and speech. This chapter also refers to cases of harassment of LGBT persons by state actors.

3. See European Union Agency for Fundamental Rights, "Homophobia and Discrimination on the grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 1 – Legal Analysis", 2008; "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 2009; "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010.

4. Agreement between the European Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe, paragraph 7. Official Journal of the European Union, 15 July 2008.

Chapter 6 considers aspects of private and family life and provides an overview of the relevant legal frameworks regarding marriage, registered partnerships and parenting in the Council of Europe member states.

Chapter 7 explores the protection mechanisms in place for asylum seekers who have fled countries where they face persecution due to their sexual orientation or gender identity.

Chapter 8 examines the situation of LGBT students and teachers in the educational system and focuses on bullying in schools. It also analyses educational materials and curricula in relation to LGBT related issues.

Chapter 9 describes the discrimination LGBT persons encounter in employment. It provides both qualitative and quantitative data on discrimination and discusses its impact on victims.

Chapter 10 focuses on discrimination of LGBT persons in housing and access to goods and services.

Chapter 11 discusses access to health care by LGBT persons. The role of medical classifications is discussed and particular attention is given to the problems faced by transgender persons when accessing health care.

Chapter 12 presents the research methodology applied in the course of the study and identifies gaps in the availability of data.

The terms and concepts used in this document are explained in the section following the introduction.

Terms and concepts

The report uses a number of terms and concepts which are defined and clarified below in order to facilitate the full understanding of the report. The definitions are not considered exhaustive. While referring to the list, one should bear in mind that some of the terms may have slightly different meanings in various contexts and in different languages.

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.⁵

* **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.⁶

* **Experienced discrimination**, also called subjective discrimination, is the experience of being discriminated against. Experienced discrimination does not necessarily entail discrimination in the legal sense.⁷

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.⁸ 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.⁹

Gender marker is a gendered designator on, for example, an identity document (passports). The most obvious gender markers are designations such as male/female or Mr/Mrs/Ms/Miss. They can also be professional titles or personal pronouns, or coded numbers, such as social security numbers and tax numbers which may use certain combinations for men and for women (for example, even/uneven numbers). Gender markers are often embedded in ID cards or personal certificates such as passports, birth certificates, school diplomas and employers' reference letters.

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 dignity of a person or creating an intimidating, hostile, degrading, humiliating or offensive environment.¹⁰ Harassment can consist of a single incident or several incidents over a period of time.

5. The Equal Rights Trust, Declaration of Principles on Equality, London, 2008, pp. 6-7.

6. Ibid.

7. Olli E. and Olsen B. K. (eds), "Towards Common Measures for Discrimination: Exploring possibilities for combining existing data for measuring ethnic discrimination", Danish Institute for Human Rights, 2005.

8. Definition based on the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

9. Commissioner for Human Rights, "Human Rights and Gender Identity", Issue Paper, Strasbourg, 2009, pp. 5-6.

10. The Equal Rights Trust, Declaration of Principles on Equality, London, 2008, p. 7.

Harassment can take many forms, such as threats, intimidation or verbal abuse, unwelcome remarks or jokes about sexual orientation or gender identity.

Hate crime towards LGBT persons refers to criminal acts with a bias motive. 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.¹¹ There should be a reasonable suspicion that the motive of the perpetrator is the sexual orientation or gender identity of the victim.

Hate-motivated incidents 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.¹²

Hate speech against LGBT people refers to public expressions which spread, incite, promote or justify hatred, discrimination or hostility¹³ 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.

Heteronormativity can be defined as the institutions, structures of understanding and practical orientations that make heterosexuality seem coherent, natural and privileged. It involves the assumption that everyone is heterosexual, and that heterosexuality is the ideal and superior to homosexuality or bisexuality. Heteronormativity also includes the privileging of normative expressions of gender – what is required or imposed on individuals in order for them to be perceived or accepted as “a real man” or “a real woman” as the only available categories.¹⁴

Homophobia is defined as an irrational fear of, and aversion to, homosexuality and to lesbian, gay, bisexual and transgender persons based on prejudice.¹⁵ **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.¹⁶

Intersex people are persons who are born with chromosomal, hormonal levels or genital characteristics which do not correspond to the given standard of “male” or “female” categories as for sexual or reproductive anatomy. This word has replaced the term “hermaphrodite”, which was extensively used by medical practitioners during the 18th and 19th centuries. Intersexuality may take different forms and cover a wide range of conditions.¹⁷

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).

Multiple discrimination describes discrimination that takes place on the basis of several grounds operating separately.¹⁸ Another term often used in this regard is **intersectional discrimination**, which refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable.¹⁹

11. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 13.

12. Ibid.

13. Based on the definition in Committee of Ministers Recommendation No. R(97)20 on “hate speech”, adopted on 30 October 1997.

14. Based on Warner M., “Introduction: Fear of a Queer Planet”, *Social Text*, 9 (4 [29]), 1991, pp. 3–17; Rosenberg T., *Queerfeministisk Agenda*, Arena, Stockholm, 2002; RFSL, *Open Up Your Workplace: Challenging Homophobia and Heteronormativity*, 2007.

15. European Parliament resolution on homophobia in Europe (P6_TA(2006)0018 (PE 368.248)).

16. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted 31 March 2010.

17. World Health Organization, “Genetic components of Sex and Gender”. See also Federal Anti-Discrimination Agency (Germany), *Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben*, Berlin, 2010, p. 11.

18. European Commission, *Tackling Multiple Discrimination. Practices, Policies and Laws*, 2007.

19. Ibid.

Queer is a term laden with various meanings and a long history, but currently often denotes persons who do not wish to be identified with reference to traditional notions of gender and sexual orientation and eschew heterosexual, heteronormative and gender-binary categorisations. It is also a theory, which offers a critical perspective into heteronormativity.

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).²⁰

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.²¹ 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. The word **transgenderism** refers to the fact of possessing a transgender identity or expression.

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.

Transvestite (cross-dresser) describes a person who regularly, although part-time, wears clothes mostly associated with the opposite gender to her or his birth gender.

20. Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2008.

21. Definition based on Commissioner for Human Rights, "Human Rights and Gender Identity". Issue Paper, Strasbourg, 2009.

1. Attitudes and public opinion towards LGBT persons

Understanding attitudes and public opinion regarding LGBT persons, homosexuality and transgenderism in the Council of Europe member states is crucial when analysing existing patterns of homophobia and transphobia, as well as discrimination on grounds of sexual orientation and gender identity. This background document, therefore, starts with a chapter reviewing existing research and surveys on attitudes as well as public opinion regarding LGBT persons. In the first part of this chapter the results of several surveys conducted in member states are analysed. In the remainder of the chapter certain overall trends in attitudes and public opinion are discussed, in particular issues related to perceptions of the nation, religion and traditional values, as well as notions of “the private” and “the public”. The final part of the chapter reviews anti-LGBT discourse in the media.

1.1. Introduction

Attitudes and public opinion are pivotal in the definition of political, legal, religious and cultural arguments in favour or against lesbian, gay, bisexual and transgender persons. However, the opposite may also be argued, namely that attitudes themselves are, to a certain extent, shaped and influenced by political, religious and cultural factors. Negative attitudes towards LGBT persons are found in all Council of Europe member states – in political, legal and social discourses. However, differences are detected between member states and the reasons underpinning these vary. Negative attitudes towards LGBT persons do not operate in a social vacuum, but depend on specific contexts, situations and practices. In order to understand the complexities behind the negative attitudes, it is important to address the interconnection between legislative and policy measures, public opinion and political, cultural and religious discourses, as well as social interaction with and (in)visibility of LGBT persons.

The media, along with other institutions such as schools, and political and religious authorities, play an important part in shaping attitudes. In 2001, the Committee of Ministers stated that: “Homosexuality can still give rise to powerful cultural reactions in some societies or sectors thereof, but this is not a valid reason for governments or parliaments to remain passive. On the contrary, this fact only underlines the need to promote greater tolerance in matters of sexual orientation.”²²

Perceptions of LGBT persons are dependent on the connotations attached to them and the context in which they appear. When asking questions of “how” and “why” homophobia, transphobia and negative attitudes towards LGBT persons occur, this study has retrieved different answers from existing literature and key stakeholders in member states. Some general trends in relation to reactions to public debates concerning issues related to LGBT persons or to the hosting of public LGBT events can be identified. Visibility of LGBT persons and the public character of such events appear to increase the level of general reactions and expression of attitudes in both negative and positive terms. Discussions and drafting of new non-discrimination laws that grant rights to LGBT persons, along with Pride parades or demonstrations, have often generated debates shedding light on public attitudes towards lesbian, gay and bisexual persons albeit less towards transgender persons.

Attitudes towards LGBT persons are not homogeneous across Europe or within the member states. They may range from very negative to very positive or neutral, but their articulation and intensity may vary depending on the context as well as socio-demographic and political factors. Even though surveys and statements demonstrate the presence of a significant degree of homophobia and transphobia, positive attitudes towards LGBT persons and their enjoyment of universal rights are also detected in member states. This chapter focuses on patterns of existing anti-LGBT sentiment. Attitudes and arguments vary, but there are striking similarities across member states. The voicing of anti-LGBT discourse is often linked to perceptions of the nation, religion, family and traditional values as well as notions of the private and the public.

This chapter also investigates the representations of LGBT persons in the media, as the media have a significant influence on, and to some extent mirror, public opinion. Stakeholders in the member states have highlighted the importance of media representations and political and religious leaders. Negative representations and statements, coupled with a lack of positive initiatives, are found to have a significant impact on attitudes towards LGBT persons. The impact of the media on attitudes towards

22. Council of Europe Committee of Ministers, Reply to Parliamentary Assembly Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states, adopted on 19 September 2001, paragraph 6.

LGBT persons, as well as the existence of strong cultural and religious arguments against the acceptance and recognition of LGBT persons' universal rights, clearly indicate that while legislative measures and improvements are important tools, diversified approaches and strategies must be applied to circumvent negative attitudes.

1.2. Surveys

1.2.1. Surveys on attitudes

General attitudes towards LGBT persons are sometimes addressed in surveys conducted at European or national level. In surveys on public opinions and values, questions concerning homosexuality are often used as an indicator of contemporary value orientations. Surveys specifically investigating attitudes towards bisexual and transgender persons are very rare. However, given that homophobic attitudes identified in some studies relate to homosexual practices, such attitudes indirectly affect bisexual persons as well. Despite the lack of extensive information on the attitudes towards transgender persons, the high level of transphobic violence and discrimination discussed in other chapters of this report demonstrate a low level of acceptance and understanding of the human rights issues at stake for transgender persons in many member states of the Council of Europe.

Surveys presented in this study use different methodologies and questions, and the figures are, therefore, not directly comparable. Some studies survey attitudes towards LGBT persons, while others specifically refer to homosexuality or same-sex sexual practices directly. Certain surveys use different indicators to assess the general level of attitudes towards LGBT persons.

Surveys and studies on attitudes towards LGBT persons have been identified in many EU member states as well as in Armenia, Bosnia and Herzegovina, Croatia, Georgia, Iceland, Norway, Russian Federation, "the former Yugoslav Republic of Macedonia" and Turkey.²³ In addition, relevant information can be found in Eurobarometer,²⁴ which covers the EU member states only, as well as the European Values Study²⁵ and the European Social Survey.²⁶

According to a Georgian survey, 84% of respondents held negative views of homosexual persons.²⁷ In a survey from Bosnia and Herzegovina, 82% of the population held negative opinions about gays and lesbians,²⁸ although it is worth noting that the focus of the study was to register public opinions on "homosexuality and prostitution". Significantly more positive figures are found in a survey from the Netherlands requested by the Dutch Government, according to which "the percentage of the population, who can be characterised as "anti-gay", fell from 15% in 2006 to 9% in 2009".²⁹

Surveys on attitudes towards transgender persons are rarer. Exceptions are a survey from Germany, commissioned by the Federal Equality Body,³⁰ and a survey in the United Kingdom (Scotland), commissioned by the Scottish Centre for Social Research.³¹ The researchers in the latter study concluded: "discriminatory attitudes are more widespread in respect of some groups than others. They are particularly common in respect of Gypsies/Travellers and someone who has had a sex change operation (a description designed to refer to a transgender person)."³² The German study found that

23. This does not mean that there are no surveys or quantitative studies covering Council of Europe member states not mentioned here. It is, however, fair to conclude that surveys on attitudes towards LGBT persons are relatively scarce.

24. European Commission, Special Eurobarometer 296, "Discrimination in the European Union: Perceptions, Experiences and Attitudes", 2008; European Commission, Special Eurobarometer 317, "Discrimination in the EU", 2009.

25. European Values Study, "How do Europeans think about life, family, work, religion, sex, politics, and society?".

26. European Social Survey, "Exploring Public Attitudes, Informing Public Policy. Selected Findings from the First Three Rounds", 2005.

27. Referred to in: Quinn, S., "Forced Out: LGBT People in Georgia", ILGA-Europe/COC Netherlands, 2007.

28. Prism Research, "Researching Public Opinion about Homosexuality and Prostitution", Sarajevo, 2005, cited in Durkovic, S., "The Invisible Q?: Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina", p. 19.

29. Keuzenkamp, S., "Steeds gewoner, nooit gewoon. Acceptatie van homoseksualiteit in Nederland", Sociaal en Cultureel Planbureau, The Hague, 2010.

30. Sinus Sociovision Study from 2008 referred to in Federal Anti-Discrimination Agency (Germany), *Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben*, Berlin, 2010. available at: www.antidiskriminierungsstelle.de/RedaktionBMFSFJ/RedaktionADS/PDF-Anlagen/2009-04-02-schriftenreihe-band4.property=pdf,bereich=ads,sprache=de,rwb=true.pdf. This study was conducted with a representative sample of 2 610 adults.

31. Bromley, C., Curtice, J. and Given, L., "Attitudes to Discrimination in Scotland: 2006, Scottish Social Attitudes Survey", Edinburgh: Scottish Government Social Research, 2007. Representative sample of 1 594 adults.

32. *Ibid.*, p. ix.

45% agreed to the statement that they have no or little understanding of those who intend to or have changed their gender.³³ The researchers concluded a low problem awareness, as 49% believed transsexuals do not suffer discrimination and 44% thought that nothing needs to be done for transgender persons.³⁴

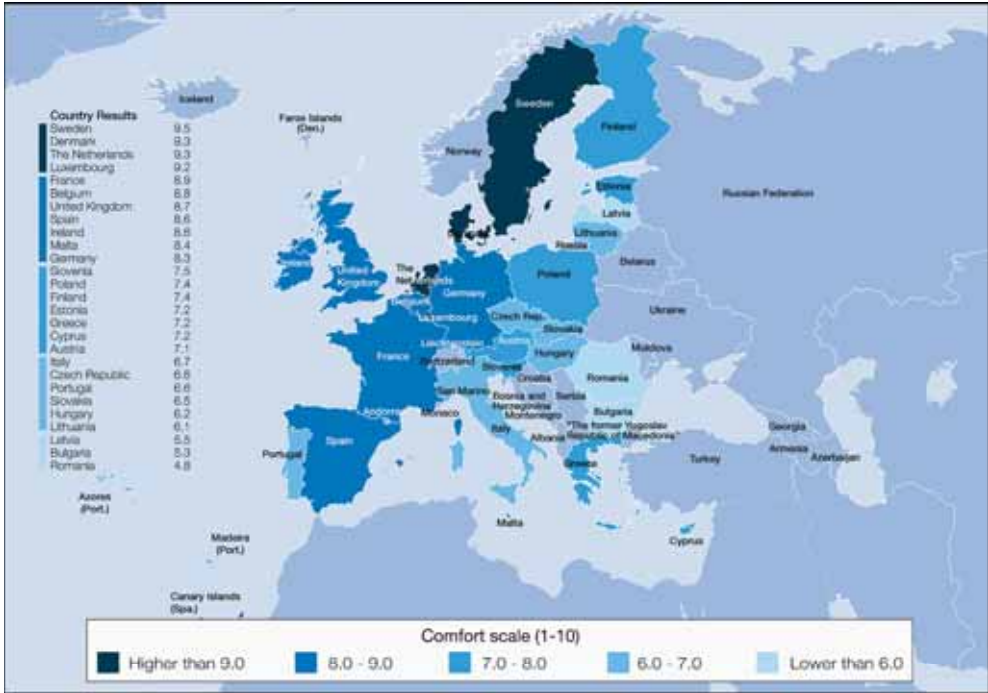
As for general attitudes, differences – as measured in the European Social Survey – have also been registered among countries regarding opinions on the following statement: “Gay men and lesbians should be free to live their own life as they wish”.³⁵ Data show that Sweden, Netherlands and Denmark register the lowest levels of disagreement with the statement (about 10% of respondents disagreeing), whilst Ukraine, Romania and the Russian Federation present the highest rates of disagreement (about 70% of respondents disagreeing with the statement).³⁶

1.2.2. Surveys on social distance: homosexual persons as neighbours

An alternative way to measure attitudes towards homosexual persons is to use a scale of social distance. The concept of “social distance” is meant to measure how comfortable respondents may feel in the presence of LGBT persons in the context of the workplace, family or other social and political settings.

A Special Eurobarometer survey from 2008,³⁷ covering the member states of the European Union, presented the respondents with the following question: “how would you personally feel about having a homosexual (gay man or lesbian woman) as a neighbour?”. On a 10-point scale, with 1 meaning “very uncomfortable” and 10 meaning “very comfortable” attitudes towards having a homosexual neighbour are illustrated in the following map:³⁸

Map 1.1: “How would you personally feel about having a homosexual as a neighbour?”



33. Sinus Sociovision Study from 2008 referred to in Federal Anti-Discrimination Agency, *Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben*, Berlin, 2010, p. 62.
 34. Sinus Sociovision Study from 2008 referred to in Federal Anti-Discrimination Agency (Germany), *Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben*, Berlin, 2010, p. 62.
 35. European Social Survey, “Exploring Public Attitudes, Informing Public Policy. Selected Findings from the First Three Rounds”, 2005.
 36. Ibid., pp. 16-17.
 37. European Commission, Special Eurobarometer 296, “Discrimination in the European Union: Perceptions, Experiences and Attitudes”, Chapter 9, 2008.
 38. All maps in this report are for illustrative purposes only to indicate the countries covered by the report.

It is concluded that “the average European is largely comfortable with the idea of having a homosexual person as a neighbour.”³⁹ However, there are large differences between countries. On a ten-point “comfort scale” respondents in Sweden (9.5), the Netherlands and Denmark (9.3) are the most comfortable with this idea. Respondents in Bulgaria (5.3), Latvia (5.5) and Lithuania (6.1) are less comfortable. Other studies measuring attitudes and “social distance” found similar patterns.⁴⁰

In the context of the European Values Study, carried out in 1999 and covering 32 Council of Europe member states, similar questions were asked (“Would you like to have homosexual neighbours?” and “Can homosexuality be justified?”). Among the member states surveyed, respondents in Denmark, Norway, Netherlands and Sweden were found to be the least negative, whereas respondents in Lithuania, Romania, Ukraine, Russian Federation and Turkey were the most negative.⁴¹

Surveys with similar questions have been carried out in some other Council of Europe member states, and several present highly negative figures. A Turkish survey from 2009⁴² showed that 87% of the population did not want to have homosexual neighbours – the same figure is found in an Armenian survey from 2005.⁴³ A survey from Croatia, from 2002, indicated that a little less than half of the people surveyed would not like a homosexual person as a neighbour.⁴⁴ In 2007, a research project in “the former Yugoslav Republic of Macedonia”, showed that 62% of those surveyed answered that it is “unacceptable to have neighbours who have sexual relations with people from the same sex.”⁴⁵

As for the socio-demographic and political profiles of the respondents, the Eurobarometer⁴⁶ survey further found that women are more positive than men, older generations more negative than young, less-educated persons less positive than higher-educated, and persons with left-wing political beliefs less negative than those with right-wing political views. This is in line with other surveys and assessments from NGOs interviewed during this study.

Replies to questions concerning having homosexual neighbours are just one indicator of attitudes towards lesbian, gay and bisexual persons in general. This is partly because the question only addresses the issue of homosexual persons and partly because a neighbour is just one of the examples that can be used to assess attitudes towards LGBT persons in daily life contexts. A Cypriot study illustrates that the degree to which homosexuality is regarded as a problem depends on whom the homosexual label is attached to. In the Cypriot case, respondents would be more uncomfortable with gay or lesbian persons teaching their child than if these persons were their colleague or neighbour.⁴⁷

1.2.3. Surveys on social distance: a homosexual person holding the highest political office

Another question in the 2008 Eurobarometer survey used to measure “social distance” concerned a homosexual person holding the highest political office in the country. The average on the “comfort scale” (with 1 representing very uncomfortable and 10 very comfortable) for EU member states was 7. Respondents in Sweden, Denmark and the Netherlands were the most positive, and people in Bulgaria, Cyprus and Romania were the most negative.⁴⁸ The question was repeated in 2009 with the

39. European Commission, Special Eurobarometer 296, “Discrimination in the European Union: Perceptions, Experiences and Attitudes”, 2008, p. 57.

40. European Commission, Special Eurobarometer 317, “Discrimination in the EU”, 2009; European Values Survey 1999/2000, pp. 85-91.

41. Data from the European Values Survey 1999/2000 data set. Analysed in: Stulhofer, A. and Rimac, I., “Determinants of Homonegativity in Europe”, *Journal of Sex Research*, Vol. 46/1, 2009, pp. 24-32; and the Atlas of European Values website, www.atlasofeuropeanvalues.eu/homepage.php?lang=en, accessed 20 September 2010.

42. Esmer, Y., “Radicalism and Extremism”, Bahcesehir University, 2009.

43. Carroll, A. and Quinn, S., “Forced Out: LGBT People in Armenia”, ILGA-Europe/COC Netherlands, 2007.

44. Lesbian Group Kontra, “Violence against Lesbians, Gays and Bisexuals in Croatia: Research Report”, Zagreb, 2006.

45. Coalition for Protection and Promotion of Sexual and Health Rights of Marginalised Communities, “Annual Report on sexual and health rights of marginalised communities”, 2009, p. 41.

46. Interviews with LGBT and human rights NGOs carried out in all Council of Europe member states between February and May 2008 and February and July 2010.

47. Cyprus College Research Center, “Attitudes and Perceptions of the Public towards Homosexuality”, 2006, also quoted in European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 33.

48. European Commission, Special Eurobarometer 296, “Discrimination in the European Union: Perceptions, Experiences and Attitudes”, Chapter 9, 2008.

comfort average having lowered to 6.5. In 2009, the survey also included Croatia, “the former Yugoslav Republic of Macedonia” and Turkey. The most negative answers in 2009 were found in Bulgaria, Romania and Turkey.⁴⁹ Notwithstanding the relatively positive average attitude registered by the Eurobarometer survey with regard to homosexual persons holding a political office, it is also worth noting that evidence collected for the purpose of this study shows that in the context of political elections homosexuality is sometimes used as a tool to attack the credibility of political candidates. This has been pointed out by stakeholders in Georgia,⁵⁰ “the former Yugoslav Republic of Macedonia”,⁵¹ Montenegro⁵² and Italy.⁵³

1.2.4. Surveys on social distance: homosexual or transgender persons as friends

The use of social distance is also relevant in other contexts such as the workplace, education and personal acquaintances and friendships. As LGBT persons cannot be merely defined by their sexual orientation or gender identity but are also family members, friends, teachers, partners or colleagues, there is not one simple way of assessing attitudes or the level of acceptance. Whereas LGBT persons may, for some people, not be accepted as in-laws, they may be accepted, for example, as colleagues.

In the sphere of personal relations some national surveys may help in understanding the attitudes found in some member states. In Bulgaria, 42% of respondents would not like to have a homosexual friend or colleague.⁵⁴ In a study from Bosnia and Herzegovina, 71% of respondents believed that they would feel very uncomfortable in the company of a homosexual person.⁵⁵ According to a Lithuanian study, 69% did not want homosexual persons to work in schools and 50% objected to homosexual persons working in the police force.⁵⁶

As noted, transgender persons are seldom referred to in general surveys about attitudes, in comparison to homosexual persons. Surveys carried out in United Kingdom (Scotland) and Germany, already referred to above, are the first but rather rare examples to register common attitudes concerning transgender persons.

1.2.5. Surveys on the prevalence of discrimination

Questions about the general prevalence of discrimination on grounds of sexual orientation were asked in a 2009 Eurobarometer survey, with Croatia, “the former Yugoslav Republic of Macedonia” and Turkey also included in addition to EU member states. The figures indicate that 47% consider that discrimination on grounds of sexual orientation is widespread, whereas 43% think that it is rare.⁵⁷ The interpretation of these figures appears to be problematic to the extent to which lower perception of discrimination may be associated with lower awareness of issues concerning LGBT persons and the recognition of their rights. There is a correlation between the countries where an above-average percentage of the population state have LGBT acquaintances and those where discrimination is thought to be widespread and vice versa. This indicates that having LGBT friends, relatives or acquaintances increases sensitivity to, and awareness of, this form of discrimination.

49. European Commission, Special Eurobarometer 317, “Discrimination in the EU”, 2009.

50. Quinn, S., “Forced Out: LGBT People in Georgia”, ILGA-Europe/COC Netherlands, August 2007.

51. Meetings with the Coalition for the Protection and Promotion of Sexual and Health Rights of Marginalised Communities, 26 April 2010, the Women’s Alliance, 27 April 2010, and the Helsinki Committee, 28 April 2010.

52. Meetings with EQUISTA, 5 May 2010, and Juventas, 6 May 2010.

53. Saviano, R., “Dossier, calunnie e voti comprati la macchina del fango targata Cosentino”, available at: www.repubblica.it/politica/2010/07/17/news/saviano_cosentino-5640367, accessed 14 October 2010.

54. Sociological Agency Skala, “Attitudes towards Minority Groups and Discriminatory Mindsets in Bulgarian Society”, sociological survey carried out within the project From Anti-Discrimination to Equal Opportunities – Innovative Methods and Effective Practices of the Commission for Protection Against Discrimination, Sofia, 2007. Also quoted in European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 36.

55. Prism Research, “Researching Public Opinion about Homosexuality and Prostitution”, Sarajevo, 2005.

56. The Market and Opinion Research Centre Vilmarus Ltd, “Discrimination against Various Social Groups in Lithuania”, 2006. Also quoted in European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 34.

57. European Commission, Special Eurobarometer 317, “Discrimination in the EU”, 2009.

The results of the 2008 and 2009 Eurobarometer surveys reveal that discrimination on grounds of sexual orientation is perceived as being particularly widespread in many Mediterranean countries.⁵⁸ Cyprus (66%) and Greece (64%) are the two countries where it is seen as being most widespread, with Italy and France (both 61%) also scoring far above the EU average of 47%.⁵⁹ On the other hand, the Eurobarometer survey also registered the fact that in many of the newer member states of the European Union discrimination on grounds of sexual orientation is perceived as much less widespread: Bulgaria, Czech Republic (both 22%), Slovakia (27%) and Estonia (28%).⁶⁰

An interpretation of developments regarding the general perception of discrimination on grounds of sexual orientation over time appears more ambiguous. Figures from 2009 show a decrease of four percentage points since 2008 (51%) in the belief that discrimination is widespread. At the same time, the view that such discrimination is rare has increased by two percentage points (41% in 2008). In 2006, the corresponding figures were 50% and 41%.⁶¹

The overview presents some limitations due to the lack of direct comparability of the figures and the methodology employed. The fact that surveys are often not repeated with the same questions on these issues is a serious obstacle when attempting to get a clear picture of the development of attitudes over time. Figures vary depending on the specific issue in question, and differences also exist between regions within a country. Some surveys show positive developments with increased acceptance, whereas others are more ambiguous. Public debates on LGBT rights and LGBT persons may also help in shedding light on the way in which attitudes are expressed and in assessing which arguments are referred to in order to support opinions on the subject.

1.3. The nation, religion and traditional values

Political and legal developments, such as the introduction of non-discrimination legislation which includes sexual orientation as a discrimination ground, invoke debates in many member states. Such developments generate and shape the public debate around issues concerning LGBT persons. Anti-LGBT discourse is found in member states in statements of politicians, opinion leaders and others. This discourse highlights the existence of a recurring set of arguments used to support negative attitudes towards LGBT persons. These arguments have their roots in strong perceptions on concepts such as the nation, culture, religion and traditional values.

Traditions and norms articulated as stemming from, and upholding, the nation are framing anti-LGBT discourse. Illustrative examples are found in several member states. Being homosexual is viewed as a “betrayal” of national values. For example in Armenia an interlocutor from the authorities explained that in Armenia being homosexual is often viewed as disloyal to the traditional values of the Armenian people.⁶² Homosexuality can also be referred to as damaging the unity and moral order of the country. With reference to the organisation of an LGBT Pride Parade in the Russian Federation, the Moscow Patriarchate was quoted as stating that it “infringes on our multi-ethnic nation’s moral norms, on public order, and, in the long run, on people’s future ... if people refuse to procreate, the nation degrades. So, gay propaganda ultimately aims at ruining our nation.”⁶³

In many countries, LGBT NGOs underlined that “traditional values” also have to do with traditional notions of gender, where LGBT persons are perceived as transgressing the normative perceptions and boundaries of what it entails to be “a man” or “a woman”. LGBT persons are regarded as provocative. In practice, this creates problems, in particular for effeminate men, masculine women, and those transgender persons who do not identify themselves with the binary division between “male” and “female”. Societies in which patriarchal values are perceived to be enforced and followed strictly tend also to have more difficulties in accepting LGBT persons. This has been pointed out by various stakeholders from Albania,⁶⁴ Georgia,⁶⁵ Montenegro⁶⁶ and Ukraine.⁶⁷

58. *Ibid.*, pp. 86-87.

59. *Ibid.*

60. *Ibid.*

61. *Ibid.*, p. 88.

62. National contribution (sociological report) on Armenia, p. 5.

63. Statement from the Department of External Church Relations of the Moscow Patriarchate. Quoted by: Interfax, “Stop Gay Propaganda in Russia – Moscow Patriarchate”, 23 May 2007.

64. Meetings with LGBT NGOs in Albania.

65. Meetings with the Office of the Public Defender, Inclusive Foundation, Georgian Young Lawyers Association, Women’s Initiatives Supporting Group, and legal expert Ana Natsvlshvili, 8-10 March 2010.

Religious institutions have been engaged in debates about the rights of LGBT persons, and in the opposition to LGBT prides in some member states. In some countries, religion and images of the nation appear to have been intertwined with processes of new state-building and international reorientation during the past two decades. In the context of the fall of communism, some member states have seen a “religious society [coming] to life again”.⁶⁸ Moreover, processes of state-building have also brought along a resurgence of not only religion, but also of nationalism.⁶⁹

The concept of “the nation” is also used in a different way in public discourse about LGBT persons. In some member states certain political groups use the promotion of respect for LGBT persons as a marker of tolerance inherent in the national culture. They highlight the tolerance of the “national culture” in a polarising way when compared to the perceived prejudices of immigrant communities. This has been witnessed in Denmark and the Netherlands, where the attitudes of immigrant and, in particular, Muslim communities have been the focus of attention, analysis and sometimes populist debates concerning LGBT issues.⁷⁰ This has generated debates on what is termed “homonationalism”⁷¹ as pointed out by Judith Butler: “We all have noticed that gay, bisexual, lesbian, trans and queer people can be instrumentalised by those who want to wage wars, i.e. cultural wars against migrants by means of forced Islamophobia. Currently, many European governments claim that our gay, lesbian, queer rights must be protected and we are made to believe that the new hatred of immigrants is necessary to protect us.”⁷² Ideas of the nation are thus used to both marginalise and integrate LGBT persons in different contexts, and in some instances to dissociate them from others, be it the national majority or immigrant populations.

Religious arguments have also been expressed and used by politicians who for instance quoted the Bible in such a way that it could be interpreted as inciting violence against homosexual persons.⁷³ In such discourses in particular, homosexuality is often linked to notions of sin, and Christianity is articulated as an integral part of the history of the nation and national (or “European”) values. In 2010, preceding a debate in the Parliamentary Assembly of the Council of Europe on a report focusing on LGBT human rights different religious communities collaboratively stated the following: “It is impossible that Europe, which is a part of an ancient Christian world and its culture is imbued with religion, from the high tribune of the Council of Europe votes for the standardisation of such abnormalities as homosexuality, bisexuality and other sexual perversions, that are considered not only by Christianity but also by all other traditional religions as the greatest sin, causing degeneration, physical and mental illnesses.”⁷⁴

The above statement is an example of different religious communities issuing joint statements against the rights of LGBT persons. Such an alliance is not exceptional and can also extend itself to the political domain. Interlocutors in “the former Yugoslav Republic of Macedonia” referred to opposition to the universal rights of LGBT persons as a matrimony between religious institutions and the government, since they were perceived to be opposed to any sort of human rights for LGBT persons.⁷⁵ Different religious communities collaborating on opposition against the basic human rights of LGBT persons have also been seen in other member states of the Council of Europe.

66. Meeting with the Ministry of Health, 7 May 2010.

67. NGO “Our World”, “Ukrainian Homosexuals and Society: A Reciprocation – Review of the Situation: Society, Authorities and Politicians, Mass Media, Legal Issues, Gay Community”, Kiev, 2007.

68. National contribution (sociological report) on Ukraine, p. 6.

69. Meeting with the Co-ordinator of the Coalition for the Protection and Promotion of the Sexual and Health Rights of Marginalised Communities in Skopje, 26 April 2010. The issue of nationalism and xenophobia as having importance in relation to anti-LGBT mobilisation was, for example, also accentuated by interlocutors in, among others, Estonia, Italy, Croatia, Serbia and the Russian Federation.

70. Drud-Jensen, M. T. and Knudsen, S. P., *Ondt i røven. Folk der har ondt i røven over bøsser – bøsser der har ondt i røven over folk*, Høst & Søn, Copenhagen, 2005. Mepschen, P., “Sex and the Other – Homosexuality and Islam in Dutch Public Discourse”, University of Amsterdam (Master’s thesis), 2008.

71. For more about the term, see: Puar, J. K., *Terrorist Assemblages – Homonationalism in Queer Times*, Duke University Press, Durham NC and London, 2007.

72. Butler, J., “I must Distance Myself From This Complicity with Racism”, Civil Courage Prize refusal speech, Christopher Street Day, Berlin, 19 June 2010. Speech made by Judith Butler, when she refused to receive a Civil Courage Prize at the Christopher Street Day in Berlin in 2010.

73. ILGA-Europe, “Human Rights + Responsibility? Respect – A Contribution to the Council of Europe Conference on Human Rights in Culturally Diverse Societies: Challenges and Perspectives”, 2008.

74. Joint statement signed by the Patriarch of the Georgian Orthodox Church, the Ambassador Extraordinary and Plenipotentiary of the Holy See to Georgia, Head of the Georgian Eparchy of the Armenian Apostolic Church, Acting Chief Rabbi of Georgia and the Plenipotentiary Representative of the Caucasian Muslims’ Organisation in Georgia, 29 January 2010.

75. National contribution (sociological report) on “the former Yugoslav Republic of Macedonia”, p. 9.

At the same time, it can be observed that there are also positive statements from certain religious communities, and a development over time in the attitudes among religious communities. For example, the Italian Waldensian and Methodist Protestant churches announced in 2010 that they would approve blessings of same-sex couples.⁷⁶ The Archbishop of Canterbury from the United Kingdom deems that same-sex relationships are comparable to marriage.⁷⁷

When touching upon issues of traditions and morals, the traditional concept of the family is often emphasised. Both in the sense that LGBT persons are perceived as a threat to traditional families, and in the sense that LGBT families are an anomaly⁷⁸ and homosexuality viewed as abnormal and a possible threat to demography.⁷⁹

The results of some national surveys have shed light on the existence of perceptions of LGB persons as being an anomaly and as such a threat to society, as the following examples demonstrate:

- In a study from Bosnia and Herzegovina, 77% believed that accepting homosexuality would be detrimental for the country.⁸⁰
- In a Serbian study, half of the respondents thought that homosexuality is dangerous to society, and that state institutions should work on preventing homosexuality.⁸¹
- According to a Lithuanian study,⁸² 47% of the Lithuanian population thought that homosexuality was an illness which should be treated.
- In a Serbian study, 70% considered homosexuality to be a disease⁸³ – a similar figure is found in Montenegro.⁸⁴
- In a Georgian study, 40% considered lesbian relationships a disease.⁸⁵

Pointing out that the issues of the nation, religion and traditional values are often articulated in anti-LGBT discourse is not the same as claiming that they as such are the final determinants of anti-LGBT attitudes. Based on analyses of findings from the European Values Survey, modernisation processes are found to be key factors in increased acceptance of homosexuality. Increased economic development and the process of urbanisation can be identified as factors reducing what can be called “homonegativity”.⁸⁶

1.4. Invisibility, the private and the public

When analysing general attitudes towards LGBT persons one important element to take into account is the question of visibility and invisibility in the public space of lesbian, gay, bisexual and transgender persons. LGBT persons are, indeed, often invisible in the public space and LGBT markers tend to be confined to the private sphere. Being openly LGBT in public can often be perceived as provocative. Several surveys and assessments by public authorities and NGOs refer to a general attitude which maintains that LGBT persons should not be visible in public, but rather be invisible and discreet or confine themselves to the private sphere. Harsh reactions against LGBT persons are seen, not least, in relation to the public presence of LGBT persons – for example, during Pride parades. This is exemplified by the following statement by a Danish member of parliament: “Those parades are

76. Italian Waldensian Church, Official Synod Press Release No. 10, “Il Sinodo apre di fatto alle benedizioni di coppie omosessuali” (The synod opens de facto to the blessings of same-sex couples), 26 August 2010, www.chiesavaldeese.org/pages/archivi/index_commenti.php?id=961, accessed 14 September 2010.

77. Gledhill R., “Rowan Williams: Gay Relationships Comparable to Marriage”, *Sunday Times*, 7 August 2008.

78. See, for example: Mozaika, “Homophobic Speech in Latvia: Monitoring the Politicians”, 2007.

79. National contribution (sociological report) on Azerbaijan, p.5.

80. Prism Research, “Researching Public Opinion about Homosexuality and Prostitution”, Sarajevo, 2005, cited in Durkovic, S., “The Invisible Q?: Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina”, p. 19.

81. Gay Straight Alliance, “Prejudices Exposed – Homophobia in Serbia”. Public opinion research report on the LGBT population, 2008. Research conducted for the Gay Straight Alliance by the Centre for Free Elections and Democracy (CeSID), February-March 2008.

82. The Market and Opinion Research Centre Vilorus Ltd, “Discrimination against Various Social Groups in Lithuania”, 2006.

83. Gay Straight Alliance, “Prejudices Exposed – Homophobia in Serbia”, op. cit.

84. Human Rights Action, “Homophobia in Montenegro”, October 2009. The survey was performed by the agency Ipsos Strategic Marketing.

85. Study conducted by the Institute of Policy Studies, referred to in: Quinn, S., “Forced Out: LGBT People in Georgia”, ILGA-Europe/COC Netherlands, 2007.

86. Stulhofer, A. and Rimac, I., “Determinants of Homonegativity in Europe”, *Journal of Sex Research*, Vol. 46/1, 2009, pp. 24-32.

repulsive, it is discomfoting and very provocative. It is a very unpleasant way to expose your sexuality. And they do it to provoke.”⁸⁷

The confinement of sexuality or markers of same-sex relations to the private sphere is compounded by negative views on same-sex relations as such. According to a German study, 32% of the population thought that two homosexuals kissing was disgusting.⁸⁸ In a Norwegian study, 30% of the male respondents were disgusted by the thought of two men living together.⁸⁹

Several NGO representatives flagged an informal “don’t ask, don’t tell” policy, rendering, in particular, LGB persons invisible, and generating harsh reactions against those transgender persons who are more visible when out in public. “Not private enough?” was asked in an analysis of homophobic and injurious speech in the Lithuanian media. The question refers to the idea of LGBT issues only having to do with sexual practice and of sexuality as a private matter. It is exemplified with a statement by a Lithuanian MP saying that “I am not against gays, but I wish they would not demonstrate their views.”⁹⁰ Some representatives of national human rights structures in member states lent a degree of understanding to such attitudes by expressing views that there should not necessarily be public venues, such as clubs and bars, for LGBT persons, or that resistance against public LGBT manifestations was understandable because they were merely displays of sexual, intimate or private matters.⁹¹

Fierce reactions against public LGBT demonstrations in many member states in recent years show that negative attitudes or homophobic and transphobic expressions are particularly accentuated when LGBT persons are visible as LGBT persons in public – either as individuals or as groups using or claiming their right to freedom of assembly. This shows that acts perceived as uneventful and unassuming for heterosexual couples (for example, holding hands, kissing or talking about their private life) may often be perceived as provocative and offensive when carried out by LGBT persons.

A study from the Netherlands reached the following conclusion: “People have most difficulty with visible expressions of homosexuality. For example, 40% of the population find it objectionable if two men kiss in public, and 27% feel the same if two women kiss. People are much less troubled by a straight couple kissing in public, with 13% taking exception to this. What is considered normal and acceptable for straight people does not apply to the same degree for gays and lesbians. As an example, one in three people in the Netherlands find it less problematic if a man and woman walk hand in hand than if two men do the same thing.”⁹²

The figures above indicate that a significant proportion of the population in different countries react negatively to observing same-sex affection in a public space. These figures show the existence of a worrying degree of negativity. This implies a possible risk for LGBT persons of encountering hostility if being open in public. The awareness of such risks in itself affects the behaviour and use of the public space by LGB persons and may also lead to internalised homophobia among LGB persons, as mentioned by several NGO representatives, including an interlocutor in the Russian Federation: “People are afraid to come out. This leads to internalised homophobia. LGB persons start to think that there is indeed something wrong with them.”⁹³

The perception of hostile reactions to the expression of LGBT persons’ identities in the surrounding environment may seriously impinge on the possibilities of organising public LGBT manifestations, not least importantly on the very access of LGB persons to public places in everyday life. A Slovenian study noted that: “It seems that gays and lesbians resort to mimicry to adjust to the heteronormativity of public spaces. They outwardly redefine their partnership and re-contextualise it as ‘just a friendship’.

87. Cited in Seeberg, K., “Bøsse-parade er frastødende”, *BT*, 21 July 2010, www.bt.dk/politik/boesse-parade-er-frastoedende, accessed 21 July 2010.

88. Institut für interdisziplinäre Konflikt und Gewaltforschung (IKG), “Indikatoren des Syndroms Gruppenbezogene Menschenfeindlichkeit im Vergleich”, 2006, p. 17, www.uni-bielefeld.de/ikg/index.htm, accessed 15 June 2006.

89. A survey from 2008 referred to in an interview with the Norwegian Ministry of Children, Equality and Social Inclusion, 26 April 2010.

90. In the Lithuanian tabloid *LT* (13 February 2007), quoted in Tereskinas, A., “*Not Private Enough?*”, LGL, Vilnius, 2008. Other studies also refer to the same issue in their title, for example: Organization Q, “*The Invisible Q*”, Sarajevo, 2008, and Kuhar, R. and Svab, A., *The Unbearable Comfort of Privacy: Everyday Life of Gays and Lesbians*, Politike, Ljubljana, 2005.

91. National contribution (sociological report) on Azerbaijan, p. 7 and National contribution (sociological report) on Ukraine, p. 6.

92. Keuzenkamp, S., “Steeds gewoner, nooit gewoon. Acceptatie van homoseksualiteit in Nederland”, Sociaal en Cultureel Planbureau, The Hague, 2010, pp. 355-356.

93. Meeting with the Russian LGBT Network, St Petersburg, 14 May 2010.

Only in circumstances that appear sufficiently safe, do some allow the expression of intimacies that point to their sexual status. Gays and lesbians are, as a rule, aware of the environment in general and the heteronormativity determining this environment.”⁹⁴

Persons belonging to the diverse community of transgender persons (including cross-dressers, transvestites and others who are – due to their gender reassignment or not – identifiable as either male or female) face negative attitudes, ridicule and outright rejection in public. This may also happen during simple everyday occurrences such as when transgender persons are not addressed with the right pronoun in shops or banks or when they use the toilet fitting their gender identity. The lack of positive role models of transgender persons in society further increases the negative attitudes towards transgender persons.

Invisibility is a common experience for LGB persons in all member states as reported by stakeholders interviewed for the purpose of this study. It is principally caused by the confinement of behavioural markers and expressions of non-dominant sexual orientations and gender identities to the private sphere, for fear of negative or hostile reactions, and concretely influences the quality of everyday life of LGBT persons. It also affects the collection of data concerning discrimination. If victims, or potential victims of discrimination, remain invisible to avoid harassment, the prevalence of discrimination is difficult to assess and document and, therefore, may often go unnoticed.

1.5. Invisibility and political change

The confinement of LGBT persons to the private sphere in some countries is also accompanied by silence, lack of awareness and lack of debate about LGBT-related issues. This was in particular highlighted by NGOs and national human rights structures in Albania, Montenegro and Turkey. In these countries, however, the general political silence about LGBT-related issues is sometimes broken. For example, in Turkey when a minister responsible for the affairs of women and families was quoted as saying that “homosexuality is a biological disorder, a disease”,⁹⁵ not only civil society and LGBT NGOs but also other members of the government, MPs, and journalists voiced criticism about the statement.⁹⁶ Among others, the Turkish health minister was quoted as stating that “the cultural and family structure of Turkey creates more difficulties for homosexuals and society should be more tolerant in handling the issue”.⁹⁷

In 2009 in Montenegro a debate in society started after the Minister for Human and Minority Rights had called the LGBT population “bad news” for Montenegro and had deemed it insulting to put national and sexual minorities on an equal footing.⁹⁸ The public statements of the minister triggered an otherwise non-existent debate about homophobia, transphobia and LGBT rights. Some public figures, as well as several civil society organisations, criticised the statements and for the first time publicly defended the human rights of LGBT persons.⁹⁹

In some member states (Albania, Bosnia and Herzegovina, Croatia, Georgia, Moldova, Montenegro, Serbia and “the former Yugoslav Republic of Macedonia”) legislative initiatives in recent years have

94. Švab, A. and Kuhar, R., *The Unbearable Comfort of Privacy: The Everyday Life of Gays and Lesbians*, Politike, Ljubljana, 2005, pp. 95-96 (e-book available at: www2.mirovni-institut.si/eng_html/publications/pdf/MI_gay_eng.pdf). also quoted in European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 35. For a similar analysis, see, for example: Coalition for the Protection and Promotion of the Sexual and Health Rights of Marginalised Communities, “Annual Report on the Sexual and Health Rights of Marginalised Communities”, “the former Yugoslav Republic of Macedonia”, 2009.

95. *Hürriyet Daily News*, “‘Homosexuality is a Disease’ Says Turkish Minister”, 7 March 2010.

96. For more on the case, see, for example: www.lambdistanbul.org/php/main.php?menuID=5&altMenuID=6&icerikID=8669, <http://bianet.org/bianet/toplumsal-cinsiyet/120511-bdpli-kisanak-ve-chpli-soysal-ayrimci-bakan-kavaf-istifa-etsin>, and www.kaosgl.com/icerik/chp_milletvekili_sevigenden_kavaf_icin_soru_onergesi, accessed 26 May 2010.

97. *Hürriyet Daily News*, “Health Minister Again Challenges Colleague, This Time on Gays”, 10 March 2010, www.hurriyetdailynews.com/n.php?n=government-members-split-over-homosexuality-2010-03-10, accessed 17 March 2010. For more examples from Turkey, see national contribution on Turkey or: www.lambdistanbul.org/php/main.php?menuID=5&altMenuID=6&icerikID=8669, www.bianet.org/bianet/toplumsal-cinsiyet/120511-bdpli-kisanak-ve-chpli-soysal-ayrimci-bakan-kavaf-istifa-etsin, and www.kaosgl.com/icerik/chp_milletvekili_sevigenden_kavaf_icin_soru_onergesi, accessed 26 May 2010.

98. National contribution (sociological report) on Montenegro, p.5.

99. Meetings carried out with NGOs, the Ombudsman office and public authorities in Montenegro, 5-7 May 2010. Note also the letter sent by Commissioner Hammarberg to the Montenegrin Prime Minister, available at <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1723369&SecMode=1&Doclid=1667996&Usage=2>.

generated awareness or debate on the rights of LGBT persons. In these countries, the adoption of new non-discrimination legislation, or plans thereof, have caused considerable debate, in particular centred on the issue of including sexual orientation, and in some cases gender identity. However, sexual orientation and gender identity have not been included in all national legislations as prohibited grounds of discrimination. Nevertheless, the attention and discussions on sexual orientation and gender identity have been instrumental, to some extent, in creating an increased level of visibility for LGBT communities and issues related to the enjoyment of human rights by LGBT persons in member states. Some NGOs have also highlighted that the EU accession processes and especially the publication of EU Progress Reports have been instrumental in ensuring that sexual orientation, and to some degree gender identity, be included in national non-discrimination legislation.

The attitudes described throughout this chapter underline that awareness-raising and training are pivotal in relation to needed legal changes in this field. Improvements in the recognition of the rights of LGBT persons are influenced by the existence of multiple factors, including the positive obligations of states to counter discrimination. This process is complex and changes at the political level depend on the social situation, and vice versa. An example of this interaction between different elements in the promotion of enjoyment of human rights by LGBT persons can be illustrated by the process related to the adoption of legislation on registered partnership in Iceland in 1996 and on gender-neutral marriage in 2010. A interlocutor commented on this: "I wondered quite a lot about how we have been able to move so rapidly forward and I think it is a combination of many things: first of all, an active NGO promoting the rights of LGBT persons; secondly, several well-known people in Iceland came out and thereby gave LGBT persons a face – LGBT stopped being an anonymous group; and, thirdly, the discussions on LGBT issues were founded on facts and not hearsay and assumptions which were promoted by academics. This fact-based approach and personal identification of LGBT persons gradually made the voice of the opposition die out."¹⁰⁰

1.5.1. Social interaction

Many stakeholders interviewed in member states underlined the lack of knowledge on issues related to sexual orientation and gender identity, the lack of social interaction between general population and LGBT persons, resulting in the prevalence of misinformation and misrepresentations regarding LGBT persons which are at the roots of negative attitudes and stereotypes. Studies show that the people who are most negative towards LGBT persons are also those who, as far as they know, are not in contact with LGBT persons. The Eurobarometer survey from 2008 shows a certain correlation between those who have acquaintances who are homosexual and the level of positive attitudes towards having a homosexual person as a neighbour, or as a country leader.¹⁰¹ The differences are quite remarkable, and indicative of significant differences in the level of visibility of LGBT persons in the countries concerned. The fewest people who state having homosexual acquaintances can be found in Romania (3%), Latvia (6%) and Bulgaria (7%), whereas most people with homosexual acquaintances are found in the Netherlands (69%), Sweden (56%), as well as in Denmark, France and the United Kingdom (all 55%).

The Eurobarometer survey, based on replies to the question of having an LGBT person as a country leader, sums up this finding. "It is quite stunning how potent an influence diversity in one's social circle is upon attitudes to minorities. Being open-minded and having contact with minorities is the factor with the most positive influence on people's attitudes. When rating out of 10, how comfortable (with 10 being completely comfortable) they would feel with a LGBT person attaining the highest elected office in the land, those with LGBT friends gave an average rating of 8.5, while those without gave an average rating of 5.5 – a significantly lower rating. This sort of finding is now consistent across three waves of this Eurobarometer study and is, no doubt, going to continue being so."¹⁰² In the Russian Federation, an expert stated: "Very few people in Russia have personal acquaintances with LGB persons. Even less people know transgender persons, because it is a very new phenomenon in our society. People with personal relations with LGBT persons have a higher degree of tolerance. Another factor is of course the location: people from bigger cities have a higher tolerance level."¹⁰³

100. Meeting with Assistant Professor Hrefna Frioriksdottir, Iceland, 14 July 2010.

101. European Commission, Special Eurobarometer 296, "Discrimination in the European Union: Perceptions, Experiences and Attitudes", 2008.

102. European Commission, Special Eurobarometer 317, "Discrimination in the EU", 2009, p. 119.

103. Meeting with Professor I. S. Kon in Moscow, 11 May 2010, National contribution (sociological report) on the Russian Federation, p. 7.

1.5.2. Regional differences

In most member states LGBT communities and LGBT NGOs are active in the bigger cities, whereas the situation is remarkably different in rural areas. Differences can be discerned on several interconnected levels: the degree of visibility is lower outside the bigger cities, the extension of LGBT networks is smaller, the risk of discrimination is assessed as being higher, and the possibilities to live as an openly LGBT person are assessed as being considerably lower. The diversity and relative anonymity coupled with the possibility to choose between the different networks and service providers found in the bigger cities create spaces for living openly as an LGBT person. Rural areas often lack opportunities of this kind. This means that LGBT persons with a sufficient amount of resources and possibilities often move to bigger cities as a way to distance themselves from the social control of the family and local communities, and to gain access to LGBT networks, communities and venues that are usually easier to find in an urban context.

As LGBT communities and NGOs are primarily found in, and focused on, larger urban areas, the amount and quality of data about the situation in rural areas is under-developed. It should, however, be noted that the wide availability of the Internet and new social media may, to a certain extent, mitigate the regional differences and diminish the social isolation and invisibility of LGBT persons living in rural areas.

1.6. *Anti-LGBT discourse in the media*

The media have a significant influence on, and to some extent mirror, public opinion. This section analyses how LGBT persons and their lives are represented and portrayed in the media across the member states.¹⁰⁴

In 1997, the Council of Europe Committee of Ministers called on member states to combat “hate speech” by requesting the public authorities and institutions to refrain, especially in the media, “from statements ... which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance”.¹⁰⁵ While this recommendation does not directly refer to homophobic or transphobic hate speech, the Committee of Ministers has expressed specific concern about hatred towards LGBT persons being disseminated in the media and by public statements in recommendation CM/Rec(2010)5¹⁰⁶ on measures to combat discrimination on grounds of sexual orientation and gender identity. In this recommendation it is stated that 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”.¹⁰⁷

Findings presented in this chapter demonstrate the importance of the impact of the media in relation to hate speech towards LGBT persons. Apart from negative incidents and portrayals of LGBT persons in the media, positive developments can also be reported.

Incidents of homophobic discourse in the media have been identified in many member states, including Bosnia and Herzegovina, Italy, Poland, Latvia, Lithuania, Germany, “the former Yugoslav Republic of Macedonia” and the United Kingdom (Scotland).¹⁰⁸

104. Media is understood as public and private media as well as the Internet, newspapers and television. Examples of hate-motivated speech can be found in different sections of this report, e.g. in the chapter on Freedom of Assembly and Association (chapter 3). In the chapter on Hate-motivated crime and speech (chapter 5) the international and European framework on hate speech is described.

105. Council of Europe Committee of Ministers Recommendation No. R (97) 20 on “hate speech”, adopted on 30 October 1997.

106. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010.

107. Ibid.

108. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, pp. 91-93; national contributions (sociological reports) of the countries mentioned.

A UK study called negative and inaccurate representations of transgender persons “an endemic problem, leading to considerable suffering on the part of transgender persons”.¹⁰⁹ It also suggests that such representations inspire at least some verbal and physical abuse against transgender persons.

According to a study carried out in Lithuania, journalists in the tabloid press use homophobic language. In some tabloids journalists have used the word “pervert” in headlines.¹¹⁰ Furthermore, the host of a TV programme covering a banned Pride parade in May 2007 recited excerpts from an Internet encyclopaedia in which homosexuality was regarded as a perversion comparable to zoophilia, paedophilia or necrophilia.¹¹¹ In an attempt to counterbalance such negative trends the Lithuanian Gay League has developed a guide for better reporting on LGBT issues.¹¹² Although still limited, the coverage of neutral or positive coverage on LGBT topics has increased in Lithuania.¹¹³ This is also noted in other member states.

1.6.1. Representations of LGBT persons in the media

The vast majority of LGBT NGOs interviewed for this report perceived that LGBT issues lack presence in the media and that media, in varying degrees, simplify, sensationalise and stereotype LGBT persons and issues. A Slovenian study¹¹⁴ carried out a comprehensive analysis of the Slovenian print media between 1970 and 2000 and found five dominant categories of LGB images:

- Stereotyping – relying on rigid gender schemes presenting gay men as effeminate and lesbian women as masculine.
- Medicalisation – consigning homosexuality to the medical and psychiatric spheres and searching for causes.
- Sexualisation – reducing homosexuality to a question of sex.
- Secrecy – making homosexuality appear as concealed and related to shame and regret.
- Normalisation – making homosexuals appear as heterosexuals in order to make homosexuality less threatening and politicised.

The study found that homosexuality caused uncertainty and uneasiness and that homosexuality was more acceptable if it was depoliticised and rendered as entertainment.¹¹⁵ A survey in the United Kingdom (Scotland) also examined how LGB issues were presented in the written media over an eight-month period.¹¹⁶ Key findings included:

- Most newspapers would not publish racist statements on their letters page, but did print homophobic statements and demonstrated ignorance of sexual orientation issues.
- It is rare to read a story about gay issues in an everyday context. Newspaper coverage often reinforces the view that sexual orientation is all and only about sex.
- Many newspapers are disproportionately interested when gay persons commit crimes, and emphasise the sexual orientation of the perpetrator even if it has no relevance to the crime committed.
- Some newspapers portray a one-dimensional view of gay male life, reinforcing stereotypes.

The EU Fundamental Rights Agency found additional evidence for stereotyping ways of portraying LGBT persons in the media in Luxembourg, Poland, Latvia, Denmark, Portugal and Germany.¹¹⁷ These studies correlate with research findings in other member states. In a study from Bosnia and

109. Trans Media Watch, “How Transgender People Experience the Media. Conclusions from Research November 2009-February 2010”, p. 11.

110. Tereskinas, A., “*Not Private Enough: Homophobic and Injurious Speech in the Lithuanian Media*”, 2007.

111. Ibid.

112. Lithuanian Gay League, “A Media for Diversity: LGBT in the News – A Guide for Better Reporting”, available at www.ilga-europe.org/home/what_we_do/developing/resources_on_capacity_building/working_with_media, accessed 18 October 2010.

113. Tereskinas, A., “*Not Private Enough: Homophobic and Injurious Speech in the Lithuanian Media*”, 2007.

114. Kuhar, R., *Media Representations of Homosexuality: An Analysis of Print Media in Slovenia, 1970-2000*, Mediawatch, Ljubljana, 2003: e-book available at: <http://mediawatch.mirovni-institut.si/eng/mw13.htm>. This study is also referred to in European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 92.

115. Ibid.

116. Stonewall, “WRITTEN OUT. The Scottish Press’ Portrayal of Lesbian, Gay, Bisexual and Transgender People”, Scotland, 2007.

117. Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, pp. 91-93.

Herzegovina for example, 58% of LGBT respondents stated having witnessed discrimination against LGBT persons by the media, and the report concluded that “the media has been seen as the primary public promoter of homophobia through the use of hate language”.¹¹⁸ The media as an active player in the creation of negative perceptions of LGBT people is also, for example, found in an analysis of the Russian media.¹¹⁹ According to a Georgian study, analysing the representation of LGBT issues and LGBT persons in the Georgian media in 2005, 65% of the statements made in the public media analysed were negative; while 35% were neutral. Positive statements about LGBT persons were non-existent.¹²⁰ A Serbian study in 2008 found 10% of the articles negative, 67% neutral and 7% positive.¹²¹ A comprehensive analysis of Turkish print media found that 60% of LGB-related media reports were homophobic or not pro-equality.¹²²

Organisations representing transgender persons have raised strong concerns regarding the “medicalisation of identity”, and the medical-legal labels they feel imposed on them, not only by the medical profession and public officials but also by society at large and also those transmitted in the media. Indeed, a Belgian study¹²³ found hardly any media coverage of transgender persons outside of a medical or problematising perspective. This appears to be common across many Council of Europe member states, with the exception of media coverage of transgender persons in the entertainment industry (“drag queens”).

Groups or themes covered by the media vary. Articles and items about gay men are mostly covered, whereas lesbian and bisexual women are largely invisible and under-represented in the media, including in the Czech Republic, Austria, Portugal, Slovenia, Sweden and the United Kingdom.¹²⁴

A study of the media coverage of different minority groups in Armenia, Azerbaijan and Georgia has revealed that marginalised groups have little or no access to the press. Observing the placement of the articles as a measure of their newsworthiness, it is concluded that news about minorities is generally not considered very newsworthy.¹²⁵ Studies in Albania, Belgium, Germany and Portugal also show that homosexuality, in varying degrees, is still considered taboo and consequently attracts very little media attention. In an Albanian survey, 98% of LGBT respondents thought that LGBT issues were dealt with in an offensive manner, or as something abnormal.¹²⁶ In a UK study, 70% of transgender persons thought that on the whole representation of trans persons in the media was negative.¹²⁷ In a German study, 63% of the LGBT respondents thought that any depiction of non-heterosexuality was still taboo.¹²⁸

Studies also refer to distorted representations of LGBT persons. One reason for that might be that LGBT NGOs are often not the primary source of information – in a Serbian study, LGBT NGOs were primary sources in only 10% of the articles analysed.¹²⁹ According to another study from Armenia, this was the case in only 2% of the information analysed.¹³⁰ Representation of LGBT activists in the media is also hindered by the request of anonymity by some activists, which is not always respected by the media. Incidents where photos or personal details about LGBT activists have been exposed against their will after being interviewed have been mentioned in some member states, including in Albania and the Russian Federation.¹³¹

Practical initiatives: In 2005 in the Russian Federation, the Institute of Press Development, together with the NGO “LesbiPARTYya”, organised two educational seminars for journalists in St Petersburg.

118. Organization Q, “The Invisible Q? Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina”, Sarajevo, 2008, p. 75.

119. Moscow Helsinki Group, “Situation of Lesbians, Gays, Bisexuals and Transgenders in the Russian Federation”, 2009.

120. Inclusive Foundation, “Representation of Homosexuality/Homosexuals in Georgian Media”, 2006.

121. Labris, “Annual Report on the Position of LGBTTIQ Population in Serbia for 2008”, Belgrade, 2009.

122. Meeting with Kaos GL in Ankara, 3 March 2010.

123. FRA national contribution on Belgium.

124. Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 92.

125. Media Diversity Institute, “Press Coverage of Minority Groups in the South Caucasus 2004-2005”, 2005.

126. GISH, “Survey Research with the LGBT Community in Albania”, 2006.

127. Trans Media Watch, op. cit., p. 6.

128. Jung, V., “Darstellung von Homosexualität in TV-Unterhaltungssendungen” (thesis), University of Bamberg, Bamberg, 2003.

129. Labris, “Annual Report on the Position of LGBTTIQ Population in Serbia for 2008”, Belgrade, 2009.

130. Carroll, A. and Quinn, S., “Forced Out: LGBT People in Armenia”, ILGA-Europe/COC Netherlands, 2009.

131. Meetings with Aleanca LGBT Albania, 30 April 2010, and FtM Phoenix in the Russian Federation, 11 May 2010.

The seminars served the purpose of dismantling myths and stereotypes about LGBT persons, and they allowed journalists to ask questions to representatives of the LGBT community.¹³²

The British public service broadcaster Channel 4 monitors how the channel “properly reflects the varied passions, aspirations, and concerns of ethnic minority groups, gays and lesbians, people with disabilities, and those from different social backgrounds”. For that purpose, Channel 4 conducts ongoing audience reputation tracking surveys and commissioned a study in 2009 on the viewers’ perceptions of the representation and portrayal of lesbian women and gay men – with a sample of 609 heterosexuals and 385 homosexual and bisexual persons.¹³³ Channel 4 documentaries have been praised by transgender persons for their educational value in relation to transgender issues.¹³⁴

The Independent Press Complaints Commission in the United Kingdom, which receives complaints about the editorial content of newspapers and magazines is in direct contact with an organisation monitoring the way transgender persons are portrayed in the UK media (Trans Media Watch) and has adopted a policy stipulating that a person should only be described as transsexual or transgender when it is relevant to the news story.¹³⁵

1.6.2. Positive trends regarding representations of LGBT persons

Indicators of a more nuanced representation of LGBT persons and their issues can also be observed in some member states. A study on media representations of LGBT persons in “the former Yugoslav Republic of Macedonia” found positive tendencies. Even though the media in this member state still, to some extent, portray LGBT persons in an exaggerated sexual way and as a Western phenomenon, the situation changed in the period between 2000 and 2009. Influenced by the emergence of new media and LGBT activism, the quality of the coverage and number of articles increased. The following quotation sums up the analysis:

The main characteristics of the newspapers’ articles from this period, and their main difference from the previous one, is that homosexuality is no longer just a western phenomenon, but has now acquired a status of visibility in the local context as well. It is still significant that a demarcation line between “Us” and “Them” is drawn, but it has now been internalised, and the binary division is further sustained (hetero/homo). Considering the influence of NGOs targeting the human rights of LGBT persons, the media discourse showcases significant increase in this direction. Important discursive characteristics of media articles from this period are the tendency for normalisation. Most of these arguments are used as implicit justification for enjoying equally the rights ascribed for heterosexual persons.¹³⁶

A study in the Czech Republic noted a trend of decreased negative stereotyping and sexualisation of LGBT persons and an increased normalised appearance of LGBT persons in documentaries and television series.¹³⁷ The analysis in other member states of the Council of Europe further shows that neutral or affirmative attitudes are prevalent, and that the use of stigmatising terms and words has significantly decreased. Positive “role models” in cultural, political and artistic life are also highlighted by different interlocutors as being of great importance.¹³⁸

Practical initiative: The Ukrainian Television and Radio Broadcasting Act obliges broadcasting companies to officialise their editorial statute. This would specify, among other things, “requirements for dissemination of information concerning various social groups (national and sexual minorities, religious groups, hospital patients and the disabled)”. Noteworthy is that in establishing the rules governing dissemination of such information, the statute shall not violate the non-discrimination principles established in the act and in other legislation. In addition, paragraph 5 of the act stipulates

132. Sabynaeva, M., “Lesbians, Gays, Journalists: In Search of Mutual Understanding”, November 2005, available in Russian at: www.queerumir.ru/site/politics/activism/press.html, accessed 17 January 2010.

133. Channel Four Television Corporation, “Report and Financial Statements 2009”, 2010, p. 50.

134. Trans Media Watch, op. cit., p. 6.

135. Editor’s Code of Practice Committee, “Press Code Change on Gender Discrimination”, 5 May 2005, available at: www.pcc.org.uk/news/index.html?article=Mzc=, accessed 18 October 2010.

136. Dimitrov, S., “Sexualities in Transition: Discourses, Power and Sexual Minorities in Transitional Macedonia, Euro-Balkan – Institute for Humanities and Social Science Research, Skopje, 2009, p. 88.

137. Working Group on the Issues of Sexual Minorities of the Minister for Human Rights and National Minorities, “Analysis of the Situation of the Lesbian, Gay, Bisexual and Transgender Minority in the Czech Republic”, Government of the Czech Republic, 2007.

138. For example, FRA national contribution on Ireland, and field trip interviews in Iceland, July 2010.

that the editorial statute warrants creation of an internal editorial board that shall monitor journalists' compliance with principles, as set forth in the statute.¹³⁹

1.7. Conclusions

While the attitudes towards LGBT persons vary among and within the 47 member states of the Council of Europe, common root causes for homophobic and transphobic attitudes have been identified. Homophobic and transphobic opinions can be found both in the context of public debates and among the population at large.

Lack of awareness of human rights issues concerning LGBT persons has been registered in some of the Council of Europe member states as a key issue which has an impact on the shaping of negative attitudes as this feeds the prevalence of misinformation and misrepresentations of LGBT persons. Socio-demographic factors, as well as political convictions, have a further impact.

Certain arguments appear to be often used to articulate anti-LGBT discourse. Such arguments are centred on notions of the nation, religion and traditional values to which LGBT persons are usually seen as posing a threat. Notions of the nation, however, can also be mobilised in order to create discourses on values of tolerance and acceptance of LGBT persons while using this argument to denigrate the perceived intolerance on the part of immigrant communities. Whilst religious figures sometimes generate negative attitudes with respect to LGBT persons, at the same time, it has been observed that there have been positive statements from certain religious communities in member states. Traditional concepts of the family unit, and thus the perception that LGBT persons are a threat to families, are also prevalent in Council of Europe member states. Coupled with this is the prevalence of attitudes towards LGBT families that view this family unit as an anomaly.

The invisibility of LGB persons in different contexts is found in all member states as an important phenomenon motivated by the fear of negative reactions to public displays of one's sexual orientation. Open expressions of one's sexual orientation (as well as gender identity) are, in fact, likely to be considered provocative and flaunting, not least because they are often perceived to be related to sexuality alone and so regarded as a private matter. Invisibility, however, does not simply jeopardise the enjoyment of human rights by LGBT persons, it also renders the identification of patterns of discrimination, homophobia and transphobia more difficult.

Less is known regarding attitudes towards transgender persons, due to the fact that fewer surveys and investigations have been carried out. Transgender persons can also be more visible in comparison to LGB persons, which has made them into particular targets. They may therefore suffer more from a problem of over-visibility which, in a homophobic and transphobic environment, can have severe consequences as the chapter on "hate crime and hate motivated violence" will show. There is the further problem of negative and inaccurate representations of transgender persons in the media.

The media play an important role both in creating common attitudes toward LGBT persons as well as mirroring such attitudes. The situation of invisibility of LGBT persons in many member states further accentuates this role and in some cases exacerbates the existence of stereotyping and confinement of issues concerning sexual orientation and gender identity to the private sphere or to the domain of "taboos". Incidents concerning homophobia and transphobia in the media are not rare and they involve both journalists themselves as well as statements issued by public figures in the press or through other means of communication. The fact that issues concerning LGBT persons are still considered taboo in varying degrees throughout member states is confirmed by their general lack of visibility in the media. Studies have shown that lesbian women as well as bisexual and transgender persons are even less visible than gay men in the media.

LGBT persons are subjected to various forms of stereotyping in parts of the media across member states. Sexual orientation and gender identity are often depicted in a morbid way and semi-erotic illustrations are found in articles covering topics of great concern to LGBT persons, contributing to prejudice. Sexual orientation is often reduced to a mere matter of sexual activity and preferences, while issues concerning transgender persons are often addressed in a pathologising medicalised way. Transgender persons are often presented in a stereotypical and ridiculed manner. Media professionals

139. For example see national contribution on Ukraine.

often lack knowledge and the necessary vocabulary to address LGBT issues in a representative and balanced way, although some reports confirm a gradual trend in some countries to a more nuanced and informed perspective on LGBT persons.

Attitudes towards LGBT persons and their dissemination through the media as well as their shaping by the media themselves may have a strong impact on the general perception of the importance of promoting the enjoyment of human rights by LGBT persons. Depending on the context, this could either enhance or diminish the possibility for legislative and political change. This in turn may seriously jeopardise the perception of the necessity to combat discrimination towards LGBT persons and slow down the process of recognition of universal rights.

2. Overall legal framework

This chapter describes the international, European and national legal frameworks related to non-discrimination with particular reference to the grounds of sexual orientation and gender identity. The second part of the chapter describes the frameworks related to the legal recognition by states of a transgender person's preferred gender and name.

2.1. The international and European legal framework on non-discrimination

International framework

The principles of equality in dignity and rights and non-discrimination are fundamental elements of international human rights law. These principles are enshrined in Articles 1 and 2 of the Universal Declaration of Human Rights and reiterated as legally binding obligations in the UN international covenants. Thus, Article 2, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR) and Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (ICESCR) oblige states to ensure the enjoyment of rights without any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social, property, birth or other status. It should be noted that the list of discrimination grounds given in the covenants is open-ended. Although neither sexual orientation nor gender identity are expressly mentioned as prohibited grounds, the respective treaty bodies have interpreted the covenants as including these grounds within the scope of the non-discrimination provisions.

The principle of non-discrimination before the law is laid down in Article 26 of the ICCPR and prohibits discrimination on the same grounds listed in Article 2, paragraph 1. Notwithstanding the absence of explicit mention of sexual orientation among the prohibited grounds, the Human Rights Committee in its case law has considered that sexual orientation is covered under the ground of "sex". In the communication on the case *Toonen v. Australia* in 1994, the committee affirmed that "sex" in Article 26 had to be read as including sexual orientation.¹⁴⁰ The state concerned was found in breach of the article in relation to the existence of criminal provisions for same-sex consensual sexual activity in Tasmania. Some nine years later, in 2003, in the case *Young v. Australia*,¹⁴¹ the committee recalled the jurisprudence of *Toonen v. Australia* and found a violation of Article 26 with regard to denial of pension benefits to same-sex partners. Similar conclusions were reached in 2007 in the case *X v. Colombia*.¹⁴²

In its General Comment No. 20, the UN Committee on Economic, Social and Cultural Rights explains that the notion "other status" contained in the list of non-discrimination grounds in UN instruments evolves over time and varies according to the context. Thus, the committee applies a dynamic approach to the interpretation of this wide notion and has, among others, recognised "sexual orientation" and "gender identity" as forming part of this concept.¹⁴³ As a consequence, the "States Parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."¹⁴⁴

The principle of non-discrimination is also part of more specialised UN human rights conventions. The UN Convention on the Elimination of All Forms of Discrimination against Women contains a non-discrimination clause in Article 2 and lays down an obligation to eliminate prejudice and stereotyped roles of men and women.¹⁴⁵ Recently, the Committee on the Elimination of Discrimination against

140. UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, 30 March 1994, CCPR/C/50/D/488/1992, paragraph 8.7.

141. UN Human Rights Committee, *Young v. Australia*, Communication No. 941/2000, 6 August 2003, CCPR/C/78/D/941/2000.

142. UN Human Rights Committee, *X v. Colombia*, Communication No. 1361/2005, 14 May 2007, CCPR/C/89/D/1361/2005.

143. UN Committee on Economic, Social and Cultural Rights, General Comment No. 20 on non-discrimination in relation to economic, social and cultural rights, 2009.

144. *Ibid.*, paragraph 32.

145. Convention on the Elimination of All Forms of Discrimination against Women, 1979.

Women clarified in a general recommendation that “discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. ... States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”¹⁴⁶

Similarly, Article 2 of the UN Convention on the Rights of the Child constitutes a general non-discrimination provision for the enjoyment of the rights protected under the convention. In its General Comment No. 4 on adolescent health, the Committee on the Rights of the Child referred specifically to sexual orientation as a prohibited ground of discrimination, albeit not gender identity.¹⁴⁷

European framework

Article 14 is the central provision on non-discrimination contained in the European Convention on Human Rights. The provision gives an open-ended list of discrimination grounds, which are repeated in Article 1 of Protocol No. 12 to the Convention. The protocol has a wider scope of application than Article 14 since it is not limited to the rights and freedoms set out in the Convention.¹⁴⁸

Neither Article 14 nor Protocol No. 12 specifically mentions sexual orientation or gender identity as prohibited discrimination grounds. In the commentary on the provisions of the said protocol, it is expressly stressed that the reason for adopting an identical set of non-discrimination grounds in this instrument is that an inclusion of other discrimination grounds “was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included”.¹⁴⁹ However, the European Court of Human Rights confirmed in 1999 that sexual orientation is a discrimination ground covered by Article 14 of the Convention.¹⁵⁰ In the judgment *P.V. v. Spain*,¹⁵¹ the Court has explicitly mentioned transsexuality – albeit not gender identity directly – as a prohibited ground of discrimination under Article 14 of the Convention although this could have been adduced from its earlier rulings as well. For example the transsexuality of the applicant in *Christine Goodwin v. the United Kingdom* had been considered as being at the heart of the complaint under Article 14 of the Convention,¹⁵² although no explicit recognition of transsexuality among the prohibited grounds of discrimination under the Convention had been affirmed in the judgment.

During the last decade, the Court has reviewed several cases on alleged discrimination on grounds of sexual orientation in which Article 14 has been invoked in conjunction with substantial articles of the Convention, in particular Article 8 on the right to respect for private and family life. As regards discrimination based on sexual orientation, the Court has severely limited the margin of appreciation of states stressing that differences in treatment related to this ground require particularly weighty reasons to be legitimate under the Convention.¹⁵³

The principle of non-discrimination can also be found in more specialised Council of Europe conventions. On 7 April 2011, the Committee of Ministers adopted the Convention on preventing and combating violence against women and domestic violence.¹⁵⁴ This Convention is the first legally

146. General Recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/2010/47/GC.2, paragraph 18, available at: www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf, accessed 23 November 2010. Note in this regard also a study on multiple discrimination for the EC in 2007: “Tackling Multiple Discrimination – Practices, Policies and Laws”, European Commission, 2007. The report is available at: <http://ec.europa.eu/social/main.jsp?catId=738&furtherPubs=yes&langId=en&pubId=51>, accessed 4 October 2010.

147. UN Committee on the Rights of the Child, General Comment No. 4, 2003, paragraph 6.

148. Protocol No. 12 to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 1 April 2005, ETS No. 177.

149. Explanatory report to Protocol No. 12.

150. See European Court of Human Rights, *Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999.

151. European Court of Human Rights, *P.V. v. Spain*, Application No. 35159/09, judgment of 30 November 2010, paragraph 30. In the specific case no violation of the provision was found.

152. European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.

153. European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003, paragraph 37, *E.B. v. France*, Application No. 43546/02, judgment of 22 January 2008, paragraph 91, and *Schalk and Kopf v. Austria*, Application No. 30141/04, judgment of 24 June 2010, paragraph 97.

154. The Convention was opened for signature in Istanbul on 11 May 2011. CETS No. 210.

binding instrument in the world creating a comprehensive legal framework to prevent violence and to protect victims in this area. The non-discrimination article of the Convention includes the grounds of sexual orientation and gender identity thereby making it the first international treaty to include explicitly both sexual orientation and gender identity as prohibited grounds of discrimination.

The revised European Social Charter includes a general non-discrimination provision in Article E with reference to the enjoyment of the social and economic rights set out in the Charter. Although sexual orientation and gender identity are not directly mentioned among the prohibited grounds of discrimination, the list given in the article is non-exhaustive. In 2009, the European Committee of Social Rights affirmed, in a decision on a collective complaint, “that educational materials [should] not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to the social exclusion, embedded discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation”.¹⁵⁵

On 31 March 2010, the Council of Europe Committee of Ministers adopted Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity.¹⁵⁶ The recommendation invites the member states to ensure that the stipulated principles and measures are applied in national legislation, policies and practices relevant to the protection of the human rights of lesbian, gay, bisexual and transgender persons and the promotion of tolerance towards them. The principles relate to the areas of hate crimes and other hate-motivated incidents, hate speech, freedom of association, freedom of expression and peaceful assembly, right to respect for family life and private life (including the recognition of the legal gender for transgender persons), employment, education, health, housing, sports, asylum, national human rights structures and discrimination on multiple grounds.

In the European Union, the Treaty establishing the European Economic Community (TEC) signed in 1957 introduced the non-discrimination principle in relation to gender and equal pay between men and women. Since the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts signed in 1997, the non-discrimination principle has been strengthened by an enabling clause allowing EU measures to combat discrimination on several grounds, including sexual orientation (but not gender identity). The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed in 2007 (hereafter: the “Lisbon Treaty”) reiterates this enabling clause in Article 19 of the Treaty on the Functioning of the European Union (TFEU).¹⁵⁷

Article 2 of the Treaty on European Union (TEU) as modified by the Lisbon Treaty affirms the centrality of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”¹⁵⁸ as a fundamental principle of the Union. It explicitly refers to the founding values of the Union in which also the respect of the rights of persons belonging to minorities is encompassed and it further reads that member states share these values in a society in which non-discrimination prevails.¹⁵⁹ Accordingly, the Lisbon Treaty renders the principle of non-discrimination into a horizontal clause which should apply in the implementation of the entire text of the treaty.

Article 21, paragraph 1, of the Charter of Fundamental Rights of the European Union (hereafter: the “Charter of Fundamental Rights”) contains a general non-discrimination provision that also mentions sexual orientation among the prohibited grounds of discrimination.¹⁶⁰ The list of discrimination grounds is not exhaustive and is thus open to the inclusion of other grounds that give rise to differential treatment. In none of the said instruments is gender identity explicitly mentioned.

155. See European Committee of Social Rights, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* – European Social Charter Complaint No. 45/2007, decision of 30 March 2009, paragraphs 60-61.

156. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted 31 March 2010.

157. The Treaty establishing the European Community (TEC) has been renamed the Treaty on the Functioning of the Union (TFEU).

158. European Union, Consolidated Version of the Treaty on European Union, OJ C 115/13, 9 May 2008.

159. *Ibid.*, Article 2.

160. Charter of Fundamental Rights of the European Union, adopted in 2000, OJ C 83/02, 30 March 2010,.

The impact of the Lisbon Treaty is also relevant beyond the EU member states, particularly for the four current EU candidate countries¹⁶¹ (Croatia, Iceland, “the former Yugoslav Republic of Macedonia” and Turkey) and the potential candidate countries which have to transpose the European Union *acquis* into their national legislation¹⁶² before joining the EU. The EU accession criteria explicitly mention human rights and respect for, and protection of, minorities.¹⁶³

Following the European Union’s overall non-discrimination provisions in the above-mentioned treaties, the Council of the European Union has introduced specific equal treatment directives. The list of discrimination grounds in these instruments is exhaustive. The first directive explicitly referring to sexual orientation as a prohibited ground of discrimination was Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereafter: the “Employment Equality Directive”).¹⁶⁴

The jurisprudence of the European Court of Justice, now renamed “the Court of Justice of the European Union”, includes a few cases related to discrimination on grounds of sexual orientation, particularly regarding access to employment and regarding spousal benefits. In the landmark judgment on the case *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen VdB*, the Court analysed the right to the survivor’s pension in relation to partners in same-sex relationships. Mr Maruko had been denied a survivor’s benefit upon the death of his deceased partner, with whom he had lived in a registered partnership for many years. The reason for the refusal was that the partner’s pension scheme only granted the survivor’s benefit to married partners. Mr Maruko argued that since he and his partner, as a same-sex couple, were not allowed to marry under national law, the refusal to grant him survivor’s benefit constituted indirect discrimination on grounds of sexual orientation under the Employment Equality Directive. The European Court of Justice in deciding the case maintained that regulation of the VdB was precluded by Articles 1 and 2 of the Employment Equality Directive prohibiting discrimination on grounds of sexual orientation. The Court, however, left it to the national courts to determine whether “a surviving partner is in a situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the ... pension scheme”.¹⁶⁵

As can be observed in the above overview, under European Union law, combating discrimination on grounds of sexual orientation is currently limited to the field of employment. The question of extending the material scope of the principle of equal treatment of all persons irrespective of religion or belief, disability, age or sexual orientation is being examined by the Council of the European Union with reference to a Commission proposal for a so-called “horizontal” equal treatment directive.¹⁶⁶

Gender identity is not explicitly recognised as a prohibited ground of discrimination in any of the EU directives. However, the first – though partial – recognition of discrimination of transgender persons was granted in the jurisprudence of the Court of Justice of the EU as early as 1996, but only in relation to “gender reassignment”, thus applying only to those persons wishing to undergo or having already undergone gender reassignment treatment. In the landmark judgment *P. v. S. and Cornwall County Council*,¹⁶⁷ the Court had found that prohibition of discrimination on the ground of sex in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereafter: the “Equal Treatment Directive”) also applied in relation to dismissal of a transsexual woman on sick leave during her gender reassignment treatment. Discrimination on the ground of sex was not exclusively to be understood in relation to one’s sex assigned at birth but could also concern the gender reassignment of the person concerned.¹⁶⁸ The rationale of *P. v. S. and*

161. Consolidated version of the Treaty on European Union, Article 49, OJ C 83/13, 30 March 2010.

162. European Union, Glossary, Community *Acquis*, http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm, accessed 26 November 2010.

163. Copenhagen Criteria, adopted by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995, available at: www.ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm, accessed 26 November 2010.

164. European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303.

165. Court of Justice of the European Union, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen VdB*, judgment of 1 April 2008, paragraph 65.

166. European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final – 2008/0140 (CNS), 2 July 2008.

167. Court of Justice of the EU, C-13/94, *P. v. S. and Cornwall County Council*, judgment of 30 April 1996.

168. *Ibid.*, paragraphs 20-22.

Cornwall County Council was confirmed in two other decisions of the Court of Justice – one related to the field of pensions and the other related to social security.¹⁶⁹

In 2004, the jurisprudence of the Court of Justice of the EU concerning discrimination on grounds of a person's gender reassignment was referred to by the Council of the European Union. The Council of the European Union stated that the principle of equal treatment for men and women "also applies to discrimination arising from the gender reassignment of a person"¹⁷⁰ and that therefore transgender persons had to be protected under the scope of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (hereafter: the "Gender Goods and Services Directive").¹⁷¹ In 2006, Directive 2006/54/EC¹⁷² (hereafter: the "Gender Recast Directive") became the first European Union directive which also refers to persons intending to undergo or having undergone gender reassignment. Recital 3 of the Preamble of the Gender Recast Directive states that the principle of equal treatment for men and women "also applies to discrimination arising from the gender reassignment of a person".¹⁷³

The European Commission is currently reviewing the transposition of both the Gender Recast Directive and the Gender Goods and Services Directive into national legislation in the EU member states. The European Commission will also continue to examine "specific issues pertaining to sex discrimination in relation to gender identity" in the framework of the EU's Strategy for equality between women and men 2010-2015.¹⁷⁴

Yogyakarta Principles

The Yogyakarta Principles, adopted in 2006 by a group of human rights experts, promote the implementation of already existing obligations under international human rights law in relation to LGBT persons.¹⁷⁵ As such, they propose baseline standards for the protection and promotion of the full enjoyment of all human rights irrespective of sexual orientation and gender identity. The right to respect for dignity and full enjoyment of human rights is contained in Principle 1 of the Yogyakarta Principles, and the right to equality and non-discrimination in Principle 2. In order to ensure effective protection, the Yogyakarta Principles stress the need to repeal criminal and other legal provisions that prohibit, or are in effect employed to prohibit, consensual sexual activity among people of the same sex who are over the age of consent. This also includes the need to ensure that an equal age of consent applies to both same-sex and different-sex sexual activity. The principles also stress the need for states to ensure the legal recognition of gender for transgender persons and access to gender reassignment treatment. In addition, the Yogyakarta Principles encourage programmes of education and training with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority, or the superiority, of any sexual orientation or gender identity or gender expression.

Several states, including the Czech Republic, Denmark, Finland, Iceland, Norway, Sweden and Switzerland, have endorsed the principles or referred to them in their statements at the United Nations

169. Court of Justice of the EU, C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, judgment of 7 January 2004; C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, judgment of 27 April 2006.

170. 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumers Affairs) held in Luxembourg on 4 October 2004, Minutes, Doc. No. 13369/04 of 27 October 2004, p. 7.

171. European Union, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004, pp. 37-43.

172. European Union, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26 July 2006, pp. 23-36, Recital No. 3.

173. *Ibid.* Note that the FRA concluded in this respect that "there is no reason not to extend the protection from discrimination beyond persons [undergoing gender reassignment], to cover cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently". EU Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis", 2008, p. 125.

174. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Strategy for equality between women and men 2010-2015.

175. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted in March 2006 following an experts' meeting held in the Indonesian city of Yogyakarta at the Gadjah Mada University as part of a project undertaken by the International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organisations.

Human Rights Council. Other countries endorsed the principles at the executive (Germany, the Netherlands, Spain and the United Kingdom) or legislative (Belgium) level.¹⁷⁶

2.2. National legal frameworks

The previous section provided an overview on the international and European legal standards in the field of non-discrimination with particular reference to the grounds of sexual orientation and gender identity. In the following section the situation in the 47 member states of the Council of Europe will be described. However, before doing so, it is relevant to provide some background information on relatively recent legislative provisions in Council of Europe member states' criminal law whereby same-sex consensual sexual acts were penalised in the past.

2.2.1. Discriminatory provisions in the criminal code of member states

Different forms of criminalisation of same-sex consensual sexual acts between adults – primarily between men, as women were often not considered in this context – have been found for shorter or longer periods in the criminal codes or legal traditions of practically all Council of Europe member states.¹⁷⁷ The first countries to decriminalise such acts did so in the 18th century while the last countries only did so at the beginning of the 21st century (see Table 1.1¹⁷⁸). Accession criteria to become a member state of the Council of Europe played a part in the process. No Council of Europe member state criminalises same-sex sexual acts as such today.

The legacy of criminalisation and the fairly recent removal of criminalisation provisions in some member states contribute to the stigma historically attached to homosexuality. Such stigma is not easily overcome, and it does not disappear by itself as has also been highlighted by the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: “Criminalization may not be the sole reason behind stigma, but it certainly perpetuates it, through the reinforcement of existing prejudices and stereotypes.”¹⁷⁹ In some member states many inhabitants may actually still be convinced that homosexuality is illegal. This is illustrated by a survey conducted in “the former Yugoslav Republic of Macedonia” in 2002 – six years after the decriminalisation of consensual same-sex sexual acts in the country. Some 65% of those surveyed still viewed same-sex sexual acts as a crime that needed to be punished with a prison sentence.¹⁸⁰ From this perspective, comprehensive non-discrimination legislation and campaigns to promote the human rights of all persons, including LGBT persons, are pivotal.

Even though there is no criminalisation of same-sex sexual consensual acts as such in the 47 member states, there are still provisions in criminal law in some Council of Europe member states which explicitly discriminate on the basis of sexual orientation. Gibraltar (United Kingdom) maintains an unequal age of consent¹⁸¹ for homosexual relationships (18 years for homosexual/16 years for

176. Ettelbrick, P.L., Zerán, A.T., *The Impact of the Yogyakarta Principles on International Human Rights Law Development. A Study of November 2007 – June 2010*. Final Report, 2010, p. 12.

177. Waaldijk C., “Civil Developments: Patterns of Reform in the Legal Position of Same-sex Partners in Europe”, *Canadian Journal of Family Law*, 17(1) (2000), pp. 62-64. See also Foucault M., *The history of sexuality*, vol. 1 (*An Introduction*), 1976.

178. This table is based on the following sources: Leroy-Forgeot F., *Histoire juridique de l'homosexualité en Europe*, Paris: Presses Universitaires de France 1997; Graupner H., “Sexual Consent: The Criminal Law in Europe and Outside of Europe”, in H. Graupner and V. L. Bullough (eds), *Adolescence, Sexuality and the Criminal Law*, Haworth Press, New York, 2005, pp. 111-171; Waaldijk K., “Legal recognition of homosexual orientation in the countries of the world”, paper for the conference “The Global Arc of Justice – Sexual Orientation Law around the World” (Los Angeles, 11-14 March 2009); Ottosson, D., *State-sponsored Homophobia*, ILGA, Brussels, 2010. These sources contradict each other on some points, partly because the enactment of a law and its entry into force do not always take place in the same year. In some member states decriminalisation took part in different years in different parts of the country, and in a few other states different penal provisions were repealed in different years. Please note that national borders have changed over time and that some of the member states listed here can be considered as successors to earlier states existing in the corresponding geographical area. According to the Andorran authorities, same-sex consensual acts have never been criminalised in the country.

179. Human Rights Council, “Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover”, A/HRC/14/20, 27 April 2010, available at: www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf, accessed 7 December 2010.

180. Presented in: Global Rights, ILGA-Europe and MASSO, “Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in ‘the former Yugoslav Republic of Macedonia’ – Shadow Report”, 2008.

181. Age of consent refers to the age at which a person is legally able to give informed consent to sexual intercourse with another person.

heterosexual sexual acts; anal sex is illegal between men and women).¹⁸² The Gibraltar Supreme Court is currently considering whether the age of consent for gay men is discriminatory.

Table 1.1: Decriminalisation of same-sex consensual acts between adults

Country	Year of decriminalisation
Armenia	2003
Azerbaijan	2001
Georgia	2000
Cyprus	1998
Bosnia and Herzegovina	1998 [BiH] / 2000 [Rep. Srp.] 2001 [Brcko District]
“The former Yugoslave Republic of Macedonia”	1996
Romania	1996
Albania	1995
Moldova	1995
Serbia	1994
Ireland	1993
Lithuania	1993
Russian Federation	1993
Estonia	1992
Latvia	1992
Ukraine	1991
Liechtenstein	1989
Portugal	1945 / 1983
United Kingdom	1967 [England + Wales] / 1981 [Scotland] / 1982 [Northern Ireland]
Spain	1822 / 1979
Croatia	1977
Montenegro	1977
Slovenia	1977
Malta	1973
Norway	1972
Austria	1971
Finland	1971
Germany	1968 [DDR] / 1969 [BRD]
Bulgaria	1968
Hungary	1962
Czech Republic	1962
Slovak Republic	1962
Greece	1951
Sweden	1944
Switzerland	1942
Iceland	1940
Denmark	1933
Poland	1932
Italy	1810 / 1890
San Marino	1865
Turkey	1858
Netherlands	1811
Belgium	1794
Luxembourg	1794
Monaco	1793
France	1791
Andorra	–

Discriminatory provisions can be found in the Penal Code in Greece, where Article 347 incriminates contact “against nature” between males, with imprisonment for at least three months, if committed (a) through an abuse of a relationship of dependence based on any service rendered, (b) by an adult through the seduction of a person under the age of 17, (c) for financial gain, or (d) as a profession. There is no obvious reason why the circumstances mentioned above should be treated differently depending on whether it involves sexual acts between men or other kinds of sexual acts – homosexual or heterosexual.¹⁸³ Moreover, the age of consent for heterosexual sexual acts is 16 years. Therefore, the requirement that in case of “seduction” the parties involved in male same-sex sexual

182. Council of Europe Parliamentary Assembly, Doc. 11485, 14 January 2008, “Laws discriminating against gay men in Gibraltar”, Written question No. 539 to the Committee of Ministers, presented by Mr Hancock, available at: www.assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11485.htm, accessed 26 November 2010.

183. FRA national contribution on Greece.

contact should be over the age of 17 violates the principle of non-discrimination in relation to the right to respect for private life, as recognised by the European Court of Human Rights in 2003 in *L. and V. v. Austria* and *S.L. v. Austria*, and in 2001 by the European Commission of Human Rights in the case of *Sutherland v. the United Kingdom*.¹⁸⁴

2.2.2. Non-discrimination legislation in Council of Europe member states

Most member states of the Council of Europe have adopted non-discrimination legislation, including some member states in recent years.

A number of member states have chosen to introduce a comprehensive prohibition against discrimination. Comprehensive non-discrimination legislation refers to non-discrimination legislation which covers several grounds of discrimination (for example, sex or gender, race, religion or belief, age, disability, sexual orientation, gender identity or other status) and provides protection against discrimination on these grounds in several different fields (for example, employment, access to goods and services, education, social security and health care). For the purposes of this chapter, national non-discrimination legislation is described as comprehensive when more grounds than sex and race are covered and when the material scope is extended beyond the fields of employment and access to goods and services. Comprehensive non-discrimination legislation can be distinguished from non-discrimination legislation which is specific to a particular field, such as non-discrimination legislation which only applies in the field of employment. This will be referred to as “sectoral non-discrimination legislation”. Thirdly, specialised legislation in different fields may also include non-discrimination provisions although such legislation does not directly amount to non-discrimination legislation as such.

Comprehensive non-discrimination legislation

Some 20 member states have enacted comprehensive non-discrimination legislation which explicitly includes sexual orientation among the prohibited grounds of discrimination. This is the case in: Albania, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Germany, Hungary, Iceland, Ireland, Montenegro, the Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. One of these member states, Sweden, has explicitly mentioned sexual orientation as a prohibited ground of discrimination in the constitution.¹⁸⁵

Some nine member states (Albania, Croatia, the Czech Republic, Germany, Hungary, Montenegro, Serbia, Sweden and the United Kingdom¹⁸⁶) have included gender identity explicitly in comprehensive non-discrimination legislation. However, no standard wording is currently followed to cover gender identity in these member states. Instead of “gender identity”, legislation in these nine member states may refer to “gender expression”, “gender identification”, “transgender identity”, “gender change”, “gender reassignment” or “sexual identity”. There may be significant differences as to the legal scope

184. European Court of Human Rights, *Sutherland v. the United Kingdom*, Application No. 25186/94, judgment of 27 March 2001, in *L. and V. v. Austria*, Application Nos. 39392/98 and 39829/98, judgment of 9 January 2003, *S.L. v. Austria*, Application No. 45330/99, judgment of 9 January 2003.

185. Portugal has also explicitly mentioned sexual orientation as a prohibited ground of discrimination in the Constitution since 2004. In a number of other countries the grounds of sexual orientation or gender identity are covered implicitly in the constitution. For example in Spain, the Constitutional Court has had the opportunity, in a concrete case, to interpret the general non-discrimination clause in Article 14 of the constitution as encompassing gender identity as a discrimination ground, Tribunal Constitucional, judgment 176/2008, 22 December 2008. Also in Finland, the constitution has been interpreted to be applicable in cases involving sexual orientation discrimination. Vaasan Hallinto-oikeus/Vaasa Administrative Court, judgment 04/0253/3, 27 August 2004.

186. Under the UK “Equality Act 2010”, “gender reassignment” protection is offered as in the past (Sex Discrimination Act 1999) but the requirement of being under “medical supervision” is removed and protection extended in several ways. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, Vienna, 2010, p. 23.

of these terms. At least 11 member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation (Andorra, Austria, Belgium, Denmark, Finland, France, Ireland, the Netherlands, Norway, Slovakia and Switzerland), while one member state has chosen multiple (Sweden)¹⁸⁷ formulations to describe the applicable ground. This makes a total of 20 member states. For the other 27 member states the situation is unclear.¹⁸⁸

In member states in which sexual orientation or gender identity are not explicitly mentioned as prohibited grounds of discrimination in comprehensive non-discrimination legislation, these grounds may be covered under “other status” (non-exhaustive list of grounds) or, for gender identity, under the ground of “sex” or “gender”. In some countries, this is explicitly recognised through case law. However, in many countries this is not applicable because cases of discrimination on grounds of sexual orientation and gender identity are not often raised before the courts – case law is scarce though gradually growing.

Sectoral non-discrimination legislation in the fields of employment and access to goods and services

Several member states which have not enacted comprehensive non-discrimination legislation which prohibits discrimination on the grounds of sexual orientation and/or gender identity have enacted sectoral non-discrimination legislation which provides protection on the ground of sexual orientation in the fields of employment and access to goods and services:

- Sexual orientation is an explicitly prohibited ground of discrimination in sectoral non-discrimination legislation in the fields of employment and access to goods and services in seven member states (Andorra, Austria, Finland, Latvia, Lithuania, Luxembourg and Switzerland).
- Sexual orientation is an explicitly prohibited ground of discrimination in sectoral non-discrimination legislation in the area of employment, but not with respect to access to goods and services, in 11 member states: Cyprus, Denmark, Estonia, France, Georgia, Greece, Italy, Malta, Poland, Portugal and “the former Yugoslav Republic of Macedonia”.¹⁸⁹

The total number of member states which include sexual orientation either under comprehensive or sectoral non-discrimination legislation is thus 38. Nine member states (Armenia, Azerbaijan, Liechtenstein, Moldova, Monaco, Russian Federation, San Marino, Turkey, Ukraine) do not have either sectoral or comprehensive non-discrimination legislation covering sexual orientation.

In member states in which sexual orientation or gender identity are not explicitly mentioned as prohibited grounds of discrimination in sectoral legislation in the fields of employment and/or access to goods and services, these grounds may be covered under “other status” (non-exhaustive list of grounds), or, for gender identity, under the ground of “sex” or “gender”.

187. Legislation passed in Sweden in 2010 introduced the prohibition of discrimination on the grounds of “transgender identity and expression” encompassing not only transsexual but also transgender persons who do not wish to undergo gender reassignment. At the same time, Swedish legislation recognises discrimination of transsexual persons under the grounds of “sex”. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, Vienna, 2010, p. 21.

188. For 15 EU member states the FRA states that the inclusion of transgender persons within the realm of non-discrimination legislation is unclear. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on grounds of Sexual Orientation and Gender Identity. 2010 Update, Comparative Legal Analysis”, Vienna, 2010, p. 22.

189. Portugal has also explicitly mentioned sexual orientation as a prohibited ground of discrimination in the constitution.

Map 2.1: Non-discrimination legislation covering sexual orientation

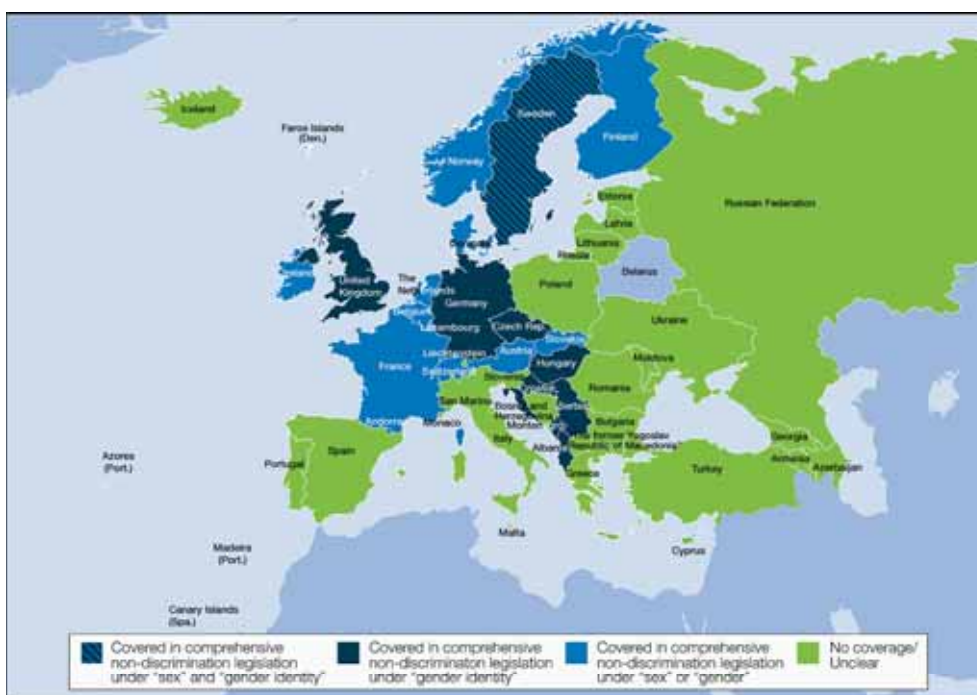


Non-discrimination clause in national laws other than non-discrimination legislation

Finally, apart from non-discrimination legislation presented above, several member states have specialised legislation in different fields which includes non-discrimination provisions prohibiting discrimination on the ground of sexual orientation or gender identity. For example, the Television and Radio Broadcasting Act in Ukraine obliges broadcasting companies to officialise their editorial statute, which would specify, among other things, “requirements for dissemination of information concerning various social groups (national and sexual minorities, religious groups, hospital patients and the disabled)” (Article 57). When establishing the rules governing dissemination of such information, the statute must not violate the non-discrimination principles established in the act and in other legislation.¹⁹⁰ In Georgia, the Law on the Rights of the Patient (Article 6) as well as the Law on the Protection of Health (Article 6) explicitly prohibit discrimination due to sexual orientation.¹⁹¹ In addition to the comprehensive Non-discrimination Law, adopted in March 2009, the Serbian Parliament has adopted four laws which specifically ban discrimination based on sexual orientation: the Labour Law, Law on Higher Education, Law on Public Information and Law on Broadcasting.¹⁹² Similar examples can be identified in other member states.

190. See national contribution (legal report) on Ukraine, p. 37.
 191. See national contribution (legal report) on Georgia, p. 5.
 192. See national contribution (legal report) on Serbia, p. 3.

Map 2.2: Non-discrimination legislation covering transgender persons



Data on cases of discrimination

The collection of comprehensive statistical data on the application of non-discrimination legislation in force in Council of Europe member states remains a challenge. This study collected information on court cases related to non-discrimination of LGBT persons and also focused on complaints submitted to national structures promoting equality. Full details on collected cases in member states can be found in the 47 national legal reports drafted for this study. Some of the available data have been integrated in the relevant parts of this report.

It should be noted, however, that the available data are incomplete for many member states, as statistics are often not available or not disaggregated by area of discrimination or prohibited ground. The lack of substantive information on case law related to discrimination on grounds of sexual orientation or gender identity in many member states may partly be ascribed to the fact that the laws are relatively new for some member states. There are also other reasons reported by interlocutors. These include the widespread anti-LGBT public discourse; a lack of awareness-raising and training of officials in the area of non-discrimination; and the lack of trust in authorities and the judiciary by LGBT victims of discrimination. Moreover, LGBT victims of discrimination often do not want to risk the exposure brought about by reporting a case to relevant authorities

2.2.3. National structures for promoting equality

Standards

National structures for promoting equality are bodies created by statute to promote equality and combat discrimination at member state level. They are usually established or designated under equal treatment or non-discrimination legislation and should carry out their functions independently of all stakeholders, including the state. There is a broad diversity of national structures for promoting equality across the member states. This diversity is particularly evident in the legal structure of the bodies, in the range of grounds that they cover, in the nature of the functions and powers accorded to the bodies, and in the scale of operations of the bodies. Some of these structures are referred to as national equality bodies, others are ombudspersons or national human rights institutes.

There are two broad types of national structures for promoting equality. There are quasi-judicial type bodies which predominantly operate to investigate, hear or mediate, and make findings in relation to claims of discrimination. There are also promotional type bodies that predominantly operate to provide assistance to individuals experiencing discrimination and to implement a broader range of awareness-raising initiatives, survey work and activities supporting good practice. Some national structures have the characteristics of both types.¹⁹³

There are several international instruments that establish rights in relation to equality and non-discrimination that require member states to establish national structures for promoting equality and that set standards for these bodies. In the UN context, Article 33 of the Convention on the Rights of Persons with Disabilities obliges the States Parties to maintain, strengthen, designate or establish a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor the implementation of the convention. In designating or establishing such mechanisms, States Parties are required to take into account the principles relating to the status and functioning of national institutions for the protection and promotion of human rights, namely the so-called “Paris Principles” endorsed by the UN General Assembly.¹⁹⁴ These principles provide detailed standards for the establishment and operation of national human rights institutions.

Within the Council of Europe, the European Commission against Racism and Intolerance (ECRI) has called on national authorities to set up specific national bodies to combat racism, xenophobia, anti-Semitism and other forms of intolerance. ECRI Policy Recommendations Nos. 2 and 7 set out basic principles as guidelines for the establishment and operation of such bodies which should be set up on a constitutional or statutory basis.¹⁹⁵ The recommendations emphasise the need for independence of the specialised bodies and enumerate a number of possible functions including monitoring the content and effect of national legislation, assistance and legal aid to victims, consideration of complaints, provision of information and advice, training of professionals and awareness-raising among the public. The Commissioner for Human Rights has issued an Opinion on national structures for promoting equality, which gives guidance to member states on enacting equal treatment legislation and setting up independent bodies for promoting equality.¹⁹⁶

Under EU law, three equality directives (the Race Equality Directive, the Gender Goods and Services Directive and the Gender Recast Directive) require member states of the European Union to establish or designate a body or bodies for the promotion of equal treatment on the grounds of racial or ethnic origin and gender. The competences of these bodies are required to include: the provision of independent assistance to victims of discrimination in pursuing their complaints of discrimination; conducting independent surveys concerning discrimination; as well as publishing independent reports and making recommendations on any issue relating to such discrimination. The Employment Equality Directive (the only one mentioning sexual orientation) does not create an obligation to establish such a body.

National practice

Although the EU provisions for establishing equality bodies are limited to race, ethnic origin and gender, several EU and other member states have enacted non-discrimination legislation and established national structures for promoting equality that clearly go beyond the minimum requirements stipulated by EU legislation. In practice, most equality bodies set up through the implementation of EU equality directives also cover either all or some of the grounds stipulated in the Employment Equality Directive, including sexual orientation and sometimes gender identity as well.

Equality bodies in 21 EU countries are vested with the mandate to receive complaints of discrimination on many grounds, including on the grounds of sexual orientation: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the

193. Ammer M. et al., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2000/54/EC. Synthesis Report, Human European Consultancy in partnership with the Ludwig Boltzmann Institute of Human Rights, 2010.

194. Principles relating to the Status of National Institutions (The Paris Principles), UN General Assembly Resolution 48/134 of 20 December 1993.

195. European Commission against Racism and Intolerance, General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, adopted on 13 June 1997, CRI(97)36; and General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, CRI(2003)8.

196. Commissioner for Human Rights, “Opinion on National Structures for Promoting Equality”, CommDH(2011)2.

Netherlands, Portugal,¹⁹⁷ Romania, Slovakia, Slovenia, Sweden and the United Kingdom. The other six EU member states do not have any equality body competent to address discrimination on grounds of sexual orientation (Czech Republic, Finland, Italy, Malta,¹⁹⁸ Poland and Spain). However, in four of these, another national human rights structure (e.g. an ombudsman institution) competent to receive complaints about discrimination on grounds of sexual orientation is in place (Czech Republic, Finland, Poland and Spain).

As regards the ground of gender identity, the picture is more complicated. Apart from the Gender Recast Directive, EU legislation does not specifically mention discrimination related to the grounds of gender identity (or gender reassignment) while the Court of Justice of the EU has applied the grounds of sex in cases related to the discrimination of transsexual persons. This fact has not hindered several equality bodies from also working with transgender issues. Four of these institutions, in Hungary, Slovakia, Sweden and the United Kingdom, have an explicit mandate to cover gender identity as a ground of discrimination.¹⁹⁹ The Commission for Citizenship and Gender Equality in Portugal has also started to incorporate issues of gender identity in its mandate. In many other countries gender identity may be covered, at least partially, through the grounds of gender or sex in line with EU law. In some countries, gender identity may also be addressed under the heading “other grounds” or understanding that it would belong among the open-ended lists of discrimination grounds in national equal treatment legislation. In a survey on national equality bodies conducted by the European Network of Equality Bodies (Equinet) in 2009, some 25% of the bodies reported that they, in one way or another, actually received and treated complaints related to discrimination on grounds of gender identity.²⁰⁰ Under EU law, more equality bodies should join to carry out such work.

Many equality bodies carry out promotional work against discrimination due to age, religion and belief, disability, sexual orientation and gender identity in their work. In general, they focus on a range of areas, including employment, education, health services, social security, housing, and goods and services. The tasks and activities embrace assistance to victims of discrimination in pursuing their complaints, conducting independent surveys, publishing independent reports and making recommendations on any issue relating to discrimination. Some bodies have been established as quasi-judicial organs with a mandate to issue decisions on discrimination, award compensation and/or bring cases to court on behalf of the victims of discrimination.²⁰¹

In other member states of the Council of Europe, there may be different bodies dealing with different grounds of discrimination or bodies with separate functions respecting a division into promotional and quasi-judicial functions. Many of these institutions are ombudsman bodies or national human rights institutions with the mandate to protect and promote human rights, including non-discrimination, with reference to the Paris Principles.²⁰² Some of them also deal with issues or incidents related to sexual orientation and gender identity.

Examples of a broader practice include the Ombudsman’s Office in Serbia, which has on several occasions issued statements regarding homophobic or transphobic incidents and hate speech, as well as the Office of the Public Defender in Georgia, which has reacted to allegations of police abuse against LGBT persons and dealt with some discrimination incidents.²⁰³ In Moldova in 2009 the Ombudsman’s Office initiated an investigation into the situation of discrimination on grounds of sexual orientation and gender identity. One of the conclusions of the investigation was that there is a gap in the legislation regarding transgender persons.²⁰⁴ In Iceland the parliamentary ombudsman issued an opinion in 2009 highlighting the legal vacuum regarding the human rights of transgender people.

197. The Commission for Citizenship and Gender Equality is the coordinating body for implementation of the *National Plan for Equality: Gender, Citizenship and Non-Discrimination 2011-13*. Relevant references are found on pages 2, 308, 314-315 of this plan.

198. However, in Malta the National Commission for the Promotion of Equality (NCPE) has initiated a qualitative study in 2011 on discrimination experienced by LGBT persons.

199. Gender identity is also referred to as sexual identity, transgender identity, gender expression or reassignment of gender.

200. Equinet, “Making Equality Legislation Work for Trans People”, 2010, p. 7. The Danish Institute for Human Rights will commence in January 2011 with inclusion of gender identity in the work programme.

201. Equinet, “Strategic Role of Equality Bodies”, December 2009.

202. Principles relating to the Status of National Institutions (the Paris Principles), UN General Assembly Resolution 48/134 of 20 December 1993.

203. Meetings with the Office of the Ombudsman in Serbia, 8 April 2010, and the Office of the Public Defender in Georgia, 8 March 2010.

204. Interview with the Ombudsman Office, Chişinău, 21 May 2010.

In Croatia, the Office of the People's Ombudsman and the Ombudsperson for Gender Equality are mandated to receive complaints on the grounds of sexual orientation and gender identity under the non-discrimination legislation. Complaints related to sexual orientation, albeit very few, have also been received by the Ombudsman Office in Azerbaijan,²⁰⁵ the Commission and Authority for Equal Opportunities in San Marino²⁰⁶ and the Ombudsman in "the former Yugoslav Republic of Macedonia".²⁰⁷

In Norway, the Equality and Non-discrimination Ombud has the powers both to promote equality in society and to enforce non-discrimination legislation also by treating individual complaints within and outside the labour market with regard to a wide range of discrimination grounds. Sexual orientation is covered as an explicit discrimination ground, whereas gender identity is currently addressed through the grounds of gender.

Adoption of new non-discrimination legislation in some member states means that new equality bodies are in the process of being established with the mandate to enforce and monitor the implementation of the legislation. These include the Commissioner for Protection against Discrimination in Albania and the Commissioner for Protection from Discrimination in Serbia. Both of them have an explicit mandate to address discrimination on the grounds of sexual orientation and gender identity.

National structures for promoting equality possess great potential for dealing with complaints on grounds of sexual orientation and gender identity as well as promoting the enjoyment of human rights by LGBT persons more generally. However, awareness of these possibilities should be enhanced among LGBT communities as well as within national structures themselves. Many LGBT NGOs interviewed for this study expressed the view that national structures were not sufficiently active in this field. Although an increasing number of equality bodies, ombudspersons and national human rights institutions appear to work on questions related to sexual orientation and homophobia, even more efforts are needed to initiate work to address discrimination on grounds of gender identity and transphobia.

2.3. Legal gender recognition

2.3.1. European standards

The legal recognition by the state of a transgender person's preferred gender, including chosen name, is a crucial aspect in the lives of transgender persons. Many transgender persons in Council of Europe member states face great difficulties in having their preferred gender and/or their new first name officially recognised. The standards, resulting from the jurisprudence of the European Court of Human Rights concerning legal recognition of the preferred gender for transsexual persons, have evolved over time.

In the cases *Rees v. the United Kingdom*²⁰⁸ and *Cossey v. the United Kingdom*,²⁰⁹ the Court did not find that the refusal by the state to amend birth certificates of persons having undergone gender reassignment amounted to a breach of the right to respect for private life under Article 8 of the Convention. States were given a wide margin of appreciation on whether they should accept changing official documents. In 2002 in the landmark case *Christine Goodwin v. the United Kingdom* the Court, however, argued that there was "clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".²¹⁰ Therefore, in accordance with *Christine Goodwin v. the United Kingdom*, member states of the Council of Europe should legally recognise the gender reassignment of transsexual persons. This was again reiterated in 2007 in the case of

205. National contribution on Azerbaijan.

206. Meeting with Associazione Culturale LGBT San Marino, 18 April 2010.

207. Meetings with the Coalition for the Protection and Promotion of Sexual and Health Rights of Marginalised Communities, 26 April 2010, the Women's Alliance, 27 April 2010, the Ombudsman's Office, 28 April 2010, the Helsinki Committee, 28 April 2010, and EGAL Skopje and Sutka, 28 April 2010.

208. European Court of Human Rights, *Rees v. the United Kingdom*, Application No. 9532/81, judgment of 17 October 1986.

209. European Court of Human Rights, *Cossey v. the United Kingdom*, Application No. 10843/89, judgment of 27 September 1990.

210. European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, judgment of 11 July 2002, paragraph 85. Cf European Court of Human Rights, *B. v. France*, Application No. 13343/87, judgment of 25 March 1992.

L. v. Lithuania,²¹¹ when the Court stressed that a legislative gap concerning full gender reassignment treatment left the applicant “in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity”.²¹²

The positive obligation of states to legally recognise the change of gender has also been reiterated by the Council of Europe Committee of Ministers²¹³ and the Parliamentary Assembly.²¹⁴ The Committee of Ministers has recommended to member states to “take appropriate measures to make possible the change of name and gender in official documents in a quick, transparent and accessible way” as well as to “ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates”.

Whereas the Court has set minimum standards on the legal recognition of the preferred gender, it concedes a wide margin of appreciation to member states in deciding on the precise procedures and requirements. Such procedures and requirements can be of a medical nature (for example, genital surgery leading to sterilisation, a gender dysphoria diagnosis or a medical opinion, preceded by psychological or psychiatric treatment), legal nature (for example, a court order, forced or automatic divorce) or yet another nature (for example, being childless, “real life experience” or the intention to live in the opposite gender for a number of years). Length and costs of the procedures at the expense of the applicant can further diminish accessibility.

Until now, no cases have been judged by the European Court of Human Rights over the mandatory preconditions of sterilisation and surgery leading to infertility. Regarding the “divorce requirement”, the European Court rejected two cases in which one of the partners had undergone gender reassignment and would have had to divorce in order to be legally recognised in the preferred gender.²¹⁵ It acknowledged however that “the legislation clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or their marriage”. Nevertheless, it considered this requirement within the United Kingdom’s margin of appreciation. In two Council of Europe member states (Austria and Germany), laws requiring transgender persons to divorce in order to obtain legal recognition of gender reassignment, have been declared unconstitutional by the highest courts of these countries.²¹⁶ Another case is currently pending before the European Court of Human Rights.²¹⁷

Recommendation CM/Rec(2010)5 of the Committee of Ministers states that “requirements, including changes of a physical nature, should be regularly reviewed in order to remove abusive requirements”.²¹⁸ The Parliamentary Assembly in its Resolution 1728 (2010) calls upon member states to “ensure that official documents reflect an individual’s preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy”.²¹⁹ The Yogyakarta Principles state that “No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”²²⁰ In an Issue Paper on Gender Identity and Human Rights published by the Commissioner for Human Rights states’ positive obligations are also stressed in this regard.²²¹

211. European Court of Human Rights, *L. v. Lithuania*, Application No. 27527/03, judgment of 11 September 2007. The Committee of Ministers is still supervising the execution of the judgment in this case.

212. *Ibid.*, paragraph 59.

213. Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination against discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010.

214. Council of Europe, Parliamentary Assembly Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, adopted on 29 April 2010.

215. *Parry v. the United Kingdom*, Application No. 42971/05, admissibility decision, 28 November 2006; *R. and F. v. the United Kingdom*, Application No. 35748/05, admissibility decision, 28 November 2006.

216. Constitutional Court of Austria (Verfassungsgerichtshof), V 4/06, 8 June 2006; Federal Constitutional Court of Germany (Bundesverfassungsgericht), 1 BvL 10/05, 27 May 2008. See also European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, Vienna, 2010.

217. In the communicated case *H. v. Finland* (Application No. 37359/09), a transgender woman complained, *inter alia*, that she could not have her identity number changed unless she divorced from her wife.

218. Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraph 20.

219. Council of Europe, Parliamentary Assembly Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, adopted on 29 April 2010, paragraph 16.11.2.

220. The Yogyakarta Principles; Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

221. Commissioner for Human Rights, “Human Rights and Gender Identity”, Issue Paper, Strasbourg, 2009.

In order to contextualise some of the possible legal or medical requirements that states impose on the recognition of transgender persons' preferred gender or name, it is crucial to take into account relevant international classifications. National diagnostic manuals in Council of Europe member states reflect these classifications, such as those developed by the World Health Organization (WHO). Also the classification used by the American Psychiatric Association (APA) is often referenced and implemented. These classifications define transsexualism as a mental or behavioural disorder.²²² It is important to note the strong impact of these classification systems on the possibility of transgender persons obtaining legal gender recognition.

It is also relevant to take into account international standards established by health professionals, such as the World Professional Association for Transgender Health's (WPATH) "Standards of Care for Gender Identity".²²³ These standards state that no medical intervention should be required for a change of documents. The WPATH urges governments and other authoritative bodies to move to eliminate conditions for identity recognition that require surgical procedures. No person should have to undergo surgery or accept sterilisation as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognise the person's lived gender, regardless of reproductive capacity.²²⁴

As the following sections will show, transgender persons in most Council of Europe member states face great difficulty in having their gender or preferred name legally recognised. It should be stressed from the outset that a change of legal gender in identifying documents is often intertwined with medical procedures, such as surgery leading to sterilisation, hormone treatment or other conditions. In some instances, there is ample evidence that transgender persons do not manage to have their preferred gender legally recognised at all.

2.3.2. Requirements and conditions for legal gender recognition

Introduction

The indication of a person's sex or gender in identifying documents can also be referred to as a "gender marker". These are references to a person's sex in identifying documents, such as state-issued identification documents (birth certificates, ID documents, passport, social security or tax numbers) as well as other documents that are commonly used to identify a person, such as school diplomas, bank cards or mortgage contracts. Gender can be identified directly, through "male" or "female" entries, or more indirectly by gendered names or gendered social security numbers (for example, 1 for a man, 2 for a woman).

The impact of not having documents reflecting the preferred gender identity of the person is not to be underestimated. Transgender persons who have been unable to change their passport or other identifying documents to reflect their gender identity experience problems every time they have to identify themselves, for example when paying with a credit card, opening a bank account, at a police control or when crossing a border. Experiences with leaving the "sex" field blank or marked by "X" have also been mostly negative: embarrassment, delays, luggage and body searches by immigration officials have been reported.²²⁵ In fact, transgender people can be barred from meaningful and full participation in society, education or employment as they may face continuous problems with "justifying" who they are. They may also face practical problems within institutional settings such as hospitals, police stations and prisons where they may be placed in a male or female ward in accordance with the sex assigned at their birth.²²⁶

Owing to the absence of relevant legislation in some Council of Europe member states as well as the lack of information available in other member states, the following overview remains tentative. Up-to-

222. This is further described in Chapter 11 on health.

223. WPATH, "The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version", February 2001, www.wpath.org/documents2/socv6.pdf, accessed 30 August 2010.

224. Press release by WPATH on 16 June 2010.

225. Human Rights Commission, "Transgender Inquiry Summary of Submissions: Uiuinga Taitamatāne, Taitamawahine Koki He Whakarāpopotanga o ngā Tono", Human Rights Commission, Aotearoa, New Zealand, 2007.

226. For example in France, a transgender woman, whose ID papers indicated that she is male, complained that she had been put in the male ward of a prison. Communication received by the Office of the Commissioner for Human Rights, 14 June 2010.

date and non-contradictory information on frameworks regulating legal gender recognition is difficult to obtain, and even skilled lawyers and human rights professionals consulted in the course of this study are often unable to describe the current legal frameworks. In some instances when legislation is lacking, one can only rely on information about actual practice.²²⁷ It should also be noted that while changes in legislation have been slow in past decades, laws are currently changing quickly – at the time of writing, legislation regulating legal gender recognition is under review in several member states, including Austria, Ireland, the Netherlands, Latvia and Ukraine.²²⁸ Another important issue to note is that frameworks regulating legal gender recognition usually focus on the change of birth certificate or civil registration, but there may be different or additional administrative or legal requirements for changes of passport or other ID documents.

Legal framework

There are 24 Council of Europe member states that have adopted legislation regulating the recognition of gender change of transgender persons. This is the case in Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Italy, Latvia,²²⁹ Malta, Montenegro, the Netherlands, Norway, Portugal, Romania, the Russian Federation, Slovakia, Spain, Sweden, Switzerland (on canton level), Turkey, Ukraine and the United Kingdom. However, in two of these member states, Austria and Germany, (parts of) the law have been declared unconstitutional (see in next section). No new legislation has been proposed or adopted in these two member states.

However, in some of these states where legislation is in place, such legislation is not always clear in its scope and substance, for example some laws seem to confuse legal recognition of the preferred gender with procedures regulating access to gender reassignment treatment.

In 10 Council of Europe member states this report has not identified legislation regulating legal gender recognition. This is the case in Albania, Andorra, Armenia, Azerbaijan, Ireland,²³⁰ Liechtenstein, Monaco, San Marino, Slovenia and “the former Yugoslav Republic of Macedonia”. Evidence has not been found that these states offer the possibility for transgender persons to have their preferred gender legally recognised.

In 13 member states no or only partial legislation was identified but transgender persons were able to have their new gender legally recognised in at least some official documents either through court rulings or by administrative practice. This is the case in Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, France, Georgia, Hungary, Iceland, Lithuania, Luxembourg, Moldova, Poland and Serbia.

Surgery leading to sterilisation

Some countries require surgery leading to sterilisation before they recognise gender reassignment. It should be stressed that this requirement still stands even in the absence of a medical necessity or the applicant’s wish for such surgery. Surgery leading to sterilisation has been identified as a requirement in 29 member states (Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark,²³¹ Estonia, Finland,²³² France, Georgia, Greece, Iceland, Italy, Latvia, Malta, Moldova, Montenegro, the Netherlands, Norway, Poland, Romania, San Marino, Serbia, Slovakia,

227. Based on (FRA) national contributions. Additional information has been obtained via Transgender Europe and ILGA-Europe. Due to unclear procedures some requirements are not marked and some countries are not mentioned. The national contributions give further details.

228. Moreover, in Malta, a member of the Parliament submitted a proposal to introduce legal gender recognition legislation. Motion No. 198 – Private Members Bill – Gender Identity Bill – Presented by Hon Evarist Bartolo MP.

229. Amendments have been proposed to the Civil Status Document Law allowing for the rectification of the recorded sex in the birth registry, but these proposals have not been adopted. European Union Agency for Fundamental Human Rights, “Homophobia, Transphobia, Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – A Comparative Legal Analysis”, 2010, p. 15.

230. However, the new Irish Government has stated in its government programme that it “will ensure that transgender people will have legal recognition and extend the protections of the equality legislation to them.” See “Towards Recovery: Programme for a National Government 2011-2016”, p. 54.

231. In Denmark a “permission for castration” is required. FRA national contribution (legal report) on Denmark, p. 23.

232. Despite the legally prescribed requirement, there is evidence that Finland does not require surgery to match the sterility requirement: cross-hormonal treatment for a minimum period of 6 months is also accepted as proof of infertility. It should be stated in a written statement from a doctor that *de facto* sterility is achieved by cross-sex hormonal treatment.

Sweden, Switzerland,²³³ Turkey and Ukraine). In two member states, Austria²³⁴ and Germany,²³⁵ the “sterilisation requirement” has been declared unconstitutional by their respective constitutional courts, but no new legislation has been proposed or adopted. In four member states – Hungary (administrative practice), Portugal, Spain and the United Kingdom (by law) – no requirements of sterilisation are enforced. In the Russian Federation there is also no legal basis for sterilisation, though some civil registry offices or courts have reportedly required sterilisation in order to recognise the new gender. In the remaining 11 member states there is either no legislation regulating legal gender recognition or the situation regarding the sterilisation requirement is unclear (see Map 2.3).

Map 2.3: Sterilisation as a requirement for legal gender recognition



For certain member states, there is some additional information available. In Denmark, the possibility of having one’s preferred gender recognised is dependent on gender reassignment surgery requiring a “castration permission”. This “castration permission” is dependent on two years’ observation by the national hospital. In the period between 2000 and 2007, only 20 transgender persons obtained this permission.²³⁶ In comparison, in Estonia, 41 people sought and received legal recognition of their new gender in the same period of time.²³⁷ In Ukraine, the medical board in charge of deciding applications did not meet once in the years 2007 and 2008.²³⁸

Divorce

Some member states require transgender persons to be unmarried in order to be legally recognised in the preferred gender. In 15 member states (Bulgaria, the Czech Republic, Finland, France, Hungary, Iceland, Italy, Malta, Poland, Serbia, Sweden, Switzerland,²³⁹ Turkey, Ukraine and the United Kingdom) the person who applies for a rectification of the recorded sex on birth certificate has to be

233. However, not in all cantons, as the Zurich High Court decided on 1 February 2011 that for the purpose of legal recognition of the preferred gender there is no need to be irreversibly infertile. Cantonal High Court of Zurich (Obergericht des Kantons Zürich), NC090012, 1 February 2011.

234. Constitutional Court of Austria (Verfassungsgerichtshof), V 4/06, 8 June 2006.

235. Federal Constitutional Court of Germany (Bundesverfassungsgericht), 1 BvR 3295/07, 11 January 2011.

236. Legal national contribution on Denmark, p.23; see also Raun, T., “Denmark – A Transgender Paradise? Narrations and Negotiations of Trans Masculinity in *Nobody Passes Perfectly*”, 2010, *Trikster*, #4, <http://trikster.net/4/raun/1.html>, accessed 31 August 2010.

Hvejsel, B., “En kritisk analyse af det danske sundhedsvæsens behandling af transseksuelle”, 2009, www.wimbs.org/?vm=17319&mname=En_kritisk_analyse, accessed 31 August 2010.

237. National contribution (legal report) on Estonia.

238. National contribution (sociological report) on Ukraine, p. 27. Presentation of Human Rights NGO “Insight” in Kiev on Oct 14th 2010

239. Only some cantons require divorce in Switzerland.

unmarried. This entails mandatory divorce if the person is already married. In most cases there is no possibility of staying in, or entering into, a registered partnership (or marriage), leaving couples without any officially recognised relationship after divorce. In the Russian Federation there is also no legal requirement for divorce though some transgender persons reported that the existence of a marriage was regarded as an obstacle to being legally recognised in the new gender. Divorce is not required by six member states (Belgium, Georgia, the Netherlands, Portugal, Romania, Spain).

In Austria and Germany the highest courts have declared the “divorce requirement” unconstitutional. The Austrian Constitutional Court granted a transgender woman the right to change her sex to female while remaining married to her wife. It ruled that “changing a sex entry in a birth certificate cannot be hindered by marriage”.²⁴⁰ The German Constitutional Court in 2008 ruled that change of sex on a birth certificate should not lead to a mandatory divorce, resulting in a decision²⁴¹ that prompted a change in the German law and ended compulsory divorce for married couples in which one partner is transgender.

Map 2.4: Divorce as a requirement for legal gender recognition



Other conditions and evaluation

In some member states other or multiple conditions are in force. For example in Ukraine, where a medical commission decides who is eligible for gender reassignment surgery, the requirements are so onerous that they become almost impossible to fulfil. They include that the person should be at a high risk of committing suicide, be childless, be older than 25, not be homosexual or have “morphologic peculiarities that may complicate or render impossible adaptation of the desired sex”. Finally, there is the requirement for hospitalisation in a psychiatric institution for a minimum of 30 days as part of the diagnostic process.²⁴²

The findings presented above are in line with other studies which have been conducted on the legal framework regulating legal gender recognition in a number of EU member states.²⁴³ These studies show that the requirements of sterilisation, other medical interventions and divorce widespread in Europe. It should be noted that some countries have adopted such clauses as recently as 2007

240. Constitutional Court of Austria (Verfassungsgerichtshof), V 4/06, 8 June 2006.

241. Federal Constitutional Court of Germany (Bundesverfassungsgericht), 1 BvL 10/05, 27 May 2008.

242. National contribution (legal report) on Ukraine.

243. Whittle, S., Turner, L., Combs, R. and Rhodes, S., “Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care”, ILGA-Europe, Brussels, 2008. Swatschek, S., “Report on ‘Transsexuality and International Private Law’”, 2005 (title of the legal opinion given by the Max-Planck-Institut in the proceedings of AZ.I BvL 1/04 of the Constitutional Court in Germany), ILGA-Europe, Brussels.

(Belgium)²⁴⁴ or have recently proposed new legislation including such clauses (Sweden, 2007,²⁴⁵ and Latvia,²⁴⁶ 2009). It should also be stressed that, while some countries have abolished some legal requirements, they have maintained or introduced others. For example, the United Kingdom has no infertility requirement but obliges transgender persons to divorce and then offers the possibility to enter into a new registered partnership (with the potential loss of some rights).²⁴⁷

In member states where procedures are in place, there are reportedly important differences as regards their length and transparency. Transgender persons have expressed their concern during this study that they are faced with a lack of information about procedures for legal gender recognition and often it is not clear if and how decisions can be subjected to judicial review. Secondly, procedures for a legal gender recognition often involve fees for diagnosis, medical treatment and court proceedings. These can mount up to a significant burden for an individual. Thirdly, NGO reports point to the phenomenon that health insurance companies may have additional requirements, such as proofs of psychotherapy, mental diagnosis, real-life experience and hormonal therapy, before agreeing to bear the costs.

Finally, transgender human rights groups point out that even after legal gender recognition has been achieved, the problems do not always cease to exist. There have been cases where the privacy of the transgender person has not been respected, for example when medical records or old personal data have been disclosed by public officials or employers.

2.3.3. Requirements and conditions for a change of name²⁴⁸

As regards conditions for a change of first names, there is a similar pattern to some of the procedures described above. However, name changes in some countries are easier to obtain than gender marker changes since most countries have general provisions for name changes in their legislation. Yet such procedures can be long and costly. The administrative burden on the individual and length of the name change procedure vary greatly. Another problem in some countries is the limited choice of names a transgender person can choose. In some member states only gender-neutral names can be chosen while in others the opposite is true: no gender-neutral names are allowed.

The information presented in this section is again hampered by an absence of up-to-date and non-contradictory information on frameworks regulating name change. In some member states, such as Albania, there are no explicit references to a person's gender identity as a possible reason for a change of first name. In other countries, such as Georgia, there are no specific requirements defined in the law for the possibility to change one's name at all. In other countries, the law provides for a change of name if there are "important personal reasons" (Liechtenstein), possibly opening up the option for transgender persons to change their first name but this has not been proven by case law.

Generally, member states require some form of medical opinion. Some states allow a change of name on documents only on production of a certificate from the medical profession confirming that gender reassignment surgery has taken place or evidence of the legal gender recognition (for example Croatia, Georgia, Latvia,²⁴⁹ Moldova,²⁵⁰ San Marino, Slovakia, Ukraine²⁵¹). At least three other member states require proof of hormonal treatment (Belgium, Croatia, Switzerland). In yet other states applicants need to have a gender dysphoria diagnosis to qualify for the name change (Denmark,

244. *Belgisch Staatsblad*, 2008, www.staatsbladclip.be/wetten/2007/07/11/wet-2007009570.html, accessed 6 June 2008; briefing paper "Transgender Persons' Rights in the EU Member States" by the European Parliament; FRA "Homophobia, Transphobia, Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – A Comparative Legal Analysis", 2010.

245. Regeringskansliet, "Ändrad könstillhörighet – förslag till ny lag", SOU 2007:16, 2007, www.regeringen.se/sb/d/8448/a/79017, accessed 6 June 2008.

246. FRA national contribution on Latvia.

247. Press for Change, "Gender Recognition Act FAQs", www.pfc.org.uk/identity/gender-recognition-act-faqs, accessed 30 August 2010.

248. The information below reflects the available data. Due to unclear procedures and lack of data found in some countries, the fact that some countries are not mentioned below does not necessarily mean that such procedures are not enforced in these countries.

249. Latvia, Law on the Change of Name, Surname and Ethnicity Entry (8 April 2009), Section 2 paragraph 6.

250. However, this requirement applies for Georgia and Moldova whereas there is no law regulating legal recognition of the new gender itself. In these two countries a person wishing to change the surname in identification documents has thus to present documents from the medical profession confirming that the gender reassignment has taken place.

251. Change of name granted simply upon application accompanied by a confirmation by the medical facility.

Germany, Finland and some cantons in Switzerland). In some member states, for example Malta, a transgender person wishing to change a name needs to initiate court proceedings. A court then authorises the change of name. The applicant has to bear the costs. In the United Kingdom and Ireland a certification from a notary is sufficient to secure a name change. Iceland, Serbia and some cantons in Switzerland require the applicant to be unmarried or to divorce in order to be eligible for a name change. In some countries where there are multiple requirements for gender marker change or where it is impossible to receive legal gender recognition, there are relatively simple procedures for a name change. For example in Ukraine there are no particular requirements and in Ireland the Passport Act 2008 provides a convenient procedure.

Legal uncertainty remains as to how member states solve a number of issues for persons who have successfully changed their name but have not obtained legal gender recognition as such: for example concerning data protection, form of address (Mr, Ms/Mrs), the right to marry, parental rights, and placement in gendered wards in hospitals or prisons.

2.4. Conclusions

Despite the fact that most international and European human rights treaties do not explicitly mention sexual orientation and gender identity as discrimination grounds, treaty bodies and experts have interpreted these treaties as covering these two grounds, including the two UN international covenants and the European Convention on Human Rights. International human rights standards apply to lesbian, gay, bisexual and transgender people as much as they apply to any other person.

Most member states of the Council of Europe have non-discrimination legislation in force. Some 20 member states have enacted comprehensive non-discrimination legislation which explicitly includes sexual orientation among the prohibited grounds of discrimination. Of those member states that have not enacted comprehensive non-discrimination legislation (inclusive of sexual orientation), seven have enacted sectoral non-discrimination legislation which provides protection on the grounds of sexual orientation in the fields of employment and access to goods and services. Sexual orientation is an explicitly prohibited ground of discrimination in sectoral non-discrimination legislation in the area of employment, but not with respect to access to goods and services, in 11 other member states. This makes a total of 38 member states.

Some nine member states have included gender identity explicitly in comprehensive non-discrimination legislation. However, no standard wording is currently followed to cover gender identity in these member states and there may be significant differences as to the legal scope of these terms. At least 11 other member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation. Thus, in at least 20 member states comprehensive or sectoral non-discrimination legislation covers transgender persons either on the ground of “sex” or the ground of “gender identity”. For the remaining 27 member states non-discrimination legislation or its implementation is unclear on this point.

In most member states, few statistics on discrimination cases and complaints are available, and the available data are for the most part not disaggregated by area of discrimination. An overall observation is that in many member states the number of cases is low or non-existent. This is partly because the victims tend, for various reasons, to refrain from bringing cases to court.

National structures for promoting equality and non-discrimination are found in many member states of the Council of Europe. In 25 EU member states such structures are vested with a mandate to receive complaints of discrimination on the grounds of sexual orientation. Many of the non-EU member states also have such national structures, some of which have dealt with cases of discrimination based on sexual orientation. As regards the ground of gender identity at least four equality bodies have an explicit mandate to cover gender identity as a discrimination ground. In many other countries gender identity may be covered, at least partially, through the ground of gender or sex in line with EU law.

Minimum standards for the legal recognition of gender reassignment have been set by the European Court on Human Rights, although the Court has given a wide margin of appreciation to member states in deciding on the precise procedures and requirements. Among Council of Europe member states, 24 have adopted legislation which regulates the recognition of the preferred gender of transgender

persons. However, in some of these states such legislation is not clear in its scope and substance. In 10 Council of Europe member states no legislation regulating the recognition of gender reassignment has been identified. Evidence has not been found that these 10 states offer the possibility for transgender persons to have their preferred gender legally recognised. In 13 further member states, although no or only partial legislation was identified, transgender persons were able to have their preferred gender legally recognised in at least some official documents, either through court rulings or by administrative practice.

Surgery leading to sterilisation is required in 29 member states. In 15 member states the person changing sex in identity documents has to be unmarried. This entails forced divorce if the person is already married. In most cases, there is no possibility to stay in, or enter into, a registered partnership (or marriage), leaving couples without any officially recognised relationship after divorce.

Procedures regarding a change of first names may have similar conditions. In some countries, a name change may be obtained through simple administrative procedures. However, in others divorce, diagnosis of gender dysphoria, hormonal treatment as well as gender reassignment treatment are required.

3. Freedom of assembly and association

3.1. Introduction

Freedom of assembly and association are at the core of democracy. Together with the right to freedom of expression, they form the legal basis of an active civil society in which individuals and their associations can collectively shape and disseminate their opinions and demands as well as engage in participatory or representative democratic processes.²⁵²

The chapter starts with an overview of the international and European legal framework and will then go on to discuss freedom of assembly with particular reference to Pride parades and other LGBT related events. It will also focus on freedom of association and problems faced by LGBT NGOs in this regard in some member states.

3.2. The international and European legal framework

The UN Universal Declaration of Human Rights sets forth the right to freedom of peaceful assembly and association in Article 20. Protection of the freedom of assembly and association is also guaranteed by Articles 21 and 22 of the International Covenant on Civil and Political Rights,²⁵³ by Article 5(d)(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination,²⁵⁴ and by Article 15 of the Convention on the Rights of the Child.²⁵⁵

The European Convention on Human Rights guarantees freedom of assembly and association in Article 11. The rights to associate and assemble are not absolute. In some instances legitimate limitations can be applied by authorities. However, according to the European Convention on Human Rights, restrictions should be (1) prescribed by law, (2) have a legitimate aim, and (3) be necessary in a democratic society to achieve those aims. Such aims are: national security, public safety, prevention of disorder or crime, or protection of health, morals and the rights and freedoms of others.²⁵⁶ When applicants bring a case to the European Court of Human Rights, the Court will therefore verify whether there is an interference by public authorities and then apply this three-part test. Only peaceful assemblies are protected by freedom of assembly. "Peaceful" is to be understood in a broad sense, but does not cover, for example, demonstrations where the organisers or participants advocate violence. The exercise of freedom of assembly may be regulated by the national authorities, in particular by introducing a requirement of prior notification.²⁵⁷ Absence of notification does not, however, per se justify infringement of the right to assembly, for instance, by terminating a demonstration.²⁵⁸

Assemblies that may offend the sensitivity or are perceived as unpopular by the majority are also protected by freedom of assembly. In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, the European Court of Human Rights stated the importance of pluralism in society: "if every probability of tension and heated exchange between opposing groups during a demonstration

252. See Scheinin, M., "Article 20", in Alfredsson, G. and Eide, A., *The Universal Declaration of Human Rights – A Common Standard of Achievement*, Martinus Nijhoff Publishers, 1999, p. 417.

253. United Nations, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

254. United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

255. United Nations, Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

256. Article 11 of the European Convention on Human Rights reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

257. European Court of Human Rights, *Güneri and Others v. Turkey*, Applications Nos. 42853/98, 43609/98 and 44291/98, judgment of 12 July 2005, paragraph 79. Also: OSCE/ODIHR, "Guidelines on Freedom of Peaceful Assembly" (2nd edition), Warsaw, 2010.

258. European Court of Human Rights, *Oya Ataman v. Turkey*, Application No. 74552/01, judgment of 5 December 2006, paragraph 39.

were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion”.²⁵⁹ At the same time, in cases in which counter-manifestations or counter-reactions to assemblies become violent, the Court has maintained that the authorities must take “positive measures”²⁶⁰ thus effectively protecting participants from attacks by counter-demonstrators. The duty of authorities, in fact, is not confined to mere restraint from interference in the exercise of the right to freedom of assembly, but it also covers the positive obligation to enable lawful demonstrations to proceed peacefully. Thus, in *Plattform “Ärzte für das Leben” v. Austria*, the Court stated that “the participants must ... be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community”.²⁶¹

As for counter-demonstrations, the same reasoning underpinning *Plattform “Ärzte für das Leben” v. Austria*, namely the one concerning the lawfulness of a restriction on the right to freedom of assembly, applies for the Court. In *Ollinger v. Austria*, in which a counter-demonstration was prohibited due to the wish of the authorities to protect another gathering, the Court had to evaluate whether said prohibition was justified only with reference to the positive obligation to protect the freedom of assembly of others, or whether it required particular justification. The latter was held by the Court, and led to the conclusion that the prohibition was disproportionate to the aim pursued and that the Austrian authorities had failed in striking the balance between competing interests by giving too little weight to the applicant’s interest in holding the intended assembly.²⁶²

The Court has also specifically ruled, in two judgments, against unlawful restrictions or bans running counter to the exercise of freedom of expression by LGBT persons in the context of the organisation of Pride parades in Poland²⁶³ and in Russia.²⁶⁴ In the former case, *Bączkowski and Others v. Poland*, the recourse to administrative impediments on the part of the authorities, namely the request to the march’s organisers for the submission of a “traffic plan”, impinged on the freedom of assembly of the organisers of the 2005 Warsaw Pride parade. In its judgment, the Court upheld a violation of Article 11, Article 13 in conjunction with Article 11, and Article 14 in conjunction with Article 11.²⁶⁵ In *Alekseyev v. Russia*, the Court recalled its previous jurisprudence in *Bączkowski and Others v. Poland*, assessing that the ban the Russian authorities had imposed during several years on Pride parades organised by the applicant could not be justified under Article 11, paragraph 2, which provides for legitimate restrictions on the right to freedom of assembly. As in the previous case, in *Alekseyev v. Russia* the Court also found a violation of Article 11, Article 13 in conjunction with Article 11, and Article 14 in conjunction with Article 11.²⁶⁶

As for the notion of “association”, this has been interpreted broadly by the European Court of Human Rights and thus encompasses all sorts of associations.²⁶⁷ Even where the objective of the association is regarded by the national authorities as contrary to the constitution, the association can still rely on the protection of Article 11 of the Convention.²⁶⁸ The right not only applies when founding an association, but also during the entire lifetime of the association.²⁶⁹ Also, an association cannot be banned in advance out of fear for what the association might do.

259. European Court of Human Rights, *Plattform “Ärzte für das Leben” v. Austria*, Application No. 10126/82, judgment of 21 June 1988, paragraph 32; and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Applications Nos. 29221/95 and 29225/95, judgment of 2 October 2001, paragraphs 106 and 107.

260. European Court of Human Rights, *Plattform “Ärzte für das Leben” v. Austria*, Application No. 10126/82, judgment of 21 June 1988, paragraph 32.

261. *Ibid.*, paragraphs 32 and 34.

262. European Court of Human Rights, *Ollinger v. Austria*, Application No. 76900/01, judgment of 29 June 2006, paragraphs 37, 44 and 49.

263. European Court of Human Rights, *Bączkowski and Others v. Poland*, Application No. 1543/06, judgment of 3 May 2007.

264. European Court of Human Rights, *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

265. *Ibid.*, paragraphs 73, 84 and 101.

266. *Ibid.*, paragraphs 88, 100 and 110.

267. European Court of Human Rights, *Sidiropoulos and Others v. Greece*, Application No. 57/1997/841/1047, 1998, paragraph 40.

268. European Court of Human Rights, *United Communist Party of Turkey v. Turkey*, Application No. 133/1996/752/951, 1998, paragraph 27.

269. *Ibid.*, paragraph 33.

Protection of freedom of assembly and association of LGBT persons or for events related to LGBT issues has been addressed by the Council of Europe Committee of Ministers. In March 2010, the Committee, in its recommendation on combating discrimination on the grounds of sexual orientation and gender identity, explicitly pointed to the necessity for states to take measures to ensure that the right to freedom of association and the right to peaceful assembly “can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity”.²⁷⁰ In relation to the freedom of assembly, the recommendation also stressed the need for protection of participants in peaceful demonstrations to promote the human rights of LGBT persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to peaceful assembly.²⁷¹

As for freedom of association, the recommendation mentions the [need for states to ensure that it can be enjoyed without discriminatory administrative procedures leading to, for instance, excessive formalities for the registration, or functioning, of associations working to promote LGBT rights. It also underlines the need for appropriate measures to effectively protect defenders of the human rights of LGBT persons, and to ensure access to public funding along with the inclusion of such organisations in consultation processes on issues and the implementation of measures that may have an impact on the human rights of LGBT persons].²⁷²

The Commissioner for Human Rights has expressed his concern²⁷³ for violence occurring during Pride parades in some of the member states and has called on authorities to provide competent police protection and respect for the right to freedom of assembly of all, including those who do not belong to the majority.

The Organization for Security and Co-operation in Europe (OSCE) has developed a set of seven guiding principles containing recommendations on freedom of assembly that build on the organisation’s commitments and on international standards.²⁷⁴ The principles build on a “presumption in favour of holding assemblies” that specifically stress that “[a]s a fundamental right, freedom of assembly should, insofar as possible, be enjoyed without regulation”. As a consequence, those wishing to assemble should not be required to obtain permission to do so.²⁷⁵ Instead, the guidelines suggest that advance notice of an assembly should suffice.²⁷⁶ The guidelines also suggest that the organisers of an assembly must be protected from *agents provocateurs* entering and disrupting a manifestation, the objectives of which they do not share, with the sole purpose of creating a disturbance. Such a disturbance could lead to the termination of the event either by the organisers or by the authorities. Thus, the authorities should be seen as under an obligation to take appropriate action to remove the *agents provocateurs* rather than terminating or dispersing the assembly, or declaring it to be unlawful.²⁷⁷

While the police have the responsibility for maintaining public order, imposing a specific obligation on the part of the organiser should not be used by the authorities to transfer the authorities’ obligations to civil persons. Organisers may, on the other hand, be required to “arrange a certain level of stewarding for their gathering”,²⁷⁸ but only to ensure the peaceful and orderly behaviour of the participants. Making use of such a condition for organising a public assembly should derive from a specific assessment and never be used as a main rule, and it does not nullify the overall responsibility of the police for public order.²⁷⁹ It is questionable whether the organiser may be asked to bear costs related to ensuring the safety of the participants during an assembly or costs related to the subsequent clean-up and any such decision would also require a specific assessment demonstrating a need for sharing financial burdens.²⁸⁰ Furthermore, following *Bączkowski and Others v. Poland*, it may be maintained

270. Council of Europe Committee of Ministers, Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted 31 March 2010, paragraphs 9 and 14.

271. *Ibid.*, paragraph 15.

272. *Ibid.*, paragraphs 9-12.

273. Commissioner for Human Rights, 2010, “Pride Events are Still Hindered – This Violates Freedom of Assembly”, available at: http://commissioner.cws.int/tiki-view_blog_post.php?postId=42, accessed 11 June 2010.

274. OSCE/ODIHR, “Guidelines on Freedom of Peaceful Assembly – Second Edition”, Warsaw, 2010.

275. *Ibid.*, Section A.2, “Guiding principles”.

276. *Ibid.*, Section A.4, “Procedural issues”.

277. *Ibid.*, Section A.2, “Guiding principles”.

278. *Ibid.*, paragraph 195.

279. *Ibid.* paragraphs 191-192.

280. Council of Europe Standing Committee on Social Cohesion, “Freedom of Assembly and Expression for Lesbians, Gays, Bisexuals and Transgendered Persons – Explanatory Memorandum”, Spring Session, CPL(13)9PART2, 26-28 March 2007, p. 10.

that the requirement to provide traffic plans from the organisers of Pride parades is in breach of the guarantee to freedom of assembly.²⁸¹

Other principles laid down in the OSCE guidelines cover the principle of “good administration” and the principle of “non-discrimination”.²⁸² The principle of good administration sets forth an obligation to clarify in law which state body “is responsible for taking decisions about regulation of freedom of assembly”. It also clarifies that these bodies should “ensure adequate access to reliable information” and that they should “operate in an accessible and transparent manner”. The principle of non-discrimination is set forth to underline the obligation of states not to discriminate against specific groups and thus guarantee freedom of peaceful assembly to all without any distinctions – including on grounds of sexual orientation as a prohibited grounds of discrimination. The guidelines make no reference to discrimination on grounds of gender identity as for the enjoyment of the right to freedom of assembly for transgender persons.

Within the European Union, the European Charter of Fundamental Rights lays down the freedom of assembly and association in Article 12. This Article 12 corresponds to Article 11 of the European Convention on Human Rights, but it may have a somewhat wider scope as it also includes associations at the European level. Moreover, the EU directive on establishing a general framework for equal treatment in employment and occupation, explicitly covering discrimination on grounds of sexual orientation, prescribes in Article 3 that non-discriminatory treatment in the field of employment and occupation should also apply to a person’s application for membership of an organisation of employees or employers, or any other organisation whose members are of a particular profession.²⁸³

The Yogyakarta Principles contain an article concerning freedom of assembly and association. According to Principle 20, the right to freedom of assembly and association covers the right to form and have recognised, without discrimination, associations advocating the rights of LGBT persons and associations that distribute information to or about, facilitate communication among, or advocate for the rights of LGBT persons.²⁸⁴

3.3. Freedom of assembly

3.3.1. Pride parades and other LGBT public demonstrations and events

Pride parades and Pride festivals have their historical roots in the “Stonewall Riots” in New York of June 1969, when LGBT persons gathered to protest in the streets against continuing police harassment against them. Since then, these riots have been commemorated in many other cities, firstly in the USA, and later annual demonstrations against homophobia, transphobia and in favour of equal rights have been organised worldwide. Annual events, often with a political character, are organised by LGBT NGOs as Equality Parade, Diversity March, Rainbow Parade or Christopher Street Day. In the last decade, several events have received considerable attention in various member states, and Pride celebrations have become indicative of the importance of sexual orientation, gender identity or the human rights of LGBT persons as a political issue. On the one hand, demonstrations have an LGBT community-building and empowering function: Prides have been used strategically by LGBT NGOs to claim their rights, create networks and alliances, build communities and increase visibility as well as start debates. On the other hand, Pride events have provoked extensive anti-LGBT discourse. Pride events have mobilised various groups and alliances against the enjoyment of human rights by LGBT persons. Pride events have been a litmus test of the attitudes of the general population and the very possibility to enjoy the right of freedom of assembly.

Public demonstrations specifically promoting the human rights of transgender persons are organised less frequently, although there is a clear increase in the number of public meetings focusing on transgender issues. Such events tend to take place during the Trans Remembrance Day on 20

281. European Court of Human Rights, *Bączkowski and Others v. Poland*, Application No. 1543/06, judgment of 3 May 2007, paragraph 71.

282. OSCE guidelines, op. cit., Section A.2, “Guiding principles”, Principles 5 and 6.

283. Cf. European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

284. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

November, when victims of transphobic murders are commemorated. While transgender communities in member states often participate in LGBT Pride events, in 2010 transgender activists in Turkey held the first separate transgender Pride parade in Istanbul.²⁸⁵

In the majority of cases, Pride events occur without problems and in many countries politicians publicly support the Pride events. Co-operation with local authorities and police goes smoothly in many instances. However, several concerns have been identified in relation to reactions to such demonstrations in some member states in recent years. Some authorities have not guaranteed, or have even prevented, the exercise of the right to assemble for LGBT persons via bans or administrative impediments. Some have failed to guarantee protection for LGBT persons from counter-demonstrators and some political or religious figures have used public LGBT demonstrations to encourage anti-LGBT attitudes and actions. Restrictions can be witnessed by imposing a ban on events or by introducing administrative impediments.

3.3.2. Restrictions on freedom of assembly

Bans or administrative impediments

There have been instances of public authorities prohibiting peaceful demonstrations and Pride festivals by organisations advocating LGBT rights. The most direct form of interference with the exercise of right to freedom of assembly has taken the form of explicit bans of public LGBT events. A second way in which public authorities restricted the freedom of assembly of LGBT persons was by imposing different types of administrative impediments which may in fact constitute indirect hindrance to the freedom of assembly. For example, public authorities have sometimes ordered the organisers of Pride parades to move the event to remote areas, or other disproportionate demands have been imposed on the organisers.

Since 2004, there have been cases of bans and/or administrative impediments imposed on Pride events or other larger public cultural LGBT events in 12 member states (Bulgaria, Estonia, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Serbia, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine). Bans or impediments in some of these member states have been justified on the ground that no police protection would have been available to protect the participants from counter-demonstrations.

No bans or administrative impediments regarding freedom of assembly for LGBT persons and groups have been identified since 2004 in 27 member states (Austria, Andorra, Bosnia and Herzegovina, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom). However, in some of these member states, bans of Pride events had initially been called for.

In eight member states (Albania, Armenia, Azerbaijan, Cyprus, Georgia, Monaco, Montenegro and San Marino), no large-scale public LGBT events such as demonstrations or Pride parades have ever been organised. At the same time, however, in Armenia, Azerbaijan and Montenegro²⁸⁶ small (often indoor) gatherings have been organised to celebrate the International Day Against Homophobia and Transphobia on 17 May. It should also be noted that other smaller events have taken place in many member states, such as poster campaigns (e.g. in Albania and Liechtenstein), information stands or handing out material (e.g. in Liechtenstein and Montenegro). LGBT cultural festivals have been organised among others in Bosnia and Herzegovina and “the former Yugoslav Republic of Macedonia”.²⁸⁷

285. Meeting with Istanbul LGBTTT, 21 February 2010.

286. See national contributions on these member states.

287. FRA national contribution and field trip meetings with NGOs in the countries listed.

Map 3.1: Bans and/or administrative impediments on large LGBT events since 2004



The following examples can be given:

In Lithuania in 2007 and 2008, the municipality in Vilnius denied authorisation for a public LGBT event.²⁸⁸ In 2010, the Baltic Pride was organised in Vilnius, Lithuania. This event was eventually allowed though only after a decision by the Supreme Administrative Court to uphold the permission to go ahead. The march took place under heavy police protection and with a significant number of hostile protesters surrounding it: the number of counter protesters and the police outnumbered the participants by a large proportion.

In Ukraine in 2008, the LGBT NGO LIGA tried to arrange an information campaign including a flash mob (a small happening) in the city of Nikolaev, which was supposed to take place on the International Day Against Homophobia and Transphobia. The event was, however, banned by the authorities. Ukrainian legislation requires that organisations that wish to hold public events inform the appropriate authorities, but it does not require organisations to obtain permission. Nevertheless, the night before the event, the organisation received a written notification from the municipality informing the organisers that the event could not take place. The notification explained this with reference to an appeal from the leaders of several religious denominations demanding that the local authorities ban the event and stated that the event “creates the danger of civil disorder, disturbs public peace and incites mass riots and conflicts”.²⁸⁹ The Ukrainian Ombudsman’s Office pointed out that the reason for banning the event may have been related to the fact that it was supposed to take place right before a religious holiday which would have led to confrontations between the participants and religious groups.²⁹⁰ Representatives of the Ministry of the Interior of Ukraine commented that there was a special unit which advised the municipalities on safety issues in relation to public gatherings and demonstrations. According to the representatives it was the obligation of the police to secure the safety of any demonstration, if the municipality decided to allow it.²⁹¹ In 2009 the Nikolaev Rainbow Spring Culture and Sport LGBT festival was also banned by local authorities, supported by a ruling of the local court.²⁹²

288. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 33; and “Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis”, 2008.

289. ILGA-Europe, “Nikolaev Local Authorities Ban Action Commemorating International Day Against Homophobia”, available at: www.ilga-europe.org/europe/guide/country_by_country/ukraine/nikolaev_local_authorities_ban_action_commemorating_international_day_against_homophobia, accessed 1 June 2010.

290. Interview with the Ukrainian Ombudsman Office, 17 May 2010.

291. Interview with the Ukrainian Ministry of the Interior, 18 May 2010.

292. According to a letter (No. 1170/209/14/24) received by LIGA from the Executive Committee of the Nikolaev City Council issued on 6 May 2009.

In the Russian Federation the authorities have banned Pride parades on several occasions. Since 2005, the Russian project GayRussia has been trying to organise a Gay Pride event in Moscow. Every year the notifications for conducting the event have been turned down by the Moscow municipality. Despite this, GayRussia has organised events, gathering LGBT persons, activists and international journalists and politicians in the streets of Moscow and carrying out public actions. Most of these public actions have resulted in violence against the participants from the side of right-wing groups.²⁹³ Particularly during the events in 2007, the police were heavily criticised for not taking any action to protect the participants against the violent attacks from the homophobic groups.²⁹⁴ In 2010, yet another request for holding the Moscow Pride event was turned down by the authorities. A public event was nevertheless conducted on 29 May 2010. GayRussia gathered 30 LGBT activists, who displayed a long rainbow flag from the Belarus Central station all the way through Leningrad Street.²⁹⁵

During the years when Pride parades in Moscow were banned, the Russian gay activist Nicolay Alekseyev lodged several complaints with the European Court of Human Rights, alleging violation of Article 11 of the Convention in conjunction with Article 14 on the prohibition of discrimination and violation of Article 13 on the right to an effective remedy. On 21 October 2010, the Court²⁹⁶ found a violation of these articles. In its arguments, the Russian Government recognised the existence of interference with the right to freedom of association, justifying them on two grounds: by affirming that they had pursued a legitimate aim and that they had been necessary in a democratic society, namely on safety grounds and protection of public order given the high number of petitions, some of which threatened violent reactions, received from groups calling for a ban on the events.²⁹⁷ Moreover, the government argued that such bans had been motivated on the basis of “protecting morals” and the authorities’ duty to “demonstrate sensitivity to the existing public resentment of any overt manifestation of homosexuality”.²⁹⁸

In its assessment, the Court observed that the mere threat of violent counter-reactions to the events did not constitute a sufficient reason for the government to ban them.²⁹⁹ The Court also affirmed that no justification³⁰⁰ could be provided to support the view, defended by the government, that “celebrations of homosexual behaviour” should be confined to the private sphere.³⁰¹ In particular, the Court stated: “There is no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or ‘vulnerable adults’. On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case.”³⁰²

Several Russian NGOs have also organised flash mobs for raising awareness and promoting the human rights of LGBT persons. For example, the Russian LGBT Network has carried out such actions in St Petersburg and Novosibirsk.³⁰³ Such happenings have often been organised as less controversial alternatives to large Pride parades. However, such events are not always welcomed by the authorities either. For example, the LGBT film festival “Side by Side”, which started in St Petersburg in 2007, was subjected to restrictions as the organisers encountered several problems in accessing premises in some Russian cities.³⁰⁴

293. The information is gathered from the websites: www.moscowpride.ru, accessed 31 May 2010; www.ilga-europe.org/europe/guide/country_by_country/russia, accessed 31 May 2010, and through interviews with the Social Centre Trust, 11 May 2010, NGO Rainbow Association, 10 May 2010, NGO Wings, 13 May 2010, and the Russian LGBT Network, 14 May 2010.

294. Human Rights Watch and ILGA-Europe, “We Have an Upper Hand! – Freedom of Assembly in Russia and the Human Rights of Lesbian, Gay, Bisexual and Transgender People”, June 2007.

295. Described by GayRussia: www.gayrussia.ru/en/news/detail.php?ID=15850, accessed on 21 May 2010. Also: Amnesty International, “Amnesty International Report 2010 – Russian Federation”, 28 May 2010, available at: www.unhcr.org/refworld/docid/4c03a806c.html, accessed 20 September 2010.

296. European Court of Human Rights, *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

297. *Ibid.*, paragraphs 56 and 57.

298. *Ibid.*, paragraph 62.

299. *Ibid.*, paragraph 77.

300. *Ibid.*, paragraph 86.

301. *Ibid.*, paragraph 61.

302. *Ibid.*, paragraph 86.

303. Meeting with the Russian LGBT Network, St Petersburg, 14 May 2010.

304. Meeting with Side by Side, St Petersburg, 13 May 2010 – see also the section on freedom of assembly in this chapter.

In “the former Yugoslav Republic of Macedonia” in October 2007, the LGBT NGO MASSO was arranging a “Love is love” party at a square in Skopje. The party was supposed to be a part of the Queer Square Festival. The organisation submitted its notification to the central municipality four months before the event, but one month prior to the event, it received a negative reply. The municipality argued that another organisation (BORKA – working on the fight against cancer) had permission to hold its event at the square instead. The problem, however, did not exist as BORKA's event would have been finished at 6 p.m. after which MASSO could have held its party. When confronted with this fact, the municipality still refused to give permission. Their explanation referred to a monument to Mother Theresa on the square, stating that BORKA's event was far more serious, and “morally appropriate” for such a place.³⁰⁵ The only other demonstration explicitly, although not exclusively, promoting the human rights of LGBT persons in the country, the March for Tolerance organised by the Macedonian Helsinki Committee for Human Rights, took place in 2009 and did not encounter any restrictions from the authorities.³⁰⁶

Bans have also occurred in Latvia in 2005 and 2006, when municipal authorities banned the Pride parade in Riga.³⁰⁷ Declared illegal by the Supreme Court,³⁰⁸ bans ended in 2007 and since then Pride parades have been held in Riga, although under heavy police protection. Similarly in Romania in 2005, municipal authorities banned a Diversity March in Bucharest.³⁰⁹ In the following years, notwithstanding the continuous counter-demonstrations and protests, as well as some administrative impediments encountered by the organisers,³¹⁰ Gay Pride marches have regularly taken place.

Problems concerning the organisation of Pride parades have been registered in Poland as well. In 2004 and 2005, LGBT equality marches were banned by municipal authorities in Warsaw and in 2005 a march was banned in Poznan.³¹¹ As mentioned before, in the case of *Bączkowski and Others v. Poland*,³¹² the European Court of Human Rights ruled that bans on equality marches and assemblies in Warsaw in 2005 constituted a violation of Article 11, Article 13 in conjunction with Article 11, and Article 14 in conjunction with Article 11 of the Convention. The facts concerned the initiative of the association Foundation for Equality to organise an equality march to alert public opinion to discrimination based on sex, race and sexual orientation. The march was not given permission by the Traffic Officer on behalf of the Mayor of Warsaw: the official reason was because the organisers had not submitted a “traffic organisation plan” that had been requested. The Court, while maintaining that the applicants were not effectively required to submit such a plan, pointed out the existence of an interview with the Mayor of Warsaw in which he had clearly stated that he would have refused permission for the march to go ahead. The Court found in the first place that the provisions of the “Road Traffic Act” were applied to the applicants in a manner which infringed their right to freedom of assembly.³¹³ Furthermore, the Court also recognised that the opinions of the mayor had “impinged on the applicants’ right to freedom of assembly in a discriminatory manner”³¹⁴ therefore recognising that a violation of Article 11 in conjunction with Article 14 had occurred. Annual equality marches have been held in Poland in the years following the bans. The EuroPride held in Warsaw in July 2010 is a notable example.

In 2005 in Bulgaria the authorities in Varna banned a Pink Point information booth. The Commission for Protection against Discrimination accepted a complaint of the organisers and subsequently found the Varna Municipality guilty of indirect discrimination.³¹⁵ It should be noted that for Bulgaria (as well

305. ILGA-Europe, “MASSO is Denied the Right to the Freedom of Assembly”, available at: www.ilgaeurope.org/europe/guide/country_by_country/fyrom/masso_is_denied_the_right_to_the_freedom_of_assembly, accessed 3 February 2010, and confirmed during a meeting with the Helsinki Committee, 28 April 2010.

306. Meeting with the Helsinki Committee for Human Rights of “the former Yugoslav Republic of Macedonia”, 28 April 2010.

307. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010; and “Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis”, 2008.

308. *Ibid.*

309. FRA national contribution on Romania. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010; and “Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis”, 2008.

310. *Ibid.*

311. Abramowicz, M. (ed.), “The Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report”, Warsaw: Campaign against Homophobia and Lambda Warsaw Association, 2007.

312. European Court of Human Rights, *Bączkowski and Others v. Poland*, Application No. 1543/06, judgment of 3 May 2007.

313. *Ibid.*, paragraph 71.

314. *Ibid.*, paragraph 100.

315. FRA national contribution on Bulgaria.

as Romania and Poland), the EU Agency for Fundamental Rights noted progress with regards to freedom of assembly for LGBT persons since then.³¹⁶

Administrative impediments

In Serbia, threats in 2004 and 2009 from fascist and nationalist groups led to the cancellation of Pride parades in Belgrade³¹⁷ following concerns that the police would not be able to guarantee the safety of the participants. In 2009, the day before the Pride parade was expected to begin, the Serbian Prime Minister presented the organisers with an official decree signed by the head of the Serbian Police stating that the public safety corps were not able to ensure the security of the demonstrators on the square in front of the Faculty of Philosophy in Belgrade. The Police Department of the Ministry of the Interior ordered the organisers to move the event from the centre of Belgrade to the Ušće estuary, far away from the centre of the city. The order from the authorities to move the Pride parade is viewed by the organising NGOs as a *de facto* ban on the planned event.³¹⁸ Members of the organising committee filed a complaint before the Constitutional Court and on 31 December 2009 an application was also sent to the European Court of Human Rights.³¹⁹ In October 2010, the first authorised and protected Gay Pride march took place in Belgrade with the government's support and heavy police protection. Despite the well-organised police protection, the NGO "Women in Black" was attacked the day before the Pride (two women were injured). Violent incidents occurred, causing nearly 140 injured among policemen and counter-demonstrators.³²⁰

In Moldova in May 2010, the LGBT NGO GenderDoc-M tried to organise a public manifestation called "Rainbow over the Dniester" in the central square of Chişinău. The Chişinău municipality and the Police Department of the Ministry of the Interior received a number of letters from veteran organisations, religious groups and other civil society organisations asking the municipality to ban the event.³²¹ The Police Department of the Ministry of the Interior recommended that the municipality move the demonstration from the central square in front of the parliament and the Central Orthodox Cathedral of Chişinău to a less public place. According to the Police Department, they did not feel they were in a position to protect the demonstrators since they did not want to be perceived as gay-friendly.³²² On this basis, the municipality did not allow the demonstration at the requested place, but suggested that it should take place away from the city centre, with the argument that the municipality did not want to create a conflict situation between the LGBT community members and what was referred to as "the majority of Moldovan society".³²³ The Commissioner for Human Rights wrote to the organisers in Moldova: "I am fully aware that on a number of previous occasions in recent years, you have faced obstacles in enjoying your human right to peacefully assemble. The right enshrined in Article 11 of the European Convention on Human Rights applies to all persons, including LGBT persons. States have a positive duty to protect the participants of demonstrations, even if this demonstration may annoy persons opposed to the ideas or claims that the demonstration seeks to promote."³²⁴

In Estonia in 2007 the police refused to co-operate with Pride organisers in protecting the participants of the Pride. The organisers successfully complained to the Estonian Chancellor of Justice who pointed out that police have a positive obligation to safeguard the participants.³²⁵

316. European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010, p. 7.

317. Meetings in Serbia with the Centre for Enhanced Legal Studies, Labris, Gay Straight Alliance, the Ministry for Human and Minority Rights, the Ombudsman's Office, 6-8 April 2010.

318. Meetings in Serbia with Labris and Gay Straight Alliance, 6-7 April 2010.

319. European Court of Human Rights (Application No. 5591/10).

320. "Police Clash with Anti-Gay Protesters in Belgrade", available at: www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=10&dd=10&nav_id=70196, accessed 20 October 2010.

321. ILGA-Europe, "Moldova: Comprehensive Denial to Moldova's Principal LGBT Organisation of the Right to Freedom of Assembly, Report as of 19 November 2006".

322. Interview with the head of the police, Chişinău. 20 May 2010.

323. Interview with the Moldovan Ministry of the Interior, Chişinău, 20 May 2010. For similar previous incidents in Moldova, see: ILGA-Europe, "Moldova: Comprehensive Denial to Moldova's Principle LGBT Organisation of the Right to Freedom of Assembly, Report as of 19 November 2006", Brussels, 2006.

324. Letter from the Commissioner for Human Rights, Thomas Hammarberg, "Message to the Participants at the Moldovan LGBT Festival 'Rainbow over the Dniester'", Strasbourg, 22 April 2010.

325. Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation", 2009, p. 52.

Annual Pride marches have been held in Turkey since 2003. The marches have not been banned or stopped by the police, but every year the organisers have had to negotiate with the police authorities about the venue of such demonstrations. However, this is an issue that is not only applicable to LGBT organisations or events and is not described by the organisers as a serious obstacle imposed due to the fact that the event was LGBT related.³²⁶ However, in August 2006, the Rainbow Association (Rainbow Solidarity and Cultural Association for Gay, Lesbian and Transgender people) of Bursa called for a demonstration on 6 August 2006 to protest against an attempt by the Governor of Bursa to shut down the association under the “general morality” statute. But before the LGBT group could hold its march, a group of 500 counter-demonstrators gathered around the association’s headquarters where the protesters had assembled. As they chanted, the counter-demonstrators started throwing stones, trapping 100 gay, lesbian and transgender persons inside the building. Following this incident, the police cancelled the planned demonstration and told the LGBT group that they were incapable of protecting them from the counter-demonstrators.³²⁷

Counter-demonstrations

Obstacles to LGBT demonstrations, such as Pride events, are not created only by public authorities; they can also come from civil initiatives such as counter-demonstrators. According to LGBT NGOs and national human rights structures in the countries where such counter-demonstrations have taken place, the protests are typically organised by fascist and neo-Nazi groups, right-wing radicals, nationalist groups, hooligans or conservative religious groups. These groups sometimes operate in alliances. While attacks on Pride participants are common occurrences before, during or after many Pride events held throughout Europe, some of them have attained a particular degree of seriousness. In the last decade organised violent attacks on Pride marches or LGBT events have occurred in at least 15 member states (Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Italy, Latvia, Moldova, Poland, Romania, Russian Federation, Serbia, Sweden and Ukraine).³²⁸ The following are examples of such incidents in some of the member states. It should be stressed that such counter-demonstrations are sometimes allowed, and sometimes not.

In Serbia, the first Pride parade was held in Belgrade in 2001 when the participants were attacked by a large group of neo-fascist and nationalist protestors, including hooligans. Several were severely injured, and the police did not effectively protect the Pride participants. The severe and violent attacks on the first Pride event in the region were a severe setback for the LGBT movement in the Balkans. Subsequent attempts to hold Pride demonstrations have been cancelled due to threats from counter-demonstrations and lack of protection from the authorities – until³²⁹ October 2010 when the first Pride took place in Serbia.

In 2003, skinheads attacked participants at Stockholm Pride in Sweden.³³⁰ The first public LGBT event in Bosnia and Herzegovina³³¹ – Queer Sarajevo Festival – was attacked by hooligans and Wahhabist religious extremists in 2008. The Queer Festival was organised as a cultural event with an art exhibition and film viewings.³³² Due to the attacks on the festival, the organisers chose to cancel the rest of the programme because of lack of safety for the participants. Apart from the physical attack on the Queer Festival, phone calls, SMS messages, statements posted on the Internet and posters calling for “death to faggots” and “we shall not allow gay festivals in our town” were used to attack and threaten the organisers as well as LGBT persons in general. Due to the security situation, Organization Q decided to move their offices.³³³

No cases have been identified where the authorities have banned or restricted planned counter-demonstrations, even when their mobilisation campaign may have included incitement to hatred against LGBT persons. This issue has received particular attention in Croatia where the Croatian Pure

326. Meeting with Lambdaistanbul in Istanbul, 20 February 2010.

327. Atasay, A., *Yürüyoruz* (We March) – a documentary, 2006.

328. See (FRA) national contributions. Some incidents in this section also refer to the period prior to 2004.

329. Meetings in Serbia with Labris, 6 April 2010, and the Gay Straight Alliance 7 April 2010.

330. RFSL (The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights), “Belonging”, 2005, available at: www.rfsl.se/public/rfsl_belonging_2.pdf, accessed 6 December 2010.

331. Except for previous exhibitions, film screenings and parties.

332. The Queer Sarajevo Festival and the events surrounding it are described in detail in a documentary made by Organization Q, *Queer Sarajevo Festival 2008*, and in “Queer Sarajevo Festival 2008 – Narrative Report”.

333. Meeting with Organization Q, 9 April 2010, also documented in the documentary about the festival, *Queer Sarajevo Festival 2008*, and Organization Q, “Queer Sarajevo Festival 2008 – Narrative Report”, 2008.

Party of Rights, together with various extremist groups, organised a counter-demonstration against the Pride parade in 2009 “to eradicate the plague of homosexuality.” LGBT NGOs heavily criticised the fact that the authorities did not restrict the counter-demonstration despite its apparent incitement to hatred and recourse to fascist symbols, whereas the authorities argued that it did not pose a security risk.³³⁴

Wider counter-reactions

Opposition to Pride festivals or demonstrations in favour of LGBT rights can also be expressed more generally by public figures backed up by popular support. Local and national politicians and religious figures have taken part in debates using anti-LGBT rhetoric to support the prohibition or prevention of Pride marches. In the case of Serbia, the counter-mobilisation and campaigning in 2009 reached a point spreading far beyond the counter-demonstration itself. The controversy of the Pride event in Belgrade in 2009 was one of the most polemical public events in Serbia for months. Anti-LGBT graffiti was seen everywhere and some of the Pride organisers felt forced to leave the country for a while due to threats.³³⁵

In Georgia in 2007, several NGOs were involved in the preparation of an activity under the Council of Europe sponsored campaign against intolerance named “All Different – All Equal.” Although the event targeted discrimination in general, the media chose to link up this campaign with LGBT persons affirming that it had the support of the authorities. Reactions of politicians and of the Patriarchate of Georgia were harsh. The patriarchate issued a public statement saying, “The nation that does not ban incorrect sexual orientation and lifestyles is always condemned by God” and calling the event an “exhibition of the sins of Sodom and Gomorrah”.³³⁶ Despite the efforts of the Council of Europe Secretary General’s Special Representative to explain the situation, there were “ferocious media attacks labelling the event as a Gay Pride”.³³⁷ Unable to guarantee the safety of the participants, the organisers cancelled the event. Reportedly, organisations sponsoring the parade received numerous threats.

There may be strong popular opposition to LGBT events. In a Polish survey from 2005, 78% of the respondents opposed the right of LGBT organisations to demonstrate in public.³³⁸ A similar figure in 2008 from a Serbian survey was 73%.³³⁹

It should be stressed that strong language is commonly used during counter-demonstrations. For example in relation to attempts to organise a Pride march in the Russian Federation a regional governor was quoted as saying: “Tolerance?! Like Hell! Faggots should be torn apart. And their pieces should be thrown in the wind.”³⁴⁰ In 2009, when organisers of a Gay Pride event in Serbia held a press conference, protestors outside were reportedly shouting: “Faggots, we will kill you.”³⁴¹ In Bosnia and Herzegovina, a YouTube clip was posted representing a direct death threat to one of the organisers of the Queer Sarajevo Festival in 2008, depicting her being beheaded. The latter situation led the Special Rapporteur on the situation of human rights defenders, together with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to send a communication

334. Based on meetings in Croatia with Kontra, the Centre for Peace Studies and the Ministry of Internal Affairs, 15-16 April 2010.

335. All institutions and organisations interviewed have similar elaborate accounts of the events related to Belgrade Pride 2009.

336. Meeting with the Council of Europe Special Representative in Georgia, 10 March 2010. The incident is also described in: OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2007”, 2008. See also, *Me Magazine*, No. 2 (5), 2007, p. 8, available at: www.inclusive-foundation.org/home/files/me/me_magazine_2007_2.pdf, accessed 3 August 2010.

337. “Honouring of obligations and commitments by Georgia”, Doc. 11502 rev, paragraph 268, 23 January 2008, report by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe; Kamushadze, A., “Georgian Media Invent Gay Pride Rally”, *Messenger*, 27 July 2007.

338. Public Opinion Research Centre, “Acceptance of Rights for Gay and Lesbian Persons and Social Distance towards Them”, 2005, available at: http://www.cbos.pl/SPISKOM.POL/2005/K_127_05.PDF, accessed 21 July 2008.

339. Gay Straight Alliance, “Prejudices Exposed – Homophobia in Serbia”, 2008. Public opinion research report on the LGBT population. Research conducted for the Gay Straight Alliance by the Centre for Free Elections and Democracy (CeSID), February-March 2008.

340. Statement of Mr Betin, Governor of the Tambov Region, as quoted in ILGA-Europe, “Human Rights + Responsibility + Respect. A contribution to the Council of Europe conference: Human Rights in Culturally Diverse Societies: challenges and perspectives”, p. 3; GayRussia.ru, 29 July 2008, “Activists intend to take the case to courts up to Strasbourg”.

341. Human Rights Watch, Letter to the President of the Republic of Serbia, 16 November 2009.

to the Bosnian authorities.³⁴² A communication was also sent by the Special Rapporteur to the Bulgarian authorities on 27 June 2008 regarding a Gay Pride Parade scheduled to take place in Sofia the day after, expressing her serious concerns for “speech which may incite hatred”.³⁴³ Other examples of web-based hate groups were reported from Latvia and Portugal.³⁴⁴

The European Court of Human Rights has shown little tolerance for hate statements, in particular when they are used by authorities as an argument for defending a ban on a Gay Pride march. In the landmark case *Alekseyev v. Russia*³⁴⁵ the Court stated:

As regards any statements calling for violence and inciting offences against the participants in a public event, such as those by a Muslim cleric from Nizhniy Novgorod, who reportedly said that homosexuals must be stoned to death ..., as well as any isolated incidents of threats of violence being put into practice, they could have adequately been dealt with through the prosecution of those responsible. However, it does not appear that the authorities in the present case reacted to the cleric’s call for violence in any other way than banning the event he condemned. By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order.³⁴⁶

Police protection

The lack of police protection during Pride parades has often been criticised. In some cases, the announcement of the police’s inability to protect demonstrators has led the organisers to cancel the events. On other occasions, even when formal announcements have not been made, the police have not effectively protected the demonstrators from violent attacks. Several LGBT NGOs report security problems for participants, not only during the demonstrations, but also before and especially after Pride events.³⁴⁷ These incidents point to the fact that the police in some instances have been unable or unwilling to protect the participants from attacks. Incidents where police authorities have announced that they could not protect the participants in specific LGBT Pride demonstrations and events have occurred in Estonia, Latvia, Moldova, Russian Federation, Serbia, Turkey and Ukraine.³⁴⁸ On other occasions, the police present at demonstrations have failed to protect demonstrators, such as in 2007 in Hungary³⁴⁹ and Romania,³⁵⁰ where initially the police arrested several anti-gay demonstrators but failed to take control of the riots which developed during the event. Another concern is that the authorities may also have reacted to the counter-protests by ordering the Pride organisers to move the event out of town or to a protected part of town as happened in the cases in Serbia and Moldova previously referred to.

Practical initiative: ILGA-Europe has produced a “Handbook on Observation of Pride Marches” (2006). The handbook gives information to people and organisations on how to monitor human rights abuses during Pride marches. Another publication by ILGA-Europe is “Prides against Prejudice – A Toolkit for Pride Organising in a Hostile Environment” (2006). The publications provide valuable know-how – including from the human rights angle – for independent observers as well as people and groups organising Pride marches.

342. Communication by the Special Rapporteur on the Situation of Human Rights Defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 27 November 2008, referred to in *Sexual Orientation and Gender Identity in Human Rights Law: Reference to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, p. 38.

343. *Ibid.*, p. 39.

344. The Latvian NoPride Association and the Portuguese Partido Nacional Renovador.

345. European Court of Human Rights, *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

346. *Ibid.*, paragraph 76.

347. For example in Romania, Sweden, Hungary, Poland, Latvia. Information was also given during meetings with the Lesbian Group Kontra, Croatia, 15 April 2010, GenderDoc-M, Moldova, 20 May 2010, Gay Straight Alliance, Serbia, 7 April 2010, and the Russian LGBT Network, Russian Federation, 14 May 2010. Also: OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2008”, 2008.

348. See the (FRA) national contributions.

349. FRA national contribution on Hungary.

350. FRA national contribution on Romania.

3.3.3. Conclusions regarding freedom of assembly

As discussed in the chapter on attitudes and public opinion towards LGBT persons in this report, Pride parades and other public LGBT demonstrations may generate resistance and anti-LGBT discourse in some member states exactly because they are “public” events. Visibility of LGBT persons in public spaces in itself is perceived as provocative. Events concerning LGBT rights are often viewed as a mere display of sexuality, which is seen as a private matter. Pride events and similar manifestations have been effective tools for breaking the silence around LGBT issues. At the same time they have constituted an important step for generating broader debates on the enjoyment of human rights by LGBT persons and addressing homophobia and transphobia. In those member states where Prides or similar LGBT demonstrations have not taken place, this may be due to, either, the size or organisational level of the LGBT communities concerned or the practical possibilities for organising demonstrations in a political and social environment which may entail administrative impediments or bans as well as the risk of threats to or attacks on the organisers and participants.

In a majority of member states, LGBT persons can exercise their rights to freedom of assembly in accordance with Article 11 of the European Convention on Human Rights. In several member states, however, LGBT demonstrations have been confronted with bans or administrative impediments, as well as widespread negative counter-reactions. In some cases such counter-reactions have amounted to violent attacks against LGBT persons. Since 2004, there have been cases of bans or administrative impediments imposed on public LGBT demonstrations in 12 member states (Bulgaria, Estonia, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Serbia, “the former Yugoslav Republic of Macedonia” Turkey and Ukraine). Bans or impediments in some of these member states have been justified on the grounds that no police protection would have been available to protect the participants from counter-demonstrations.

The availability of police protection for LGBT demonstrations is essential for the effective enjoyment of the right to freedom of assembly. In some member states, however, public authorities have not provided police protection or have failed to provide sufficient protection to ensure the safety of participants in public LGBT demonstrations from organised attacks by counter-demonstrators. In some cases, the organisers of Pride marches have had to cancel the events for security reasons.

No bans or administrative impediments regarding freedom of assembly for LGBT persons and groups have been identified since 2004 in 27 member states (Austria, Andorra, Bosnia and Herzegovina, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Slovakia, Switzerland, Slovenia and the United Kingdom).

In eight member states (Albania, Armenia, Azerbaijan, Cyprus, Georgia, Monaco, Montenegro and San Marino), no large-scale public LGBT events, such as demonstrations or Pride parades, have ever been organised.

3.4. Freedom of association

3.4.1. LGBT NGOs in the member states

The oldest existing LGBT organisations in member states date back to the 1940s. These are COC Netherlands (Centre for Culture and Recreation) in the Netherlands, established in 1946, and Forbundet af 1948 (today: LGBT Denmark), founded in Denmark in 1948. In the following decades, LGBT NGOs and groups were gradually established in many member states in Western Europe developing their activities and strategies along other new social movements throughout the 1960s and 1970s. However, the consolidation of LGBT NGOs in many Council of Europe member states in central and eastern Europe is a fairly new development following the political changes mainly in the 1990s.

LGBT groups and NGOs work in a number of different fields. Some focus on community building and social services, activities and counselling, while others provide legal support and assistance. Other activities include outreach to LGBT persons, for example, in the form of distributing information material or carrying out awareness-raising campaigns or lobbying for the rights of LGBT persons,

participation in the drafting of new laws, monitoring rights violations, and LGBT demonstrations and happenings. LGBT NGOs also organise cultural events such as movie screenings, exhibitions or parties. In all member states of the Council of Europe, except Monaco, there are LGBT NGOs or NGOs promoting the human rights of LGBT persons. Furthermore, there are non-LGBT-specific human rights organisations that focus on, and promote, the universal rights of LGBT persons. The organisational landscape depends not only on the situation regarding LGBT rights, but also on the different civil society traditions and, not least, the size of the country concerned. LGBT NGO activities are mainly concentrated in the bigger cities. In some countries, LGBT groups receive funding from local, regional or national authorities, although in most Council of Europe member states they rely mainly on membership revenue or donations.

In many countries, there are several NGOs, including both LGBT organisations as well as NGOs working exclusively with, for example, transgender persons, lesbian women or gay men. ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, has approximately 300 member organisations in 40 Council of Europe member states. Of these, many are LGBT, some are only LGB, and some, for example, are only for women, transgender persons or gay men respectively.³⁵¹ ILGA-Europe has no member organisations in Albania, Andorra, Czech Republic, Liechtenstein, Monaco, San Marino and “the former Yugoslav Republic of Macedonia”.

Transgender Europe (TGEU), a European NGO building a European network of transgender groups and activists, lists the following countries as those without individual members, organised groups or associations dealing (exclusively) with transgender issues: Albania, Bulgaria, Cyprus, Estonia, Greece, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Romania, Slovakia, Slovenia and “the former Yugoslav Republic of Macedonia”.³⁵² Based on information from TGEU as well as from field trips to member states, Andorra, Armenia, Georgia and San Marino could be added to the list. Like Transgender Europe itself, which does not receive regular funding from either public or private sources, local member groups are usually self-funded.

Findings from interviews in all member states show that, even though transgender persons are represented in some of the LGBT organisations, the representation of transgender persons in many of such organisations is limited. Separate transgender organisations are often smaller both in influence and numbers. This is partly ascribed to the fact that transgender organisations started later than lesbian and gay organisations, and due to the fact that, although included under the “LGBT” umbrella, many LGBT organisations have historically focused little, or not at all, on the transgender aspects in their social and political work.

As for the organisational development of transgender communities in member states, groups are stronger in countries that have a longer tradition of transgender emancipation and social movements (such as in the United Kingdom and the Netherlands), whereas there are few stable groups with a specific focus on transgender people in southern and eastern Europe. This finding is confirmed by publications in Belgium³⁵³ and the Netherlands.³⁵⁴ A large number of countries have virtually no meeting facilities for transgender people, and only in very few countries, such as Finland,³⁵⁵ Germany, Netherlands,³⁵⁶ Norway, Spain and the United Kingdom have transgender groups been able to raise some funding to employ professional staff to assist transgender persons with counselling and social services. However, there are hardly any examples of transgender groups being able to raise sufficient funding to employ community development or policy professionals. This leaves the task of combating discrimination in the hands of a few, leaving transgender organisations with few financial resources to carry out their work, as well as a feeling of disempowerment.³⁵⁷ However, in recent years, political advocacy and the community building of transgender persons have strengthened considerably, due to

351. Information on ILGA-Europe’s website, www.ilga-europe.org/home/about_us/what_is_ilga_europe/members, accessed 14 July 2010.

352. Information on the TGEU’s website: www.tgeu.org, accessed 14 July 2010. Andorra and San Marino have been added in this report based on information from the TGEU and from field trips.

353. Motmans, J., “De Transgenderbeweging in Vlaanderen en Brussel in kaart gebracht: Organisatiekenmerken, Netwerken en Strijdpunten”, Steunpunt Gelijkekansenbeleid, Antwerp, Hasselt, 2006. Remmerie, L., “Naar een Vlaams transgenderoverleg? Visie van transgenderbeweging en zijn potentiële partners”, Arteveldehogeschool, Gent, 2008.

354. Meulmeester, G., Bos, G., Spaas, J.-P. and Eisfeld, J., *Do T Zelf – Transgenderorganisaties in Nederland*, Stichting T-Image, Amsterdam, 2005.

355. Trans support centre SETA Finland, www.transtukipiste.fi/en/index.html, accessed 10 June 2008.

356. Transvisie, centrum voor genderdiversiteit, www.transvisie.net, accessed 15 June 2008.

357. This was one of the most frequent issues raised during the worldwide Trans* Action = Trans* Rights Conference in Barcelona, 1-3 June 2010.

the consolidation and activities of Transgender Europe and other new transgender groups, and because several former LGB NGOs have actively included transgender persons in their organisations. ILGA-Europe and TGEU have also started to work together on activities, joint submissions to the European Commission and joint publications.

Practical initiative: In Scotland (United Kingdom), the Equality Network employs a development worker to support the work of the Scottish Transgender Alliance and promote transgender rights and equality across Scotland – funded by the Scottish Government Equality Unit.³⁵⁸ In Northern Ireland (United Kingdom), a Trans Forum has been established. The forum meets on a quarterly basis with the participation of key government departments, statutory bodies (police, housing, health) and transgender groups to discuss relevant issues, build relations and review policies.

In most member states, other NGOs working with, for example, human rights, social inclusion or non-discrimination also may, to a greater or lesser degree, work with LGBT issues. Collaboration also exists with NGOs working on other human rights, women's rights or minorities' rights. In member states with a long history of LGBT organisations, such collaboration is often well established. In member states where LGBT NGOs do not have such a long history, co-operation of this kind has been recently established or is in the making. Whereas in most countries such organisations can develop their activities in an efficient way, some organisations face obstacles. The following section focuses on officially registered NGOs (or NGOs having attempted to register) and incidents of state interference and restrictions on their work.

3.4.2. State interference and restrictions regarding registration of NGOs

Restrictions on freedom of association of LGBT persons can largely be divided into three categories. They are usually justified by authorities on the grounds that the purpose and founding documents of the association are found to be contrary to national law; or that the purpose of the association undermines national moral values; or they can take the form of administrative issues related to the registration and formalities of the association. In many cases, such restrictions not only apply to LGBT NGOs, but also to NGOs working in other fields.

In 42 member states, LGBT NGOs have apparently encountered no difficulties regarding official registration or in relation to their activities (period investigated: 2004-10).³⁵⁹ However, in some member states the registration of an LGBT NGO can be problematic, and in a few member states authorities have attempted to close down LGBT NGOs or impose restrictions on their ability to register – primarily with reference to notions of public or traditional values. Problems have been detected in the Russian Federation, Ukraine and Turkey. In Armenia and Azerbaijan, the authorities have reportedly also interfered in the process of registering LGBT NGOs.

Freedom of association is guaranteed as a constitutional provision in the Russian Federation. Nevertheless, LGBT organisations have often been denied registration with examples as recent as 2010:

- In February 2010, the General Directorate of the Ministry of Justice of the Russian Federation in Moscow denied the state registration of the non-profit organisation "Marriage Equality Russia". According to the charter of the NGO, its purposes are to "provide legal services to protect the rights and freedoms of individuals and citizens in the area of marriage; promoting and providing information services to overcome discrimination, defamation and violations of human rights on the basis of sexual orientation and gender identity; the promotion of human rights in the sphere of marriage and achievement of equality as concerns marriage for gay, lesbian, bisexual and transgender persons in the Russian Federation, as well as activities aimed at achieving the legalisation of same-sex marriage in the Russian Federation." It was also noted that "the founding documents of the organisation are contrary to the legislation of the Russian Federation".³⁶⁰

358. Scottish Transgender Alliance, "Transgender Experiences in Scotland – Research Summary", Equality Network, Edinburgh, 2008, p. 3.

359. It should be noted that the establishment of LGBT NGOs in some member states decades ago did not go uncontested, but this is outside the scope of this report.

360. National contribution on Russian Federation (legal report), pp. 16-17.

- In May 2010, in Arkhangelsk, the Regional Office of the Ministry of Justice refused registration of amendments to the charter of the NGO Rakurs. The organisation, which was registered in 2007 as a women's rights organisation, had amended its charter by specifying as its purposes "the protection of human dignity, rights and legitimate interests of the victims of homophobia and discrimination based on sexual orientation and gender identity – lesbian, gay, bisexual and transgender persons (LGBT); as well as socio-psychological and cultural support and adaptation of LGBT persons". The Regional Office of the Ministry of Justice refused the state registration of the amendments because they were assessed as being in contravention of the Law on Countering Extremist Activity.³⁶¹
- In 2009 in St Petersburg, the founders of a non-commercial organisation providing information, and legal and psychological services, "Feminist and LGBT Organisation Gender-L", applied for registration of their organisation. The registration authority refused to register them with reference to the specific wording of the statute, but the refusal was successfully appealed in court.³⁶²
- The founder of the Tyumen regional public organisation for the protection of the sexual rights of citizens, "Rainbow House", applied to the Regional Office of the Federal Registration Service for state registration of the organisation several times in the period between 2005 and 2007.³⁶³ However, registration of the organisation was repeatedly denied. In the refusals to register the organisation, the registration office argued that "the propaganda of non-traditional sexual orientation could lead to undermining the security of Russian society and state, [since it would] undermine the moral values of society, and undermine the sovereignty and territorial integrity of Russia because of a reduction of the population". Hence the activities of the organisation "infringe on the institutions of family and marriage, as protected by the state". The refusal to register the organisation was unsuccessfully challenged in the courts and administratively. The district court, in particular, pointed out that because the organisation is in fact created and operates *de facto*, the denial of state registration does not violate the constitutionally guaranteed right of association.³⁶⁴ This case has become the basis for an application lodged at the European Court of Human Rights, which is still pending.³⁶⁵

Parallel to the problematic cases described above, some LGBT NGOs have succeeded in registering in the Russian Federation. During 2009, the LGBT organisations "LGBT Organisation Coming Out" (St Petersburg) and the "Centre of Social and Psychological Assistance and Legal Support to Victims of Discrimination and Homophobia Maximum" (Murmansk) were registered without problems with their statutes mentioning (respectively) "overcoming discrimination, defamation and civil rights violations based on sexual orientation and gender identity" and "victims of homophobia".³⁶⁶

In recent years there have been several cases of LGBT NGOs in Turkey having had difficulties with obtaining official NGO status. This has involved either having their application for official status rejected by the public authorities, or having the authorities try to close down the organisation.³⁶⁷ There is a pattern in this regard and problems were reported in different cities, such as in Ankara

361. See: decision of the Office of the Ministry of Justice of the Russian Federation on the Arkhangelsk Region and Nenets Autonomous District of 31 May 2010 No. 03-09-3266 on the refusal of state registration of amendments to the constituent documents of a public association. Besides this ground, two formal grounds were set out as reasons for the refusal: according to the office's decision, the wording of the purposes of the organisation means that members of the organisation who are not LGBT cannot count on the protection of their rights and legitimate interests by the organisation, which is contrary to the Law on Public Associations; and in the title of the statute the full name of organisation is used (Regional Public Association "Arkhangelsk Regional Public Association of socio-psychological and legal assistance to lesbians, gays, bisexuals and transgenders (LGBT) 'Rakurs'"), while in the text of the statute – a short one is used (Arkhangelsk Regional Public Association of socio-psychological and legal assistance to lesbians, gays, bisexuals and transgenders (LGBT) "Rakurs"), 2010.

362. Demos Centre, www.demos-center.ru/news/26971.html, accessed 2 January 2010.

363. National contribution (legal report) on the Russian Federation. Annex to Chapter 2, Case 6.

364. On the cassation appeal of A. V. Zhdanov on the decision of the Centralny District Court of the Tyumen, Case No. 33-2383.

365. European Court of Human Rights, *Aleksandr Zhdanov and Rainbow House v. Russia*, Application No. 12200/08.

366. National (legal) report on the Russian Federation. Also: www.rosbalt.ru/2009/02/12/617973.html, accessed 2 January 2010.

367. KAOS GL, "The Discrimination Based on Sexual Orientation Prevents Freedom of Organising LGBT People!" (press release), 2007, available at: www.ilga-europe.org/europe/guide/country_by_country/turkey/turkish_gay_group_faces_closure_in_istanbul, accessed 25 January 2010.

(KAOS LG), Istanbul (Lambdaistanbul), Izmir (Black Pink Triangle) and in Bursa (Rainbow Association). Arguments used to carry out these operations, later successfully challenged in Turkish courts by the NGOs, related in all these cities to issues concerning the contrariety of the activities of these associations to Turkish moral and family values.

The case of Lambdaistanbul was heard in 2009 by the Turkish Supreme Court of Appeals after the Istanbul 3rd Civil Court of First Instance had ruled for the closure of the association. The Supreme Court in deciding the case ascertained that the scope of activity of the association did not go against moral values and therefore overturned the previous decision.³⁶⁸ However, although Lambdaistanbul defeated the legal challenge to its registration, the Supreme Court of Appeals left open the possibility of future challenges to freedom of association in its ruling: “The dissolution of the defendant organisation could still be demanded if it would act counter to its charter, in the ways of encouraging or provoking lesbian, gay, bisexual, transvestite and transsexual behaviour or acting with the aim of spreading such sexual orientations.” Lambdaistanbul lodged a case challenging this aspect of the judgment at the European Court of Human Rights in June 2010.³⁶⁹

The case against the Bursa Rainbow Association resulted in the closure of the association following a criminal complaint by the Bursa Governor’s office. In its judgment, the Bursa Criminal Court ruled that the association facilitated prostitution. The association’s appeal against the judgment of the first-instance court is pending before the Court of Cassation.³⁷⁰

The competent authorities assessing applications of associations to be officially registered operate under the authority of the Ministry of the Interior. During a meeting with this ministry for this study, a representative of the ministry described the process of assessing associations as “subjective”, with no available ministerial guidelines, and added that the courts provided the “objective view” if a case was brought to the court.³⁷¹

In Ukraine, the law sets no restrictions that could hinder the ability of LGBT people to create associations to protect their rights and freedoms or promote their common interests. A representative of the Ministry of Justice stated that NGOs can be registered without any problems.³⁷² However, there are several accounts of restrictions on LGBT persons’ right to association. One case concerned the LGBT organisation “People of Bukovina”. On 12 December 2008, the competent authorities in Chernivtsi province registered the organisation. The administrative officials requested the founders of the organisation to delete the wording “sexual orientation” from the statute and instead use “gender orientation”.³⁷³ Similar problems in the process of registration have been experienced by the Lviv LGBT organisation Total, which was registered in April 2009.³⁷⁴

Problems with registering LGBT NGOs have also been reported in Armenia and Azerbaijan.³⁷⁵ In Armenia this has taken place in the sense that the registration authorities, according to NGO representatives, request that references to LGBT, sexual orientation and/or gender identity are not included in the statutes. Such a practice was, however, denied by the public authorities.³⁷⁶

During the establishment and registration of the NGO “Gender & Development Social Union” (G&D) in Azerbaijan, the founders were called several times for a personal meeting with the State Security Committee where they were questioned about the objectives and the target groups of the organisation

368. Beyoğlu/Istanbul Civil Court of First Instance No. 3, Case No. 2009/65, Decision No. 2009/69. National contribution (legal report) on Turkey, pp. 10-11.

369. European Court of Human Rights, *Lambda Istanbul v. Turkey*, Application No. 53804/10. The application has been registered but not yet communicated.

370. www.ilga-europe.org/home/guide/country_by_country/turkey/rainbow_lgbt_association_closed_down_by_court_decision, accessed 1 February 2011.

371. Meeting with the Ministry of the Interior in Ankara, 1 March 2010.

372. Meeting with the Ministry of Justice in Kiev, 17 May 2010.

373. National contribution (legal report) on Ukraine, p. 14.

374. *Ibid.*

375. Interviews with NGOs in Armenia, 4-5 March 2010, and in Azerbaijan, 11-12 March 2010. See also: “The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report”, presented to the UN Human Rights Committee in respect of the ICCPR and for 44th Session of the Committee on the Elimination of Discrimination against Women (CEDAW), 20 July-7 August 2009.

376. Meeting with the Ministry of Justice in Yerevan, 5 March 2010.

and their interrelations with other countries. The process of registration and permission took six months.³⁷⁷

Finally, a case which is still undecided, involves the LGBT NGO MASSO in “the former Yugoslav Republic of Macedonia”.³⁷⁸ The NGO was closed down, and according to ex-representatives of MASSO, the official State Registrar played a crucial role in the closure. Allegedly, in 2006, the State Registrar allowed an unauthorised person to change the name of the president in the official State Register and to nominate a new president thus enabling the takeover of the organisation. After the takeover, all documents, equipment and archives were taken out from the offices of MASSO and the organisation’s accounts were transferred to independent accountants. The Appeal Commission in the Central Register has decided that the change of president was an illegal act of the Registrar and has reinstated the president in his position with empty account and office. The ex-president of MASSO has pressed charges against the State Registrar and the person who took over MASSO in spring 2008. The court process is ongoing and the Public Prosecutor’s Office has informed the Macedonian Helsinki Committee for Human Rights that the case is still under investigation.³⁷⁹

3.4.3. Access to premises

LGBT persons and organisations also face problems in some member states as regards access to premises for political or cultural activities. In all member states except Cyprus, Andorra, Liechtenstein, San Marino and Monaco,³⁸⁰ LGBT NGOs operate in their own offices or offices shared with other NGOs. Acquiring such premises to organise political, social or cultural activities is sometimes problematic. For example:

- In Bosnia and Herzegovina, the LGBT NGO Organization Q was evicted from its premises by its landlord allegedly because of its work.³⁸¹
- In Russia, the LGBT film festival, Side by Side (founded in St Petersburg in 2007), faced problems regarding access to premises for the screening of movies – partly due to the reluctance of some private film theatre owners and partly because of reported interference from public authorities. For example, when the NGO had to move the location of the festival for the third time to yet another venue in St Petersburg: “one of the organisers got a telephone call from the director of the venue and was told that the fire department promised to close the place down because of a violation of fire regulations, if the festival went ahead”.³⁸² In another incident which took place during the organisation of the 2008 edition of the festival, the director of a cinema received a phone call informing him that the power would be cut off if the cinema did not cancel screenings of LGBT movies. He then cancelled the screenings.³⁸³
- In Serbia in 2009, the Director of the Sava Centre in Belgrade, a centre for conferences and cultural events, cancelled a press conference of the Gay Straight Alliance (GSA) that was due to take place in the centre, stating that the organisation promotes and advocates gay rights and therefore was inappropriate for the centre. When the press conference took place in a different venue in Kragujevac one month later, hooligans threw stones at the windows and doors of the venue. It is worth noting, however, that a similar GSA press conference in 2010 was organised in co-operation with the Ministry for Human and Minority Rights and took place at the premises of the ministry.³⁸⁴

FRA has also reported similar problems in Italy, Lithuania and Slovenia.³⁸⁵

377. The NGO Clean World, which was consulted for this study in Baku, Azerbaijan, also reported prolonged registration procedures.

378. Meeting with the Helsinki Committee of Human Rights of “the former Yugoslav Republic of Macedonia”, 28 April 2010.

379. E-mail correspondence from the Helsinki Committee for the Human Rights of “the former Yugoslav Republic of Macedonia” to the Office of the Commissioner for Human Rights, 10 August 2010 and 29 March 2011.

380. There is no LGBT NGO in Monaco.

381. Meeting in Bosnia and Herzegovina with Organization Q, 9 April 2010.

382. Meeting with Side by Side, St Petersburg, 13 May 2010.

383. Ibid.

384. National contribution (sociological report) on Serbia, p. 8.

385. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 54.

3.4.4. Conclusions regarding freedom of association

Organisations working on LGBT rights and on LGBT-related issues have seen a steady development in many member states of the Council of Europe. In almost all member states there are LGBT NGOs as well as other (not specifically LGBT) NGOs promoting the rights of LGBT persons. Some countries have well-established networks of LGBT NGOs, as well as a number of NGOs that include LGBT issues within the scope of their work. The number of transgender groups is increasing and they are gaining stability and regional integration. More work, however, needs to be done in order to effectively empower and include transgender persons in LGBT-specific or other NGOs working on human rights and non-discrimination. In this context, lack of funding for transgender organisations is also an issue of concern. LGBT NGO activities and organisations tend to be concentrated in the bigger cities. This situation impacts on the capability of LGBT persons in rural areas to find support, build communities, socialise and counter homophobia and transphobia with joint actions and initiatives.

Notwithstanding the increased existence and activity of LGBT NGOs, problems in relation to freedom of association of LGBT persons have been detected in five member states: in the Russian Federation, Ukraine and Turkey LGBT persons faced bans of their organisations. In Armenia and Azerbaijan, NGOs reported obstruction by the authorities in the process of registering LGBT NGOs. Administrative impediments, censorship of statutes, or slowing down the process of registration can also be used to interfere with the exercise of the right to freedom of association of LGBT persons.

While breaches of the right to freedom of association of LGBT persons appear to be confined to a small number of member states, it is nonetheless important to point out that such restrictions considerably weaken the possibility of LGBT persons to undertake actions to promote understanding and acceptance of issues concerning sexual orientation and gender identity. They jeopardise the opportunity for individuals to stand up against discrimination, homophobia and transphobia, build strategic alliances with other groups working on human rights themes and counter social isolation which many lesbian, gay, bisexual and transgender persons are still confronted with in their daily life.

4. Freedom of expression

This chapter addresses freedom of expression. It will first outline the international and European legal framework and case law followed by an overview of the concrete limitations of freedom of expression encountered by LGBT organisations, including restrictions imposed on the so-called “promotion of homosexuality”.

4.1. *The international and European legal framework*

Freedom of expression is considered as one of the cornerstones of democracy and essential for the enjoyment and exercise of other fundamental rights such as the freedom of assembly and association. Freedom of expression covers a broad range of expressions from holding and expressing opinions to receiving and imparting information and ideas regardless of the chosen media and regardless of the format (orally, in writing or in print). Without freedom of expression, one cannot speak out against human rights violations, and without a free press discussing human rights they will not be effectively protected.

The right to freedom of expression is set forth in Article 19 in the UN Universal Declaration of Human Rights and further articulated in Article 19 of the International Covenant on Civil and Political Rights.³⁸⁶ The right has to be understood as being guaranteed to everybody without discrimination, including on grounds of sexual orientation and gender identity.³⁸⁷

Moreover, Article 19 of the International Covenant on Civil and Political Rights regulates in paragraph 3 the nature of the restrictions that states can legitimately impose in the enjoyment of the right to freedom of expression. Such restrictions involve the respect of the rights or reputation of others (paragraph 3.a) and the protection of national security or of public order, or of public health or morals (paragraph 3.b).

Such restrictions have to be understood as having, however, a limited range of action and can only be justified when the strict principle of proportionality³⁸⁸ is met and when they are necessary to respond to a precise threat as maintained by the UN Human Rights Committee.³⁸⁹

A dynamic interpretation of the right to freedom of expression may include expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the right to receive and impart information on sexual orientation and gender identity as suggested by Principle 19 of the Yogyakarta Principles.³⁹⁰

In the European context, the freedom of expression is enshrined in Article 10 of the European Convention on Human Rights. According to paragraph 2 of this provision, and similarly to Article 19 of the International Covenant on Civil and Political Rights, freedom of expression may be restricted, but only insofar as this is prescribed by law and is necessary in a democratic society. Restrictions are permissible only in a limited number of cases, in particular when aimed at protecting public safety, or if they are needed to prevent disorder or crime, protect health or morals, protect the reputation or rights of others, prevent the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary.

386. Similar provisions are found in the UN Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(viii), and the UN Convention on the Rights of the Child, Article 13.

387. “Civil and Political Rights, including the Question of Freedom of Expression. Report of the Special Rapporteur on the Right to Freedom of Opinion and Expression, Ambeyi Ligabo, Addendum: Mission to Columbia”, UN Doc E/CN.4/2005/64/Add.3 of 26 November 2004, paragraph 75. See also Principle 19 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

388. Human Rights Committee, General Comment No. 27 on freedom of movement (Article 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999). Note also draft General Comment No. 34 on Article 19, available at www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/HUMAN%20RIGHTS%20CTTE%20DRAFT%20GEN%20COMMENT%2034.PDF, accessed 23 November 2010.

389. Human Rights Committee, *Hak-Chul Shin v. Republic of Korea*, Communication No. 926/2000, UN Doc. CCPR/C/80/D/926/2000 (2004).

390. See Principle 19 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

Whether references in national legislation to public order, public morality, public health and public security, “obscenity” or similar reasons for limiting the freedom of expression are in compliance with the European Convention on Human Rights must be assessed on the basis of the case law on Article 10. In principle, the restriction grounds in sub-paragraph 2 of the provision allow for a very broad interpretation by national authorities, but already in the 1970s the European Court of Human Rights underscored that when evaluating a specific restriction applied in a national context it is faced “not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted”.³⁹¹ Very importantly, “public morals” should not be interpreted as the moral views of the authorities and therefore not be used to limit freedom of expression. The public authorities, on the contrary, are obliged to ensure freedom of expression even if they are controversial, provided that such expression does not counter other legally protected interests.

Within the EU, the Charter of Fundamental Rights stipulates the right to freedom of expression in Article 11. In the “Explanations relating to the Charter of Fundamental Rights”,³⁹² it is explicitly stated that the article has to be interpreted as corresponding to Article 10 of the European Convention on Human Rights, including the restrictions enumerated in paragraph 2 of the provision. This right entails that such a right cannot be restricted on grounds of protection of morals or that information imparted or received regarding issues concerning sexual orientation or gender identity cannot be arbitrarily scrutinised in the light of such restrictions. Article 11 of the Charter of Fundamental Rights further addresses, in paragraph 2, respect of the freedom and pluralism of the media.

The precise extent to which the right to freedom of expression has to be effectively guaranteed without interferences falling beyond the scope of paragraph 2 of Article 10 of the European Convention on Human Rights is illustrated by the judgment *Handyside v. the United Kingdom*.³⁹³ In its judgment, the Court maintained that freedom of expression allows not only for expressions, information and ideas that are favourably received, but that it also includes those that offend, shock or disturb the state or any part of the population. The reasoning for extending the freedom of expression to include unpopular statements is that the overall aim of the right is to protect pluralism, tolerance and broad-mindedness and that it is a precondition for a democratic and open society.³⁹⁴ It is this strand of the jurisprudence of the Court that might apply to any unlawful attempt to restrict the right to freedom of expression of LGBT persons, particularly regarding the expression of a person’s sexual orientation or gender identity and the non-discriminatory access to the exercise of the right to freedom of expression.

Interferences with the freedom of expression of LGBT persons and LGBT organisations may be seen as incompatible with the Convention and the states’ positive obligation to secure genuine and effective respect for freedom of expression, including for minorities who are vulnerable to victimisation.³⁹⁵ Such interferences, some of which have not been explicitly addressed by the Court but may be reasonably interpreted as included in the right to freedom of expression, may range from limitations imposed on books, magazines, newspapers, films, videos and on the Internet, as well as other forms of expression such as organising exhibitions and cultural festivals. Also expressions of identity or personality through speech, dress, holding hands, bodily characteristics or choice of name may be considered as falling under the freedom of expression.³⁹⁶

There have been no cases in which the Court has expressed its opinion regarding the extent to which – and eventually under which circumstances – restrictions to the right to freedom of expression of LGBT persons or regarding issues concerning sexual orientation or gender identity can be justified. As

391. European Court of Human Rights, *The Sunday Times v. the United Kingdom*, Application No. 13166/87, judgment of 26 April 1979, paragraph 65.

392. Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) published in the Official Journal of the European Union, 14 December 2007, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>.

393. European Court of Human Rights, *Handyside v. the United Kingdom*, Application No. 5493/72, judgment of 7 December 1976.

394. *Ibid.*, paragraph 49, and *Bladet Tromsø og Stensaas v. Norway*, Application No. 21980/93, judgment of 20 May 1999, paragraph 62.

395. The only case where sexual orientation in relation to freedom of expression was addressed by the European Court of Human Rights was in *Pay v. the United Kingdom* (Application No. 32792/05). This case was declared inadmissible on 16 September 2008. However, the Court acknowledged that in itself “Article 10 applies, in that the applicant was dismissed as a consequence of his expression of aspects of his sexual identity”.

396. E.g. the Yogyakarta Principle No. 19: The right to freedom of opinion and expression.

observed in cases, amongst others, on the right to realise a Gay Pride parade,³⁹⁷ it seems fair to assume that freedom of expression will also be interpreted in a dynamic way that ensures the genuine and effective protection of this basic human right for LGBT persons. There is a pending case at the European Court of Human Rights³⁹⁸ on an alleged violation of the freedom of expression which may give clear guidance on the issue of freedom of expression in relation to sexual orientation and gender identity. The case will be discussed below.

Limitations on the exercise of the right to freedom of expression have been deemed appropriate, according to the jurisprudence of the Court, in cases in which racist expressions reflect hatred or aim at harming a specific group of people by spreading intolerance. Such hate speech is seen as incompatible with the Convention and the underlying principles of tolerance and respect for the equality in dignity of all human beings.³⁹⁹ The Committee of Ministers has stated that “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.”⁴⁰⁰

A similar reasoning concerning the sanctioning of hate-motivated speech and the respect of the rights and dignity of every individual is also addressed with regard to the role of employees in the public sector. In the recommendation on hate speech adopted by the Committee of Minister, Principle 1 thus states that all types of public officials and authorities at national, regional and local levels “have a special responsibility to refrain from legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance”.⁴⁰¹

4.2. Limitations to the freedom of expression of LGBT persons

It appears from the analysis carried out for this report that all 47 member states of the Council of Europe have the right to freedom of expression enshrined in their national constitutions.⁴⁰²

Overall, LGBT persons and LGBT organisations do not face systematic limitations regarding freedom of expression in the Council of Europe member states. However, in recent years there have been incidents in a few member states amounting to limitations on LGBT persons in the exercise of their right to freedom of expression. In some countries, these have taken the form of bans on publications (Azerbaijan, Poland and Turkey). Some states criminalise, or have attempted to criminalise, the so-called “promotion of homosexuality” – this is the case in Lithuania, Poland and the Russian Federation.

4.2.1. Bans

In May 2005, the Polish version of *Compass*, the Council of Europe manual for human rights education for young people, was launched. In 2006, the then Polish Minister for Education dismissed the director of the government agency which financed and distributed the Polish version of the manual, because the minister objected to *Compass* chapter on homosexuality and homophobia.⁴⁰³

397. European Court of Human Rights, *Bączkowski and Others v. Poland*, Application No. 1543/06, judgment of 3 May 2007; European Court of Human Rights, *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

398. European Court of Human Rights, *KAOS GL v. Turkey*, communicated to the government for observations, Application No. 4982/07, date of communication: 16 June 2009.

399. European Court of Human Rights, *Gündüz v. Turkey*, Application No. 35071/97, judgment of 4 December 2003, paragraph 41, and *Jersil v. Denmark*, Application No. 15890/89, judgment of 23 September 1994, paragraph 35.

400. Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010. The question of hate-speech will be investigated more thoroughly in the chapter on hate-motivated violence and speech.

401. Council of Europe, Recommendation No. R. (97) 20 of the Committee of Ministers to member states on “hate speech”, adopted on 30 September 2010.

402. For further information on EU member states see the Charter of Fundamental Rights of the European Union, Article 11 – Freedom of expression and information, related national constitutional law, available at: infoportal.fra.europa.eu/InfoPortal/infobase>ShowContent.do?btnCat_300&btnCountryBread_169, accessed 20 October 2010. For further information concerning other Council of Europe member states see the national contributions.

403. The then Secretary General of the Council of Europe, Terry Davis, reacted to events: “Naturally, I asked the Polish authorities for a clarification of a decision which seemed, to put it mildly, unusual in the light of Poland’s membership of the Council of Europe and its commitment to the values it represents. These values are not a smorgasbord from which governments can pick and choose as they like.” Source: Article by Terry Davis, Secretary General of the Council of Europe, published in

The Polish Government defended its position by arguing that *Compass* did not reflect Polish values.⁴⁰⁴ According to the government, homosexuality was not a problem in Polish society and should not be discussed in schools. The officially accepted manual entitled *Wygrajmy Młodość* (Let's win youth) defined homosexuality as unnatural and as a shameful deviation. The Commissioner for Human Rights of the Council of Europe found this depiction wrong and contrary to the principle of diversity and respect for rights of every human being.⁴⁰⁵

Another case relates to the confiscation of the LGBT magazine of Kaos GL in Turkey.⁴⁰⁶ In July 2006, the Press Division of the Ankara Public Prosecutor's Office confiscated three copies of Issue 28 of Turkey's only LGBT magazine, published by Kaos GL, just before its scheduled publication date. The measure, based on Article 25, paragraph 1, of the Press Law,⁴⁰⁷ was taken ostensibly in order to ascertain whether a crime had been committed. At the same time the Public Prosecutor formally launched a criminal investigation against the editor of the magazine. On 21 July 2006, the Public Prosecutor's Office applied to the Ankara 12th Criminal Court of Peace for authorisation to confiscate all copies of the magazine, based on Article 28 of the Turkish Constitution⁴⁰⁸ and Article 162 of the Law on Criminal Procedure,⁴⁰⁹ for the duration of the investigation. The Public Prosecutor did not explain the reasons for the application other than through a general reference to the publication's "contents". On the same day, the 12th Criminal Court of Peace granted the application of the Public Prosecutor, without mentioning the legal grounds for that decision. It only stated that some articles and pictures from the magazine had interfered with the protection of public morals.⁴¹⁰

On 24 July 2006, the police seized all 375 copies of the magazine from the association's office, immediately after their delivery from the printing house. On 27 July 2006, Kaos GL filed an appeal against the decision of the 12th Criminal Court of Peace with the Ankara Criminal Court of First Instance. On 28 July 2006, the applicant's appeal was referred to the 15th Ankara Criminal Court of First Instance. On 28 July 2006, the 15th Ankara Criminal Court of First Instance endorsed the decision of the 12th Criminal Court of Peace without adducing further reasons. This decision was final so the association applied to the European Court of Human Rights. The Court has accepted the application, and the Turkish Government has made its preliminary observations on the case. In its observations, the government stated that although the freedom of expression was "a cornerstone of a democratic society", the right may be subjected to restrictions in order "to protect national security, territorial integrity, public peace and public order and to prevent committing crimes (legitimate aim)".⁴¹¹ Applied to the "present case, the applicant should be considered to have more 'duties' and 'responsibilities' than others in exercising its freedom of expression considering that it chose to express its ideas to the whole community by publishing the magazine".⁴¹² In conclusion, the government stated that "Taking into account the content of the publication, the decision was proportionate to the aim pursued. The government is of the opinion that the measure imposed on the applicant was in compliance with Article 10/2 of the Convention."⁴¹³ The case is pending before the Court.⁴¹⁴

An incident concerning the freedom of expression of LGBT persons has also been registered in Azerbaijan, in relation to the publication of a novel by the novelist Alekper Aliyev. The author had published *Artush and Zaur*, the story of a love affair between two men, one from Azerbaijan and the

Gazeta Wyborcza of 2 October 2006, www.coe.int/t/secretarygeneral/sg/Oped/2006/Finding_the_compass_200906_EN.asp, accessed 25 March 2011.

404. FRA national contribution on Poland (legal report), p. 67.

405. Memorandum to the Polish Government, "Assessment of the Progress Made in Implementing the 2002 Recommendations of the Council of Europe Commissioner for Human Rights", 20 June 2007, CommDH(2007)13.

406. Information on this case can be found in the national contribution (legal report) on Turkey, pp. 12-16. Confirmed at a meeting with Kaos GL in Ankara, 3 March 2010.

407. Article 25: The state prosecutor may confiscate three copies for examination at most of all printed matter. If inconvenience results from delays in the examination, police may confiscate the printed matter.

408. Article 28 (as amended on 17 October 2001): Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of offences prescribed by law, and in situations where delay could endanger the indivisible integrity of the state with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent authority designated by law.

409. Article 162: The Public Prosecutor must ask for an authorisation to start an investigation from the first instance criminal court in those cases where investigations may only be initiated by courts.

410. National contribution (legal report) on Turkey, p. 13.

411. National contribution (legal report) on Turkey, p. 14.

412. *Ibid.*

413. *Ibid.*

414. European Court of Human Rights, *KAOS GL v. Turkey*, communicated to the government for observations, Application No. 4982/07; date of decision to communicate: 16 June 2009.

other one from Armenia in the wake of the collapse of the Soviet Union. The book, however, caught the eye of the Azerbaijani police which ordered the removal of the book from the shelves of one of the capital's major bookstores. Moreover, a public discussion of the book between the author and readers was cancelled due to threats and intimidation.⁴¹⁵

4.2.2. Penalties for “promoting homosexuality”

In Lithuania the Law on the Protection of Minors against the Detrimental Effect of Public Information, which possibly limits the freedom of expression of LGBT persons and organisations, was passed on 22 December 2009. The law states that the following information is detrimental to minors: “15) which promotes sexual relations; 16) which expresses contempt for family values, encourages the concept of entry into marriage and creation of a family other than that stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania”. Article 38 of the constitution stipulates that “Marriage shall be concluded upon the free mutual consent of a man and a woman”. The implementation of the law remains unclear. However, the process of adopting the law has brought a great deal of attention to the issues of homosexuality and bisexuality, as the supporters and initiators of the law argued that the law should prevent public information on homosexuality, for example, in schools. The initial version of the law (passed on 14 July 2009) included a prohibition against “propagation of homosexual, bisexual and polygamous relationships; information which distorts family relationship and its values”. Due to the criticism from national as well as international organisations and institutions (including the Council of Europe), the law was amended prior to coming into force, leaving out the reference to “propagation of homosexual, bisexual and polygamous relationships”. However, the concept of “contempt for family values” remains unclear.⁴¹⁶

In addition, on 9 July 2009, draft laws supplementing the Penal Code and Code of Administrative Offences were proposed to parliament by a group of parliamentarians. The amendments suggested establishing administrative liability for the propagation of homosexual relationships and the financing of public propagation of homosexuality, and to criminalise public agitation for homosexual relationships. According to the proposed legislation, such actions might be punished by community service, fine or arrest. The wording of the proposed bill was not precise, with the term “agitation” not defined in the Criminal Code. The ambiguity of this proposal and possible breaches of the constitutional right to information and freedom of expression as well as the international commitments of Lithuania were stressed by the European Law Department within the Lithuanian Ministry of Justice. The draft law is still pending adoption but discussions in parliament on the proposed law indicated that the aim of the bill was to prevent issues related to homosexuality from being raised in public.⁴¹⁷ The FRA concludes that developments in Lithuania “constitut[e] the only recent example of such legislation. In contrast, a number of Member States have taken action to foster education and dialogue, with the aim of challenging negative attitudes towards homosexuality and LGBT people, namely: Estonia, France, Germany, Netherlands, Spain and the UK.”⁴¹⁸

In Poland, the deputies from the Law and Justice Party declared their intention to prepare a draft law inspired by the Lithuanian Law on Minors, and in August 2009 the head of the parliamentary group of the party ordered the translation of the Lithuanian law.⁴¹⁹ This was not the first initiative of this kind in Poland since in 2007 a draft of the law banning “homosexual propaganda” in schools was presented by the Minister of Education at the time. The draft envisaged that any school or educational unit should protect pupils from content threatening their proper psychological and moral development, including content “promoting brutality, violence, hatred and discrimination; pornography; promoting conduct contrary to moral standards; and incompatibility with the principle of the protection of marriage

415. Robinson M., Antidze M., *Azeri-Armenian gay love story strains at taboos*, Reuters, 12 March 2009, available at: www.globalgayz.com/country/Azerbaijan/view/AZ/gay-azerbaijan-news-and-reports-2, accessed 16 January 2011.

416. FRA national contribution on Lithuania and the European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 35.

417. Ibid.

418. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 7.

419. FRA national contribution on Poland (legal report), pp.67-68.

and family, including the promotion of homosexuality”⁴²⁰ However, these amendments to the Law on the Education System were never passed.⁴²¹

Attempts to impose criminal or administrative responsibility for so-called “promotion” or “propaganda” of homosexuality have been recurring in the Russian Federation. In 2003 and 2006 respectively, two drafts of federal laws on Amending the Criminal Code of the Russian Federation to Criminalise the Propaganda of Homosexuality were introduced through a member’s bill. Both drafts proposed adding an Article 242.1 to the Criminal Code of the Russian Federation to read as follows: “Article 242.1. Propaganda of homosexuality. Propaganda of homosexuality contained in a public statement, publicly demonstrated works or in the mass media, including those expressed in the public display of a homosexual lifestyle and homosexual orientation, shall be punished by deprivation of the right to occupy certain posts or practise certain activities for a period of between two and five years.”⁴²²

The Supreme Court of the Russian Federation in its review of the draft law stated that “in accordance with the current legislation, sodomy and lesbianism are considered as criminal only if these deeds are associated with violence or the threat of violence, or in taking advantage of the victim’s helpless condition. Committing the mentioned deeds by mutual consent does not constitute a crime or administrative offence. The Federal Law on the Mass Media prohibits the distribution of information that promotes pornography, and a cult of violence and cruelty, but does not exclude the possibility of releasing erotic publications under certain conditions (Articles 3 and 37).”⁴²³ The Government of the Russian Federation did not support the draft either, noting that “the prohibition, proposed by the project, contradicts the first part of Article 14 of the Criminal Code, under which a crime must be recognised only as a socially dangerous deed, which this phenomenon is not.”⁴²⁴ On 8 May 2009 the draft was rejected by the State Duma.⁴²⁵

Although the ban was never adopted, several authorities in the Russian Federation have used similar arguments against TV and radio stations which have promoted acceptance and non-discrimination of LGBT persons.⁴²⁶ A report from the Moscow Helsinki Group describes the warning issued by the Prosecutor’s Office in March 2006 to two TV stations in Rostov (TRC “Pulse” and the “ExpoVIM Company”). The warning indicated the prohibition in the Russian Federation of the “propaganda of homosexuality.”⁴²⁷ The warning, according to the General Prosecutor’s Office of the Russian Federation, had been motivated on the grounds of the violations by the two TV stations of the legislation in force, and aiming to protect the interests of minors. The General Prosecutor’s Office refers to the international commitments of the Russian Federation within the Declaration of the Rights of the Child of 20 November 1959, the UN Convention on the Rights of the Child of 20 November 1989, as well as the federal laws “on the main guarantees of the rights of the child in the Russian Federation” and “on the media”. However, the term “propaganda of homosexuality” is not contained in any of these documents.⁴²⁸

In the Ryazan Region of the Russian Federation the “promotion” or “propaganda” of homosexuality is in fact prohibited according to regional legislation. According to the Law of the Ryazan Region on Administrative Offences, “public actions aimed at propaganda of homosexuality (sodomy and lesbianism) among minors shall be punishable by a fine” (Article 3.10 “Public actions aimed at the

420. The initial draft envisaged that school directors who allow such content would be subject to disciplinary dismissal and anyone who promotes homosexuality would be subject to sanctions (restriction of liberty and a fine). Moreover, on one occasion (on Radio Tok FM, on 15 March 2007) the Secretary of State at the Ministry of Education announced that all teachers who reveal their homosexuality would be dismissed. On the next day, he withdrew from this position. Since then there have been cases reported by NGOs of lesbian or gay teachers who had to leave their workplace due to their sexual orientation.

421. FRA national contribution on Poland (legal report), pp. 67-68.

422. Federal Law on Amending the Criminal Code of the Russian Federation to Criminalise the Propaganda of Homosexuality, Draft No. 367150-3: proposed by Deputy of the State Duma A. V. Chuyev on 15 September 2003; Federal Law on Amending the Criminal Code of the Russian Federation to Criminalise the Propaganda of Homosexuality: Draft No. 311625-4: proposed by Deputy of the State Duma A. V. Chuyev on 20 June 2006. The drafts and relevant materials are available in Russian at: www.duma.gov.ru/faces/lawsearch/search.jsp, accessed 5 January 2010.

423. On the Draft Federal Law on Amending the Criminal Code of the Russian Federation to Criminalise the Propaganda of Homosexuality: Official Response of the Supreme Court of the Russian Federation No. 492-2/06 of 20 April 2006.

424. On the Draft Federal Law on Amending the Criminal Code of the Russian Federation to Criminalise the Propaganda of Homosexuality: Official Response of the Government of the Russian Federation No. 2063н-П4 of 13 June 2006.

425. On the Draft Federal Law on Amending the Criminal Code of the Russian Federation to Criminalise the Propaganda of Homosexuality: Decree of the State Duma of the Federal Assembly of the Russian Federation No. 2061-5 ГД of 8 May 2009.

426. Moscow Helsinki Group and the Russian LGBT Network, “Situation of Lesbians, Gays, Bisexuals and Transgender People in the Russian Federation – 2008”, 2009, pp. 36, 43-44.

427. *Ibid.*, p. 43.

428. *Ibid.* p. 44.

propaganda of homosexuality (sodomy and lesbianism) among minors”).⁴²⁹ Similarly, the Law of the Ryazan Region on the Protection of the Morality and Health of Children in Ryazan Region⁴³⁰ states that “public actions aimed at the propaganda of homosexuality (sodomy and lesbianism) are not allowed” (Article 4).

On 30 March 2009, three members of the Moscow project GayRussia.Ru demonstrated against this prohibition in Ryazan. They took to the streets with placards saying “Homosexuality – this is normal” and “I am proud of my homosexuality. Ask me about it”. The action took place near the school in Ryazan and the Ryazan Region children’s library. The protesters were detained by police, and they were charged with committing an administrative violation in accordance with Article 3.10 of the Law of the Ryazan Region on Administrative Offences. On the same day, the activists notified the city administration of an intention to hold a picket and march of LGBT people in the city, but their appeal was rejected with reference to Article 4 of the Law of the Ryazan Region on the Protection of the Morality and Health of Children in Ryazan Region, and Article 3.10 of the Law of the Ryazan Region on Administrative Offences. The District Court and the Regional Court recognised the refusals as legitimate. On 6 April 2009, the organisers were found guilty and they were imposed a fine of 1 500 roubles. On 14 May 2009 the District Court affirmed this decision. On 1 September 2009, the LGBT activists appealed to the Constitutional Court of the Russian Federation with in order to test the constitutionality of the laws of the Ryazan Region banning the propaganda of homosexuality among minors. The applicants claim that these statutory provisions are contrary to several articles of the Russian Constitution, in particular Article 29 (the freedom of ideas and speech), Article 19 (the prohibition of discrimination) and Article 55 (limitations of citizens’ constitutional rights only by federal law).⁴³¹

4.2.3. Other examples of limitations on the freedom of expression

Other circumstances, such as public attitudes and the tendency to confine information about LGBT issues to the private sphere, may limit the possibilities of LGBT persons to freely express their views. Films, publications or images relating to homosexuality and gender identity may be considered contrary to morals and subject to informal restrictions or to characterisation of “obscenity”, resulting in a *de facto* limitation of freedom of expression for LGBT persons.

The LGBT NGO GenderDoc-M in Moldova reported problems distributing the two LGBT magazines *Zerkalo* (“The mirror”) for gay men and *Theme* for and by lesbian women: “It is possible to publish such media, but difficult to distribute. We had the magazine in magazine stands all over Chişinău and some other cities, but after a while the sellers asked us to remove the magazine from their windows ... the problem is that LGBT persons often feel ashamed to ask for this magazine. If it is in the window though, they can just point at it and say “I want to buy this magazine”, without saying its title. This meant that the sales went down and they used it to argue that they won’t be selling it any more.”⁴³²

In Denmark the Penal Code (section 234) makes it illegal to sell obscene pictures or items to persons below the age of 16, and the official commentary to this provision states that “nude pictures and pictures of sexual intercourse most likely cannot be categorised as obscene in relation to section 234 unless these are pictures of homosexual sexual relations or pictures with sadistic content or pictures of perversions”.⁴³³ According to the European Union Agency for Fundamental Rights: “The commentary seems obsolete on this point, however, and it would be highly unrealistic to see courts in Denmark following that opinion”.⁴³⁴

429. Law of Ryazan Region on Administrative Offences: passed by the Ryazan Region Duma on 24 November 2008. Available in Russian at: www.duma.ryazan.net/cgi-bin/search.pl, accessed 5 January 2010.

430. Law of Ryazan Region on the Protection of the Morality and Health of Children in Ryazan Region: passed by the Ryazan Region Duma on 22 March 2006. Available in Russian at: www.duma.ryazan.net/cgi-bin/search.pl, accessed 5 January 2010.

431. In the Constitutional Court appeal against the Ryazan law banning the promotion of homosexuality, <http://nasharyazan.ru/novost775.html>, accessed 5 January 2010.

432. Meeting with GenderDoc-M, 20 May 2010.

433. Karnov, LBKG 2010-10-26 nr 1235 Straffeloven [Penal Code], note 939, and European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 35.

434. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 35.

4.3. Conclusions

Bans or limitations on diffusion and dissemination of information by and for LGBT persons and for the general public on issues concerning sexual orientation and gender identity are illegitimate if motivated only by the mere presence or display of themes touching upon homosexuality, bisexuality or gender identity, and when they do not run counter to other interests protected by the law. Member states, therefore, have an obligation to ensure that lesbian, gay, bisexual and transgender persons can freely exercise their right to freedom of expression without being subject to arbitrary bans or restrictions to such a right, unless prescribed by national and international obligations.

In the vast majority of Council of Europe member states, LGBT persons and groups do not face significant legislative limitations regarding freedom of expression. Nevertheless, incidents including bans on LGBT publications have been detected in Azerbaijan, Poland and Turkey. Moreover, some member states or regions have criminalised, or have attempted to criminalise, the so-called “promotion of homosexuality”. This is the case in Lithuania, Poland and the Russian Federation.

5. Hate-motivated crime and speech

5.1. Introduction

Like several other groups in society LGBT persons are often victims of hate-motivated violence and speech inciting to hatred. This chapter addresses a number of issues related to hate-motivated crime and speech.⁴³⁵ In the first section, an overview is provided on international and European standards as well as national legislation regarding homophobic and transphobic hate crime and speech. In the following section, the barriers regarding data collection on hate crimes are explored. In the third section, data and statistics on homophobic and transphobic hate crime are presented. This section includes official data provided by the authorities as well as data provided by NGOs. The fourth section focuses on the type of assaults and the fifth section on the perpetrators. The sixth section looks into violence and harassment perpetrated by state actors, including law enforcement agents, against LGBT people.

In this chapter, hate crime, hate-motivated incident and hate speech are defined in the following manner:

- Hate crime towards LGBT persons refers to criminal acts with a bias motive. 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 (a characteristic associated with) the sexual orientation or gender identity of the victim.⁴³⁶
- Hate-motivated incident is used in this chapter to encompass 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.⁴³⁷
- 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 to hatred.⁴³⁸

5.2. International and European standards

5.2.1. Hate crime and hate speech

International instruments simultaneously address prohibitions of hate crimes as well as hate speech (public incitement to hatred and discrimination). Article 20, paragraph 2, of the International Covenant on Civil and Political Rights provides that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

In addition, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination imposes an obligation to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”.

435. Many examples of “hate speech” have already been given in the chapters on “Freedom of Association and Assembly” as well as the chapter on “Attitudes and Public Opinion”. For this reason, they will not be repeated in this chapter.

436. Definition based on: OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 13; Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, paragraphs 1-5.

437. Definition based on: OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 13.

438. Based on the definition in Recommendation No. R (97) 20 of the Committee of Ministers on “hate speech”, adopted on 30 October 1997.

Hate crime

At the regional level the European Court of Human Rights has set some minimum standards in cases related to racist attacks, by holding that there is an obligation under the Convention for authorities to take all reasonable steps to uncover and establish any racist motive in a crime as part of an effective investigation.⁴³⁹ In *Angelova and Iliev v. Bulgaria*, a 28-year-old man of Roma origin died after having been attacked and beaten by seven teenagers. The Court found that the Bulgarian authorities failed in their obligation to properly investigate and punish the racist motive of the crime and held that Article 14 of the Convention (the prohibition of discrimination), in conjunction with the obligation to open investigations on alleged ill-treatment under Article 3, and the right to effective remedies in Article 13 were violated.

It should be noted that although the European Court of Human Rights does not commonly use the term “hate crime” itself in its judgments,⁴⁴⁰ the Court stressed that there is a positive duty by states to investigate and proportionately punish bias-motivated criminal acts. These are positive obligations flowing from the ECHR and its jurisprudence with reference to Articles 2 and 3 in conjunction with Article 14.

The Committee of Ministers Recommendation CM/Rec(2010)5 addressing discrimination against LGBT persons stresses the need for effective protection from hate crimes and other hate-motivated incidents.⁴⁴¹ Ensuring such protection is linked to the realisation of the right to life and the prohibition of torture, inhuman or degrading treatment or punishment, and the non-discrimination principle.⁴⁴² The recommendation encourages states to ensure effective investigations and sanction schemes that include a bias motive related to sexual orientation or gender identity as an aggravating circumstance. Moreover, it underlines the need for states to support victims in reporting hate crimes and to ensure proper identification of such crimes within law enforcement structures. It also highlights the necessity to ensure the dignity and safety of LGBT persons when deprived of their liberty, and to collect data and conduct analyses on the prevalence and nature of discrimination and hate crimes that are motivated by hatred related to sexual orientation or gender identity.⁴⁴³

Hate speech

Article 10 of the European Convention on Human Rights guarantees freedom of expression. As elaborated in the chapter on freedom of expression, this right is not absolute. Restrictions may be permitted on speech or other expressions which incite to xenophobia, anti-Semitism and the like,⁴⁴⁴ which do not fall under freedom of expression. In this regard, Article 17 of the Convention is also relevant, as it limits the use of rights contained in the Convention (such as freedom of expression) if the aim of using the freedom of speech is to destroy other rights and freedoms in the Convention. For instance, in the case of *Norwood v. the United Kingdom*, the Court held that the applicant’s speech was not protected under Article 10 because the speech was incompatible with the “values proclaimed and guaranteed by the Convention, notably, tolerance, social peace and non-discrimination”.⁴⁴⁵

The Committee of Ministers recommendation on hate speech⁴⁴⁶ calls on the member states to “take appropriate steps to combat hate speech on the basis of the principles laid down in this recommendation”, including by adhering to and implementing existing international instruments.⁴⁴⁷ It

439. European Court of Human Rights, *Cobzaru v. Romania*, Application No. 48254/99, judgment of 26 July 2007; *Šečić v. Croatia*, Application No. 40116/02, judgment of 31 May 2007; and *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, judgment of 26 July 2007.

440. The European Court has used the term in one case, *Ognyanova and Choban v. Bulgaria* (Application No. 46317/99, date of judgment 23 February 2006). However, the Court only uses that term in paragraph 142 to summarise the state’s arguments.

441. Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 1-5.

442. See Explanatory Memorandum to the Recommendation CM/Rec(2010) of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, CM(2010)4 add3 rev2, 29 March 2010, paragraphs 1-2.

443. Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 1-5.

444. See for example European Court of Human Rights, *Incal v. Turkey*, Application No. 22678/93, judgment of 8 June 1998.

445. European Court of Human Rights, *Norwood v. the United Kingdom*, Application No. 23131/03, judgment of 16 November 2004.

446. Recommendation No. R (97) 20 on “hate speech”, adopted by the Committee of Ministers on 30 October 1997.

447. Such as the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in accordance with Resolution (68) 30 of the Committee of Ministers.

addresses all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including discrimination and hostility against minorities. Moreover, the Committee recommends that all member states review their domestic legislation and practice in this field. In Recommendation CM/Rec(2010)5, the Committee of Ministers addresses homophobic and transphobic hate speech more specifically.⁴⁴⁸ The recommendation urges states to combat all forms of expression which are likely to produce the effect of inciting, spreading or promoting hatred or discrimination against LGBT persons. A specific responsibility is vested with the public authorities and officials to refrain from statements that may be understood as legitimising hatred or discrimination and to promote tolerance and respect for their human rights.

Finally, the Council of Europe's White Paper on Intercultural Dialogue⁴⁴⁹ states that "States should have robust legislation to outlaw 'hate speech' and racist, xenophobic, homophobic, anti-Semitic, Islamophobic and anti-Gypsy or other expressions, where this incites hatred or violence".

For the EU member states, the Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, adopted in 2008, applies. It is a binding instrument on all EU member states and it requires that a racist or xenophobic motivation is considered as an aggravating circumstance. The framework decision establishes that the following acts should be punishable by criminal penalties of between one and three years of imprisonment:

- publicly inciting to violence or hatred on the basis of "race" (in a broad sense: colour, religion, descent or national or ethnic origin);
- public dissemination of tracts, pictures and the like;
- publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes.

The framework decision does not recognise aggravating circumstances in crimes committed with a homophobic or transphobic motivation. The European Union Agency for Fundamental Rights has stated in an Opinion that, following the model of the framework decision, "EU legislation needs to cover homophobic and transphobic hate speech and hate crime and approximate criminal legislation in the Member States applicable to these phenomena".⁴⁵⁰

5.2.2. National legislation

The incitement of hatred, violence or discrimination on grounds of sexual orientation is considered as a criminal offence in 18 member states (Andorra, Belgium, Croatia, Denmark, Estonia, France, Iceland, Ireland, Lithuania, Monaco, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom⁴⁵¹). Similarly, homophobic intent is accepted as an aggravating factor in common crimes in 15 member states: Andorra, Belgium, Croatia, Denmark, France, Greece, Lithuania, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. In only two member states is gender identity or transphobic hate crime explicitly addressed in hate crime legislation (see Map 5.1).⁴⁵²

In the remaining member states incitement to hatred, violence or discrimination on grounds of sexual orientation is not considered a criminal offence, nor is homophobic intent recognised as an

448. Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 6-8.

449. The Council of Europe White Paper on Intercultural Dialogue – "Living Together As Equals in Dignity", section 5.1, 2008.

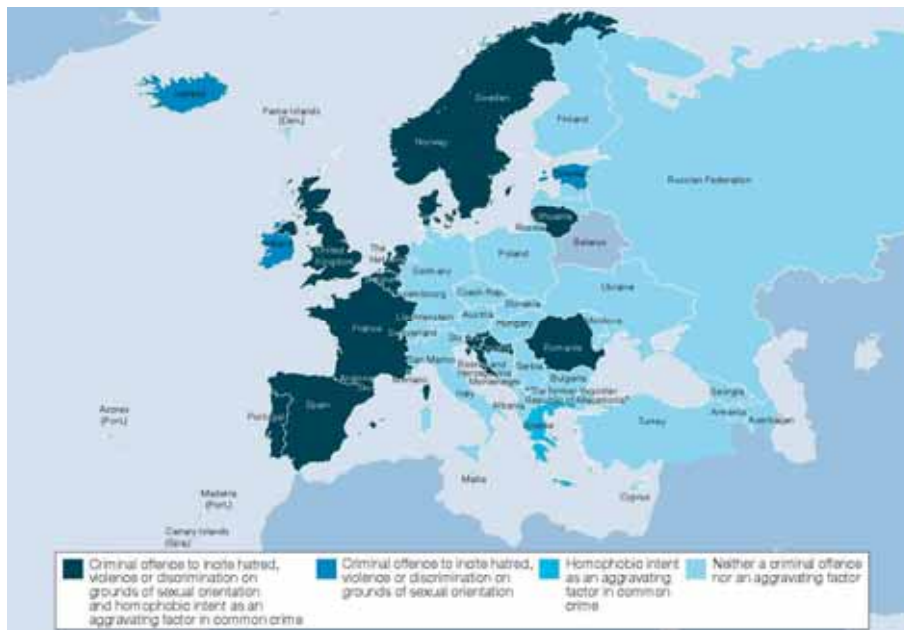
450. European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", September 2010, p. 36, and European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual orientation: Part I – Legal Analysis", 2008, p. 166.

451. England and Wales have a specific incitement criminal offence on grounds of sexual orientation and gender identity. They also have a homophobic intent statutory aggravation. Scotland has no specific incitement criminal offence on grounds of sexual orientation or gender identity but has both homophobic and transphobic statutory aggravations for common crime.

452. This overview is based on European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010; OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009", Warsaw, 2010; national contributions (legal reports).

aggravating factor in common crimes. However, several of these member states use definitions in their criminal law on incitement to hatred which may include LGBT persons. Examples are “groups of society” (Albania), “other characteristics” (Czech Republic), “other population group” (Finland), “parts of the population” (Germany), “group of society” (Hungary), “group of people” (Slovakia) and “any social group” (Russian Federation). This may also be the case in Cyprus, Luxembourg and Poland. Whereas in Finland and Germany case law exists which shows that LGB people are included in such general definitions, there is no case law in other countries.⁴⁵³ In four countries, provisions in criminal law against incitement to hatred cannot be extended to LGBT persons as they are restricted to predefined groups only (Austria, Bulgaria, Italy and Malta).⁴⁵⁴

Map 5.1: Hate crime legislation inclusive of sexual orientation



Regarding gender identity only Sweden and part of the United Kingdom (Scotland) explicitly address gender identity, gender expression or transphobic hate crime or hate speech in the criminal law. In a few member states the prohibition of incitement to hatred, discrimination or violence on the ground of “sex” or “gender” may include violence against transgender persons. Transphobic hate crime or hate speech may also be considered to be categorised under the heading of homophobia, but this is not clear from the national legislative frameworks.

5.3. Barriers regarding data collection on hate crimes

There are several problems and limitations throughout the member states regarding collecting, recording and presenting data on hate crime against LGBT persons.

5.3.1. Lack of reporting by victims of hate crime

According to representatives of LGBT NGOs, human rights structures and some public authorities interviewed for this study, few hate crime incidents are reported to the police or other public authorities. Studies confirm this under-reporting.⁴⁵⁵ Reporting of transphobic violence and hate crimes takes place in few police districts, and even fewer police districts record transphobic crimes as a

453. For the respective countries: (FRA) national contributions (legal reports).

454. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, Vienna, 2010, pp. 42-43.

455. For example, the hate-crime studies cited above, FRA national contributions on Latvia, Estonia, Bulgaria and Italy, as well as field trip meetings in Armenia, Croatia, Georgia, Moldova, Norway, Russian Federation, Ukraine, Serbia and Turkey.

separate category. According to an NGO study in Poland, 15% of hate incidents against LGBT persons are reported.⁴⁵⁶ In the United Kingdom this figure is 23% according to an NGO survey.⁴⁵⁷

Several factors contribute to this: many victims of a hate crime do not report this because of fear of exposure of their sexual orientation or gender identity or because of a lack of trust in the judiciary. In other instances the victims do not know where they could go to file a complaint or report a hate crime.⁴⁵⁸ Others are reluctant to go to the police because they have previously encountered police officers being hesitant to believe in the existence of a homophobic motive for a crime or incident. In Greece, Hungary, Italy and France more than half of the transgender respondents in a Europe-wide hate-crimes study did not have confidence in the police.⁴⁵⁹

The LGBT NGO Black Pink Triangle in Izmir, Turkey, sums up on the basis of their experience and the cases reported to them by LGB persons: “Lesbian and gay individuals prefer to keep their orientation hidden, or let us say they have such an option. And if someone steals your purse in a club where the LGBT community usually goes to, when you go to police they say: ‘If you go to such a place such things happen.’ Under these circumstances lesbian and gay individuals are afraid to complain or report abuses, even violence.”⁴⁶⁰

Assessments by NGOs, national human rights structures and public authorities in the member states are mixed regarding the efforts of public authorities to confront hate crime against LGBT persons. Whereas some consider the police to take hate-crime reports seriously, others consider that public authorities consider such incidents as having little or no importance. This may either be because of homophobia or transphobia among the police, or because the police focus on the crime as violence as stipulated in the law and do not pay attention to the homophobic/transphobic motive as such.

The lack of reporting contributes to the difficulties in assessing the extent and character of assaults throughout the member states, as official statistics and case law often do not exist.

5.3.2. Lack of recording by authorities

Several public authorities stated during field visits for this report that administrative tools to report hate crimes are underdeveloped and difficult to develop.⁴⁶¹ Interviews with LGBT NGOs, national human rights structures and public authorities suggest that the education of those responsible for reporting and recording is poor or incomplete in most countries.

The case of Serbia illustrates some of the procedural shortcomings in the process of creating comprehensive official data, and it is not exceptional: in spite of known incidents of attacks, no cases have been brought to court as hate crimes – partly out of victims’ fear of exposure, partly because of a lack of trust in the judiciary.⁴⁶² Serbia has reported to the ODIHR that data on hate crimes against LGBT persons are collected,⁴⁶³ but the Ministry of Justice notes a need for developing tools and training not only to prosecute cases, but also to register and analyse potential cases for increased knowledge and statistics.⁴⁶⁴ The EU’s “Serbia 2009 Progress Report” also states that “in spite of the legal framework, incidents involving hate speech, threats and physical attacks against journalists, human rights defenders and the lesbian, gay, bisexual and transgender (LGBT) population have not been properly investigated and perpetrators have not been brought to justice”.⁴⁶⁵

456. Abramowicz M. (ed.), “Situation of bisexual and homosexual persons in Poland”, Kampania Przeciw Homofobii & Lambda Warsaw, 2007, p. 15.

457. Dick S., “Homophobic Hate Crime – The Gay British Crime Survey 2008”, Stonewall, 2008.

458. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2010, pp. 43-45; national contribution (sociological report) on Armenia, p. 11; national contribution (sociological report) on Croatia, p. 9; national contribution (sociological report) on Georgia, p. 11; national contribution (sociological report) on Moldova, pp. 11-12; national contribution (sociological report) on Serbia, p. 10.

459. Turner L., Whittle S. and Combs R., “Transphobic Hate Crime in the European Union”, Press for Change, London, 2009, p. 55.

460. Meeting with Black Pink Triangle in Izmir, 24 February 2010.

461. See (FRA) national contributions, for example those on Sweden, the United Kingdom, “the former Yugoslav Republic of Macedonia” and Serbia.

462. National contribution (sociological report) on Serbia, p. 10.

463. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, pp. 18, 120-121.

464. National contribution (sociological report) on Serbia, p. 10.

465. European Commission, “Serbia 2009 Progress Report”, 2009, p. 14.

The example of Georgia illustrates another problem, also identified in other member states: hate crimes against LGBT persons are likely to be reported or labelled under provisions of the Criminal Code which are not directly traceable as LGBT specific, such as hooliganism or bodily injury. This does not reflect whether or not the action in question is hate motivated. Therefore, it is difficult to create reliable and comprehensive data on hate-motivated crimes against LGBT persons.⁴⁶⁶

The lack of official statistics from member states partly results from the fact that: (1) hate speech and hate crime offences are not considered a crime or an aggravating factor, or (2) the collection of complaints does not disaggregate according to motive. In the latter case, this means that it is often difficult to identify crimes committed on the basis of different bias motivations. Thus, crimes committed with either a racist or homophobic motive become indistinguishable in the statistics. Moreover, in many member states, the procedures and measures for collecting (and presenting) quantitative data are under-developed. Creating an overview of the situation throughout Europe is further complicated by the fact that some authorities registered and provided data on the number of cases reported to the police whereas others only have statistics on court convictions.⁴⁶⁷

Practical initiative – the police in Stockholm (Sweden) use “pop-up-windows” in their reporting procedures when registering hate crime cases. When certain words, like “gay” are inserted in the computer system, the police officer is asked whether the case could be a hate crime, meaning that the victim or informant should be asked specific questions.⁴⁶⁸

Practical initiative – tools for reporting hate crime: as part of the EU Fundamental Rights and Citizenship programme, the Danish Institute for Human Rights together with LGBT NGOs in nine European countries (Denmark, Latvia, France, Germany, Ireland, Portugal, Romania, Sweden and the United Kingdom) as well as ILGA-Europe and the consultancy firm COWI have mapped the situation regarding hate crime against LGBT persons in the participating countries with a focus on how the police handle the cases. The project has developed a tool kit for handling hate crime, including a database for reporting, a website with information about hate crime, training material for police as well as information material for LGBT people.⁴⁶⁹

Practical initiative – in a few member states, pilot projects have been set up in order to facilitate anonymous reporting of hate crimes by victims. If victims do not want to report to the police directly, they can use this method.⁴⁷⁰ NGOs in some other member states have established third-party reporting systems where victims or witnesses of hate crime can report the incidents online or by phone – that includes Galop in the United Kingdom, SOS Homophobie in France, and the Gay Anti-Violence project in Berlin (Germany).

5.3.3. Lack of proper prosecution and sentencing

In 2009, Sweden reported to the OSCE/ODIHR that police recorded 1 060 hate crimes motivated by sexual orientation, of which 1 040 were homophobic crimes. Additionally, the police recorded 30 hate crimes targeting transgender persons.⁴⁷¹ However, regarding court procedures, a Swedish study⁴⁷² showed that the percentage of hate incidents brought to trial varies significantly between police jurisdictions, and that the element of hate or homophobia was sometimes left out in trial and sentencing, even though it was a motive in the crime committed.

A case from Azerbaijan, described in a NGO shadow report presented by the UN Human Rights Committee, shows similar problems: “The case involved the murder of a transgender man called

466. National contribution (sociological report) on Georgia, p. 13.

467. For more in-depth analysis, see Swiebel, J. and van der Veur, D., “Hate Crimes against Lesbian, Gay, Bisexual and Transgender Persons and the Policy Response of International Governmental Organisations”, *Netherlands Quarterly of Human Rights*, No. 4, Vol. 27, December 2009, pp. 485-524.

468. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 48.

469. The project website for Tracing and Tackling Hate Crimes against LGBT Persons: www.stophatecrime.eu, accessed 26 September 2010.

470. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 48.

471. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 81.

472. Tiby, E., “En studie av homofoba hatbrott i Sverige”, Forum för levande historia, Stockholm, 2006, p. 11.

Samir in August 2007 by a member of a religious group. The two agreed to meet in person after meeting on an Internet site. However the murderer came to Samir's flat intending to kill him with a large kitchen knife. There were other witnesses in the flat at the time, and the murderer was identified and caught. The lawyer of the accused openly stated in court in his client's defence that such people as Samir need to be killed. The lawyer did not receive any admonition from the judge.⁴⁷³ The convicted was given a reduced sentence – six years – but it was eventually changed to 13½ years by the Appeal Court, according to a local NGO because they intervened and hired a good lawyer for the appeal case.⁴⁷⁴

A NGO report on Turkey⁴⁷⁵ shows that the bias motivation is sometimes not taken into account in the trial and sentencing of alleged hate crime cases. The report documented problems related to sentences that are sometimes reduced due to “unjust provocation” or “good behaviour in the courtroom”. However, in 2007 a court recognised for the first time an element of hate motivation and elements of prejudice in a relevant case.⁴⁷⁶ In another case in 2009 a Turkish court acknowledged that the perpetrator committed the crime with a homophobic or transphobic motivation.⁴⁷⁷ It should be recalled that the European Court of Human Rights has held that there is a positive obligation under the Convention for authorities to take all reasonable steps to uncover and establish any bias motive in a crime as part of an effective investigation and to investigate and punish bias-motivated criminal acts.⁴⁷⁸

The shortcomings found in the course of this study are mirrored in findings made by the OSCE/ODIHR's monitoring of hate crime: “there is still a paucity of clear, reliable and detailed data on the nature and scope of hate crimes in the OSCE area. ... Even where statistics exist, they are not always disaggregated according to bias motivation, type of crime or outcome of prosecution. ... Since different participating States keep statistics in different manners, it is also not possible to make comparative judgments on the extent of hate crimes.”⁴⁷⁹

5.4. Presentation of data on hate crime

In this section, available data on hate crimes against LGBT persons are presented, commencing with official statistics on reported incidents and court cases followed by other data from studies, surveys and known single incidents, and an analysis of how to read the data. Following this, data on the character of assaults and types of perpetrators will be presented. Violence by state actors will be highlighted in a separate section.

There are strong indications that LGBT persons, and especially transgender people, face an exceptional amount of hate crime in the course of their lives, ranging from harassment, bullying and verbal abuse to physical violence, (sexual) assault and even murder. The OSCE highlights this issue: “Homophobic hate crimes and incidents often show a high degree of cruelty and brutality. They often involve severe beatings, torture, mutilation, castration, even sexual assault. They are also very likely to result in death. Transgender people seem to be even more vulnerable within this category.”⁴⁸⁰

473. “The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report”, presented to the UN Human Rights Committee in respect of the ICCPR and for 44th Session of the Committee on the Elimination of Discrimination against Women (CEDAW), 20 July-7 August 2009. And meeting with G&D in Baku, 11 March 2010.

474. “The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report”, submitted during the third periodic reports to the UN Human Rights Committee, July 2009.

475. Human Rights Watch, “We need a Law for Liberation, Gender, Sexuality and Human Rights in a Changing Turkey”, 2008, pp. 24 and 47.

476. Ankara 11th High Criminal Court, case number: 2007/250, decision number: 2008/246.

477. Ankara 6th High Criminal Court, decision of 15 October 2009.

478. These are positive obligations flowing from Articles 2 and 3 of the European Convention on Human Rights read in conjunction with Article 14. European Court of Human Rights, *Cobzaru v. Romania*, Application No. 48254/99, judgment of 26 July 2007; *Secic v. Croatia*, Application No. 40116/02, judgment of 31 May 2007, and *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, judgment of 26 July 2007.

479. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009”, Warsaw, 2010, p. 14.

480. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2006”, OSCE/ODIHR, Warsaw, 2007, p. 53 ff.

5.4.1. Official statistics on reported incidents and court cases

Official statistical data on hate crimes and hate incidents are scarce. According to the ODIHR annual report on hate crime for 2009, 15 Council of Europe member states have reported that they collect data on crimes committed against LGBT persons (Andorra, Belgium, Croatia, Cyprus, France, Germany, Iceland, Ireland, Liechtenstein, Netherlands, Norway, Serbia, Spain, Sweden and the United Kingdom).⁴⁸¹ However, not all these 15 member states actually provided data to ODIHR. In fact only four states (Germany, Norway and Sweden and the United Kingdom) submitted data on homophobic hate crimes to ODIHR and only two of those states, Sweden and United Kingdom, submitted figures on hate crimes committed against transgender persons. Some other member states provided information on incidents to ODIHR but did not have comprehensive data sets. The discrepancy between the number of member states reporting to the ODIHR that they collect data on hate crimes against LGBT persons and the number of states actually providing data should be clarified.

In addition to ODIHR data more information was found in some member states in the course of this study. For example Denmark started registering hate crime against LGBT persons in 2009. Data are also collected in Finland, but not disaggregated according to the motive or target group.⁴⁸²

In the United Kingdom⁴⁸³ in 2007, 988 criminal court cases were initiated against suspects of LGBT hate crimes; 759 persons were convicted, while in 2009 these figures had risen to 1 078 and 868 respectively.⁴⁸⁴ Norway reported that in 2009 it recorded 36 crimes committed against LGBT persons based on bias motivation.⁴⁸⁵ Germany reported that in 2009 it recorded 164 crimes motivated by a bias against sexual orientation, 45 of which were violent crimes.⁴⁸⁶ In Sweden⁴⁸⁷ in 2008, 1 055 hate crimes against LGB persons were recorded of which 1 046 had a homophobic motive. In the same year 14 crimes were recorded against transgender persons.⁴⁸⁸ In 2009, Sweden recorded 1 060 hate crimes against LGB persons of which 1 040 were homophobic crimes. In the same year the police recorded 30 hate crimes targeting transgender persons.⁴⁸⁹ Public authorities in Turkey counted seven murdered transgender persons in 2008 and 2009.⁴⁹⁰

5.4.2. Other studies, surveys and incidents

In addition to official statistics collected by states, studies have been carried out in several member states, mostly by NGOs or expertise centres,⁴⁹¹ and have universally shown the presence of hate crime and hate incidents. This is a finding backed by consultations with the NGOs and national human rights structures dealing with the issue in each member state including the countries where no data are available.

481. OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009", Warsaw, 2010, pp. 18, 77-81. Only four states (Germany, Norway, Sweden and the United Kingdom) submitted data figures on hate crimes committed against LGBT persons and only two of those states, Sweden and the United Kingdom, submitted data figures on hate crimes committed against transgender persons. Four additional states (Belgium, Croatia, Denmark and Turkey) described specific incidents of hate crimes against LGBT persons for the report.

482. FRA national contribution (legal report) on Finland, p. 10.

483. OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2007", Warsaw, 2008.

484. FRA national contribution (legal report) for the United Kingdom, p. 100.

485. OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009", Warsaw, 2010, p. 79.

486. *Ibid.*, p. 78.

487. OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2007", 2008, p. 26.

488. OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2008", Warsaw, 2009, p. 56.

489. OSCE/ODIHR, "Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2009", Warsaw, 2010, p. 80.

490. Information provided by the Turkish authorities to the Office of the Commissioner for Human Rights. Three convictions were found by the courts.

491. An example of such a comparative study is "Geweld tegen homoseksuele mannen en lesbische vrouwen. Een literatuuronderzoek naar praktijk en bestrijding", Movisie, Netherlands, 2009.

As flagged before, the prevalence of transphobic harassment and violence appears to be very high. The largest study on transgender persons' experiences of violence so far (2 669 respondents from all parts of Europe) found that 79% of respondents had experienced some kind of harassment in public, ranging from comments to physical or sexual abuse.⁴⁹² In another NGO study from the United Kingdom 73% of the participants reported negative comments, verbal, physical or sexual abuse or threatening behaviour.⁴⁹³ In Sweden, 41% of the transgender respondents of a large-scale study into the health situation of LGBT people (374 transgender respondents) reported they had been victims of offensive behaviour/treatment in the past three months (30% of homosexuals reported the same). Some 12% of transgender people (6% of gay respondents) reported repeated abuse. A third of the transgender respondents reported to have been the victim of violence, abuse or harassment at some point in their lives, one third of this group reported these experiences within the last year.⁴⁹⁴

There are different explanations why transgender persons are particularly exposed to hate crime and hate-motivated incidents. Firstly, in some instances transgender persons will have aspects of their physical appearance which do not fully correspond to the gender in which they are living. That makes them more visible and thus a potential object for a hate crime. Secondly, depending on the size of the community the transgender person may live in, word may spread about a transgender person's change of ID documents and the person may become the object of ridicule and hatred. Thirdly, given their visibility and overall societal marginalisation, a segment of the transgender community cannot find employment and relies on sex work to make a living. This job makes them even more vulnerable to violence.

Some other examples from studies and surveys:

Bosnia and Herzegovina: 7% of the LGBT respondents to a survey stated having experienced physical attacks due to their sex/gender, and 16% had experiences of maltreatment.⁴⁹⁵ Religious extremists attacked the Queer Sarajevo Festival in 2008.⁴⁹⁶ Some 21 complaints were submitted to the police by the organisers of the Queer Sarajevo Festival and two by volunteers/guests who were attacked.⁴⁹⁷ Two indictments were made by the end of 2008,⁴⁹⁸ but apart from that, the Ministry of Justice report stated, after inquiring about the proceedings at the Prosecutor's Office, that "there is no record that something is being done".⁴⁹⁹

Croatia: in a survey conducted in Zagreb, Rijeka and Osijek, half of the LGB respondents had suffered violence due to their sexual orientation during the previous four years.⁵⁰⁰ Almost 40% of the respondents had experienced insults or swearing in that period, 20% of them suffered threats of physical violence, while 14% of the participants had experienced physical violence. More lesbian and bisexual women had experienced sexual violence (38%) than men (22%).

Georgia: 22% of LGBT respondents had experienced being threatened with physical violence because of their (assumed) sexual orientation or gender identity, 25% of the respondents reported experiencing name calling on the same grounds – 12% had experienced physical violence.⁵⁰¹

492. Turner, L., Whittle, S. and Combs, R., "Transphobic Hate Crime in the European Union", Press for Change, London, 2009.

493. Whittle, S., Turner, L. and Al-Alami, M., "Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination", *Equalities Review*, Wetherby, 2007, p. 53.

494. Statens Folkshälsoinstitut, "Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer", FHI, Östersund, 2005.

495. Organization Q, "The Invisible Q? Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina", Sarajevo, 2008.

496. The Sarajevo Queer Festival and the events surrounding it are described in detail in a documentary made by Organization Q: *Queer Sarajevo Festival 2008* and in "Queer Sarajevo Festival 2008 – Narrative Report".

497. National contribution (sociological report) on Bosnia and Herzegovina, p. 7.

498. *Ibid.*, p. 7.

499. *Ibid.*, p. 7.

500. Sample contained 202 persons. Lesbian Group Kontra, "Violence against Lesbians, Gays and Bisexuals in Croatia: Research Report", Zagreb, 2006.

501. Inclusive Foundation Discrimination survey conducted among 120 LGBT persons in Georgia, February 2006.

Italy: 51% male and 33% female gay, lesbian and transsexual respondents reported violence due to their sexual orientation or gender identity.⁵⁰² The LGBT community in Italy also reported that neo-fascists have on several occasions attacked LGBT venues.⁵⁰³

Moldova: the offices of the LGBT NGO GenderDoc-M have been vandalised several times.⁵⁰⁴

Poland: 18% of LGB respondents in a large survey reported physical violence due to their sexual orientation.⁵⁰⁵

The Russian Federation: 27% of LGB respondents in a survey were reportedly exposed to physical violence due to their sexual orientation. Some 37% had been subject to psychological violence, blackmail and threats. Some 90% had experienced discrimination.⁵⁰⁶ Several LGBT venues had been attacked. A report from the Moscow Helsinki Group describes several cases of police raids and violent confrontations in gay clubs.⁵⁰⁷ One incident referred to in this report took place in 2006, when a group of approximately 200 skinheads and persons calling themselves orthodox believers attacked the "Renaissance Event Club" in Moscow, where a gay party was to take place. The extremists blocked the club, not allowing visitors to come in. Some guests and several staff were beaten. The administration of the club called the police. Police officers turned up and told the staff to take their things and leave the place. The police officers made the organisers of the party responsible for what had happened. The attackers threw bottles and stones at the club. The police created a safety corridor for people to get away but did not prevent the crowd beating up several people. No one was arrested.⁵⁰⁸

Sweden: 59% of the transgender respondents of a survey were afraid of harassment and violence on the basis of their gender identity, while gay men, lesbian women (45%) and bisexuals (39%) reported lower numbers.⁵⁰⁹ In another study, one third of transgender respondents reported having experienced violence or abuse at some point in their lives.⁵¹⁰ In 2005, the premises of a local branch of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights was vandalised, including breaking windows and throwing Molotov cocktails.⁵¹¹

Turkey: a study by the Ministry of Justice in 2003 found that 37% of lesbian and gay respondents had experienced physical violence – whereas the figure was 89% for transvestites and transsexuals.⁵¹² There are numerous accounts of hate crime against LGBT persons in Turkey – especially, violence against transgender women is of concern. The hate-crime figures vary from different sources as shown in the table that follows.

502. Sample contains 514 respondents. Saraceno, C. (ed.), *Diversi da chi? Gay, lesbiche, transessuali in un'area metropolitana*, Guerini, Milan, 2003.

503. European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation", 2009, p. 47; See also: www.arcigay.it/incendio/incendio-al.coming-out-roma, www.repubblica.it/2006/05/gallerie/cronaca/incendio-coming/1.html and www.arcigay.it/dossier-omofobia-italia-2006-2008, accessed 20 July 2008.

504. GenderDoc-M Information Centre discrimination reports for 2007 and 2008.

505. Sample contains 1 002 respondents. Abramowicz, M. (ed.), "Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report", Kampania Przeciw Homofobii and Lambda Warsaw, 2007.

506. Sample contains 3 800 respondents. Moscow Helsinki Group and the Russian LGBT Network, "Situation of Lesbians, Gays, Bisexuals and Transgender People in the Russian Federation – 2008", 2009.

507. Ibid.

508. Ibid., p. 30.

509. Statens Folkhälsoinstitut "Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer", FHI, Östersund, 2005.

510. Sample contains 374 respondents. Statens Folkhälsoinstitut, "Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer", FHI, Östersund, 2005.

511. Riksförbundet För Sexuellt Likaberättigande (Nord) (Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights) "Hatbrott! Vad gör jag? Information och råd för homosexuella, bisexuella och transpersoner" (pamphlet without date of publication), www.rfsl.se/nord.

512. As reported in: Human Rights Watch, "We Need a Law for Liberation", Gender, Sexuality and Human Rights in a Changing Turkey, 2008.

Source	Hate crime figures
Public authorities ⁵¹³ Ministry of Justice ⁵¹⁴	seven murders of transgender women 2008+2009 three transgender murder convictions 2008-10
NGOs: LGBT Rights Platform ⁵¹⁵ Istanbul LGTT ⁵¹⁶	34 LGBT hate incidents in 2008 36 transgender murders during the two years prior to February 2010
Transgender Europe ⁵¹⁷	13 transgender murders January 2008- November 2010 ⁵¹⁸
Kaos GL ⁵¹⁹	700 LGBT hate incidents in 2008 600 LGBT hate incidents in 2009

Serbia: 70% of the lesbian and gay male respondents had experienced violence due to their sexual orientation – and over 50% more than once.⁵²⁰ There are also several examples of attacks on LGBT venues or events. For example on 11 January 2009 an attack on the gay club X Zam in Novi Sad took place, when unknown men came in the club and attacked the guests.⁵²¹ Another gay club, Apartment, located in Belgrade, was attacked twice, on 11 and 21 March 2009. Both times hooligans used different gatherings in order to mobilise the crowd and attack the club.⁵²² In 2009, during a press conference of the Gay Straight Alliance, hooligans threw stones at the windows and doors of the venue while reportedly shouting, “Faggots, we will kill you”.⁵²³

United Kingdom: In a 2008 report by London’s Metropolitan Police⁵²⁴ 65% of lesbian and transgender women surveyed experienced incidents that they considered as homophobic or transphobic in nature. Nearly two thirds (64%) of the women having experienced such incidents said they had a short-term or long-term impact on them. Of the incidents mentioned by these women, 83% went unreported to the police. Other studies in the United Kingdom⁵²⁵ provide similar accounts of experiences of harassment, physical or sexual abuse.

Some other surveys from, for example, Liechtenstein⁵²⁶ and Norway⁵²⁷ have been carried out without asking about the perceived motive behind the assault. However, the results show that LGB respondents have more often experienced physical violence than the average for the population.

5.4.3. Analysing the data

The results from the surveys, but also the official data provided by states presented above, should be read with caution. The surveys use different methodologies in terms of data collection and questions asked. Also, the extent of hate crime found in the different surveys should be seen in the light of the level of visibility in the different contexts. Visibility is a prerequisite for homophobic and transphobic

513. Information provided by the Turkish authorities to the Office of the Commissioner for Human Rights (letter of 22 February 2010).

514. National contribution (sociological report) on Turkey, p. 9.

515. LGBT Rights Platform, “Human Rights Violations against LGBT Individuals in Turkey in 2008”, Istanbul, 2009.

516. National contribution (sociological report) on Turkey, p. 9.

517. Transgender Europe, Trans Murder Monitoring project, www.transrespect-transphobia.org/en_US/tvt-project/tmm-results.htm, 2010, and www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tdor2010.htm, accessed 2 December 2010.

518. Ibid.

519. National contribution (sociological report) on Turkey, p. 9.

520. Sample contains 170 respondents. Labris, “Research on Violence against the LGTTIQ Population in Serbia”, Belgrade, 2005.

521. Gay Straight Alliance annual report 2009.

522. Meeting with the Gay Straight Alliance, 7 April 2010.

523. Human Rights Watch, “Letter to the President of the Republic of Serbia”, 16 November 2009, available at: www.hrw.org/en/news/2009/11/16/letter-president-republic-serbia, accessed 15 December 2009.

524. Metropolitan Police, “Women’s Experience of Homophobia and Transphobia: Survey Report”, London, 2008, p. 16.

525. Dick S., “Homophobic Hate Crime – The Gay British Crime Survey 2008”, Stonewall, 2008, p. 3; Turner L., Whittle S. and Combs R., “Transphobic Hate Crime in the European Union”, Press for Change, London, 2009, p. 18.

526. Wang, J., “Homosexuelle Menschen und Diskriminierung in Liechtenstein”, Kurzbericht, Institut für Sozial- und Präventivmedizin, University of Zurich, 2007.

527. Moseng, B. U., “Vold mot lesbiske og homofile tenåringer. En representative undersøgelse av omfang, risiko og forbyrdelse – Ung i Oslo 2006”, Norsk institutt for forskning om oppvekst, velferd og aldring (NOVA), Rapport 19/07, Oslo, 2007.

assaults – the more visible LGBT persons are, and the more they are recognised as LGBT, the more they are, in principle, exposed to homophobic or transphobic aggression. This schism is explained by a representative of the NGO Aleanca LGBT in Albania: “Hate crime is not widespread, because it is difficult to identify LGB persons, but when you are out of the closet, the risk of being a victim of hate crime is very high.”⁵²⁸

This means that the differences in figures seen in the surveys above are not only a result of different methodologies or differences regarding the level or character of homophobia/transphobia, they are also influenced by the extent to which LGBT persons are rendered invisible or keep their sexual orientation or gender identity hidden in public in order to escape from discrimination and violence. Studies and findings from interviews conducted for this study point to the fact that LGBT persons, to a large extent, conceal their identity in public settings throughout the member states. However, the surveys document the occurrence of hate crime against LGBT persons throughout the member states, and there are no data suggesting that hate crimes do not take place in those countries where no surveys have been carried out. The results above thus do not document the full extent of the problem throughout the Council of Europe member states, but all LGBT NGOs interviewed possessed knowledge of hate incidents in their own country, even when no quantitative research had been carried out.

It is important to note that many surveys only include assaults on LGB persons. This is either due to the fact that they deliberately focus on LGB persons, or because they are conducted with a relatively small number of respondents or have little contact with transgender persons and communities. However, accounts throughout the member states point to the fact that transgender persons are particularly exposed to hate crime – partly due to their visibility and partly due to societal marginalisation.

The following is an example from Ukraine illustrating the issue of visibility: “It was before the hormone therapy, when people could still tell, I was already wearing women’s dresses, etc. I was on my way home from the cinema, and there were some teenagers who started to pick on me. I went to the bus stop and wanted to get on a trolleybus, but they stopped me. They were calling me names, offending me, they started to beat me. I started to fight one of them, another one took my purse and started to run away. There were people around us, but no one interfered. They were just standing there watching and waiting to see how it was going to end.”⁵²⁹

The Commissioner for Human Rights has expressed concern over hate crimes and hate speech against LGBT persons in several of his country assessment reports.⁵³⁰ Moreover, in 2008, a Commissioner’s viewpoint drew attention to certain incidents that occurred in member states in which LGBT persons were victims of homophobic and transphobic violence: “In Riga, extremists hurled faeces and eggs at gay activists and their supporters when they were seen leaving a church service. Some years ago a Swedish hockey player was stabbed to death in Vasteras after he had made known that he was homosexual. In Oporto, Portugal, a group of boys attacked and killed a homeless Brazilian transgender woman and left the body in a water-filled pit.”⁵³¹ The Commissioner affirmed that the above-reported cases only constitute “the tip of the iceberg”.⁵³²

5.5. Types of assault and perpetrators

Moving on from the extent of hate crime and hate incidents to the character of the assaults experienced by LGBT persons, the studies and surveys listed previously in this chapter as well as additional surveys from other member states⁵³³ reveal a pattern in the abuse experienced. Aggression can be physical but also verbal and such incidents usually occur in public places. Counter-

528. National contribution (sociological report) on Albania, p. 8.

529. Insight NGO, “The Situation of Transgender Persons in Ukraine – A Research Report, 2010”, Kiev, Ukraine, 2010, p. 49.

530. For example in the Commissioner’s country assessment reports on Albania, “the former Yugoslav Republic of Macedonia”, and Ukraine. Commissioner’s country reports are available on the website of the Commissioner for Human Rights.

531. Commissioner for Human Rights, “Hate Crimes – Racism, Anti-Semitism, Anti-Gypsyism, Islamophobia and Homophobia”, 2008: www.coe.int/t/commissioner/Viewpoints/080721_en.asp, accessed 3 September 2008.

532. Ibid.

533. Abramowicz, M. (ed.), “Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report”, Kampania Przeciw Homofobii and Lambda Warsaw, 2007; Poelman, M. and Smits, D., “Agressie tegen holebi’s in Brussel-Stad”, Apeldoorn, Antwerp, 2007; Tiby, E., “Hatbrott? Homosexuella kvinnor och mäns berättelser om utsatthet för brott”, Stockholms universitet: Kriminologiska institutionen, 1999; MANEO, Das schwule Anti-Gewalt-Projekt in Berlin, 2007 (MANEO – The Gay Anti-Violence project in Berlin), www.maneo.de/highres/index.html, accessed 14 July 2008.

demonstrations during Pride parades often result in hate-motivated attacks on LGBT persons. Hate-motivated slogans calling for, for example, “the death of sodomites”⁵³⁴ have been registered during such events.

Hate crimes may also result in deadly attacks. There are accounts of hate killings in several member states. In a report submitted to a Council of Europe expert committee, ILGA-Europe lists examples of hate killings against LGBT persons in the period 2005-08 in the Netherlands, Portugal, Russian Federation, Turkey and the United Kingdom.⁵³⁵

In recent years, a number of cases of transgender people who were murdered has reached the national and international media. The case that has received the most attention was that of Gisberta in the city of Porto, Portugal, who was tortured, raped and thrown in an abandoned well to die by a group of teenage boys.⁵³⁶ Other murder cases like that of Henriëtte Wiersinga in The Hague, the Netherlands, in 2007,⁵³⁷ and Luna, again in Portugal, in 2008⁵³⁸ made international headlines. The Transgender Murder Monitoring project of Transgender Europe (TGEU) recorded at least 36 murders in Council of Europe member states from 2008 to November 2010.⁵³⁹ In this period, murders of transgender persons occurred in eight member states with Italy and Turkey both having 13 cases, followed by Spain (three cases), Germany (two cases), United Kingdom (two cases), Albania (one case), Portugal (one case) and Serbia (one case).⁵⁴⁰ Most of the transgender people murdered were transgender women, and some of them worked as sex workers. Also a relatively large number of these crimes were committed against transgender women who were undocumented immigrants.

Perpetrators of violent attacks against LGBT persons do so because of their rejection of what they label as “visible” homosexuality or transgressing traditional gender roles. Academic research in the Netherlands on the motives of perpetrators found that “views and emotions regarding sex and gender play a decisive part”.⁵⁴¹ It is important to note that violence also happens against persons who are perceived to be LGBT even when they are not. The perpetrators are often unknown to the victim, though in some cases relatives or colleagues are the perpetrators. Lesbian women are more likely to be assaulted by older perpetrators, often acting on their own, and often by somebody they know. In the case of LGBT sex workers the client could be the perpetrator. The perpetrators of anti-LGBT violence are primarily men and often young men in organised groups.

In relation to perpetrators, two aspects can be discussed: firstly, the existence of organised political groups targeting LGBT persons, namely nationalist and right-wing radicals, and, secondly, the issue of members of ethnic (immigrant) minorities as perpetrators.

There are several examples of right-wing groups harassing or attacking LGBT persons and venues, including incidents in Bosnia and Herzegovina, Croatia, Estonia, Italy, Moldova, Poland, Russian Federation, Serbia and Sweden. Interlocutors in these countries often linked the occurrence of hate crimes against LGBT persons with broader nationalist, xenophobic or racist tendencies in society. Anyone perceived as an outsider can be attacked by such persons or groups.⁵⁴²

534. FRA national contribution (sociological report) on Romania, p. 6; Knudsen, S. P., “Gay Pride er vestlig decadence”, *Dagbladet Information*, 2 June 2008, www.information.dk/160136, accessed 21 July 2008.

535. Submission to the Council of Europe Expert Committee: ILGA-Europe, “The Preparation of a Recommendation on Discrimination Based on Sexual Orientation and Gender Identity”.

536. OSCE/ODIHR, “Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2006”, OSCE/ODIHR, Warsaw, 2007, p. 54.

537. *Algemeen Dagblad*, “Travestiet overleden na mishandeling”, 19 April 2007, available at: <http://www.ad.nl/ad/nl/1040/Den-Haag/article/detail/190052/2007/04/19/Travestiet-overleden-na-mishandeling.dhtml>, accessed 12 June 2008. “RIP Henriëtte Wiersinga”, available at: <http://www.vreer.net/archives/78>, accessed 12 June 2008.

538. *Diário de Notícias*, 2008. “Transexual assassinada um ano depois de Gisberta”, *Diário de Notícias*, Lisbon, 1 March 2008, available at: http://dn.sapo.pt/2008/03/01/cidades/transexual_assassinada_ano_depois_gi.html, accessed 12 June, 2008.

539. Transgender Europe, Trans Murder Monitoring project, www.transrespect-transphobia.org/en_US/tvt-project/tmm-results.htm, 2010, available at: www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tdor2010.htm, accessed 2 December 2010.

540. *Ibid.*

541. Buijs, L., Duyvendak, J. W. and Hekma, G., “Als ze maar van me afblijven”, Amsterdam School for Social Science Research, University of Amsterdam, Amsterdam, 2008, p. 128.

542. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2010, p. 42; National contribution (sociological report) on Serbia, p. 7; National contribution (sociological report) on Russian Federation, pp. 25-26. National contribution (sociological report) on Bosnia and Herzegovina, p.6; National contribution (sociological report) on Croatia, p. 7 and p. 14; National contribution (sociological report) on Moldova, p. 12.

In a few member states, among them the Netherlands and Germany, some public debate has taken place on alleged higher percentages of members of ethnic minority or migrant communities in committing hate-motivated incidents against LGBT persons.⁵⁴³ A German NGO study⁵⁴⁴ on hate crime against gay and bisexual men in Berlin reported that perpetrators were perceived as having an ethnic minority background in 16% of incidents (while at the end of 2003, 13% of the population in Berlin was of migrant background, that is, persons without German citizenship⁵⁴⁵). There is very little quantitative research available and it is thus impossible to draw conclusions.

5.6. Violence, harassment and the collection of sensitive private data by state actors

Incidents of violence and harassment against LGBT persons can be perpetrated by state actors as well.

In Turkey harassment and violence towards LGB and especially transgender persons in Istanbul and Ankara was flagged as a major concern by several interlocutors, including in a report published by the Istanbul Provincial Human Rights Board.⁵⁴⁶ Due to a lack of work opportunities, many transgender women in Turkey are dependent on sex work, making them vulnerable to violence from clients and harassment from the police, who reportedly view transgender persons as immoral or criminal even though sex workers can receive official licences in Turkey. NGOs report that the police employ certain discriminatory routines against transgender persons, on the basis of the Code on Misdemeanour (*Kabahatler Kanunu*), one of which is the use of “traffic fines” charging transgender persons for disturbing traffic. The NGO Istanbul LGBTTT has been informed of large numbers of fines and alleged extensive discrimination by the police. The NGO has information of more than 500 such penalty cases during 2009.⁵⁴⁷ Some of such practices have also been identified in the report of the Istanbul Provincial Human Rights Board⁵⁴⁸ and are reported not only from Istanbul and Ankara but also from Mersin and Eskişehir.⁵⁴⁹

In Ukraine, NGO reports document experiences of Ukrainian gay men who were arrested in a park late at night, subsequently photographed by police and had their fingerprints taken.⁵⁵⁰ In a pending case before the European Court of Human Rights an applicant from Romania claims he has been detained, questioned, photographed and fingerprinted because of his homosexuality.⁵⁵¹ Again in Ukraine, during the investigation of a criminal case connected with the murder of a gay man, NGO reports refer to the police raiding the gay club “Androgin” in Kiev during the night of 10 to 11 April 2009. Over 80 people were allegedly detained and taken to a police station. Some people reported rude and abusive treatment by police officers and also claimed that the officers used force against them. At the police station, the officers took fingerprints and photos of those detained.⁵⁵² In 2003, the Parliamentary Assembly of the Council of Europe had already invited the Ukrainian authorities “to investigate allegations of police harassment of the lesbian and gay community and to take disciplinary action as appropriate”.⁵⁵³

In Azerbaijan during 2009 police raided bars which LGBT persons visit and arrested almost 50 people. Police reportedly held the individuals and threatened to expose their sexual orientation publicly unless

543. For example, in the Netherlands, described in: Mepschen, P., “Sex and the Other – Homosexuality and Islam in Dutch Public Discourse”, 2008.

544. Sample contains 23 949 respondents. MANEO – Das schwule Anti-Gewalt-Projekt in Berlin, 2007 (MANEO – The Gay Anti-Violence project in Berlin), available at: www.maneo.de/highres/index.html, accessed 14 July 2008.

545. Der Beauftragte für Integration und Migration in Berlin, “Integration und Migration in Berlin, Zahlen – Daten – Fakten, 2005”. Even though perceived ethnic minority background and official migrant background is not the same, the figures indicate that persons categorised as coming from an “ethnic minority” or “migrant” are not over-represented in the hate-crime statistics from Berlin.

546. Report of TC Istanbul Valiliği, Sayı B054VLK4340300/521/3764; National contribution (sociological report) on Turkey, p. 11; Human Rights Watch, “We Need a Law for Liberation” – Gender, Sexuality, and Human Rights in Changing Turkey”, May 2008, p. 75. See also national contribution (sociological report) on Turkey, pp. 7, 9-12.

547. National contribution (sociological report) on Turkey, p. 11.

548. *Ibid.*, p. 11.

549. *Ibid.*, p. 11.

550. Nash Mir, “Overview of LGBT human rights situation in Ukraine in 2010”, Kiev, Ukraine, p. 5.

551. European Court of Human Rights, *Adrian Costin Georgescu v. Romania*, Application No. 4867/03, case pending.

552. National contribution (legal report) on Ukraine, p. 40.

553. Resolution 1346 (2003), Honouring of obligations and commitments by Ukraine, adopted by the Assembly on 29 September 2003 (27th Sitting), paragraph 8, iii.

they paid a bribe.⁵⁵⁴ A film documentary from Azerbaijan in which several people testify about their experiences also points to such incidents of blackmail.⁵⁵⁵

In Albania, in 2006 the police arrested nine people – some of whom were transgender – in a park in Tirana. Many Albanian newspapers, TV and radio stations ran the story of prostitutes, homosexuals and transvestites being arrested in the park behind the Culture Palace. They also reported that two persons who were arrested were HIV-positive, and they printed pictures taken by the police of the persons arrested. The arrested persons were reportedly offended and maltreated by the police.⁵⁵⁶

Incidents have also been reported from other member states of the Council of Europe.⁵⁵⁷

In some member states NGOs reported that law-enforcement agencies have kept records on a person's sexual orientation. For example, in Austria and the United Kingdom police have kept database records of gay and bisexual men who were convicted in the past for consensual, although then illegal, same-sex acts. These records are still visible on criminal records and may show up, for example when employers check the credentials of job applicants. Whereas in the United Kingdom this has led to the introduction of legislation remedying this situation⁵⁵⁸ some Austrian citizens have filed complaints at the European Court of Human Rights.⁵⁵⁹

In Georgia, on 15 December 2009, the office of the LGBT NGO Inclusive Foundation was searched by police. The leader of Inclusive Foundation was arrested and charged with drug possession. Reportedly, during the raid, officials used homophobic slurs, made unnecessary strip searches, damaged organisational posters, and ransacked offices, and the law enforcement officials were not wearing any uniforms and did not have a search warrant. They confiscated the staff's cell phones and did not allow contact with families and friends. The leader of Inclusive Foundation was released after a few weeks.⁵⁶⁰ The Georgian Ministry of Internal Affairs subsequently denied that any procedural violations had taken place and maintained that the profile of the organisation was irrelevant in terms of the law. The ministry reported that its General Inspection Office had given one officer a reprimand at the "severe" level in accordance with the police code of ethics, as his actions had been determined to be non-ethical and inappropriate for police officers. Two other officers had also been given a reprimand at the "severe" level for not preventing the above-mentioned officer from making the unethical statements. Both the Public Defender and the Georgian Young Lawyers Association expressed concern about the incident to the ministry, but neither of them received any response.⁵⁶¹

UN treaty bodies and UN special rapporteurs have, in relation to Azerbaijan, the Russian Federation and Turkey, urged these states to end acts of violence and harassment by the police against LGBT persons.⁵⁶² In some instances LGBT human rights defenders have been a target of such harassment and violence. The UN Special Representative on the situation of human rights defenders pointed out in 2007 that "In numerous cases ... police or government officials are the alleged perpetrators of violence and threats against defenders of LGBTI rights. In several of these cases ... police officers have, allegedly, beaten up or even sexually abused these defenders of LGBTI rights." The Special

554. US Bureau of Democracy, Human Rights, and Labor, US Department of State "Human Rights Report: Azerbaijan", 2009, section 1, paragraph c.

555. ILGA-Europe and COC Netherlands, "Everyone has the right to life, liberty and security of person". Documentary.

556. National contribution (sociological report) on Albania, p. 6.

557. For example European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation", 2009, p. 44; FRA national contribution (sociological report) on Greece, pp. 5, 11; FRA national contribution (sociological report) on Romania, p. 5; national contribution (sociological report) on Armenia, pp. 3, 9-11; national contribution (sociological report) on Georgia, pp. 8-10; national contribution (sociological report) on "the former Yugoslav Republic of Macedonia", pp. 8-9; national contribution (sociological report) on Moldova, pp. 8, 12-13; national contribution (sociological report) on Serbia, pp. 9-10.

558. The UK Government has introduced the Protection of Freedoms Bill which, among other issues, will expunge convictions for non-legal consensual same-sex sex from criminal records.

559. European Court of Human Rights, *F.J. v. Austria*, Application No. 2362/08, case pending; *E.B. v. Austria*, Application No. 26271/08, case pending; *H.G. v. Austria*, Application No. 48098/07, case pending.

560. National contribution (sociological report) on Georgia, p. 8. Further information on the case: www.ilga-europe.org/europe/news/for_media/media_releases/police_raids_office_of_ilga_europe_s_member_organisation_in_georgia_and_arrests_ilga_europe_s_board_member, accessed 20 March 2010.

561. National contribution (sociological report) on Georgia, p. 8.

562. See Concluding Observations on Azerbaijan, CCPR/C/AZE/CO/3, 13 August 2009, paragraph 19; Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Addendum: Summary of cases transmitted to governments and replies received, A/HRC/10/12/ADD.1, 4 March 2009, paragraphs 2574-2577 (Turkey); Concluding Observations on Russian Federation, CCPR/C/RUS/CO/6, 29 October 2009, paragraph 27.

Representative reminded states of their responsibility for protecting defenders against violence and threats.⁵⁶³

5.7. Conclusions

There is a growing amount of evidence showing that a significant number of LGBT persons in Council of Europe member states experience physical violence and harassment because of their real or perceived sexual orientation and gender identity. LGBT persons run a serious risk of becoming victims of a hate crime or a hate-motivated incident, especially in public places. Moreover, some state agents, such as the police, have reportedly been involved in blackmailing and harassing LGBT persons. Often LGBT persons do not report such violence to the competent authorities due to a lack of trust in law-enforcement agencies, which often have no training for investigating such incidents, or due to the fact that it is simply unclear to whom to report to.

Homophobic and transphobic incidents or hate crimes are not reflected in official hate crime statistics in most member states. Incitement to hatred, violence or discrimination on grounds of sexual orientation is considered a criminal offence in only 18 member states. Similarly, homophobic intent is accepted as an aggravating factor in common crimes in only 15 member states. In only two member states is gender identity or transphobic hate crime explicitly addressed in hate crime legislation.

563. Report of the Special Representative of the Secretary-General on the situation of human rights defenders, A/HRC/4/37, 24 January 2007, paragraph 96.

6. Family life

This chapter examines to what extent member states currently protect the private and family lives of LGBT persons and enable the respect due to them under Article 8 of the European Convention of Human Rights. It starts with the ability to seal a legal partnership and examines whether same-sex couples receive the rights and benefits which are customarily granted to different-sex partners. Parental rights are of particular interest here because LGBT persons may have children and the rights to custody, inheritance and next-of-kin status need to be assured in the best interests of the child. The chapter will also present data on attitudes towards marriage and adoption among same-sex couples. The final section focuses on homophobia and transphobia in the family.

6.1. Marriage and registered partnership

6.1.1. The international and European legal framework

The legal and social recognition of the enjoyment of family life by LGBT persons are issues of debate both in member states and at the European level. In the last decade, there has been a constant evolution in member states' national legislation and in the jurisprudence of national and international courts in the area of family life. The recognition by the European Court of Human Rights, in the case of *Schalk and Kopf v. Austria*⁵⁶⁴ in June 2010, that same-sex couples enjoy "family life" represents the latest development in this field and can be considered a landmark judgment. The ongoing evolution in both national and international fora can be observed in the significant number of member states that have introduced forms of recognition of same-sex couples giving the possibility of entering into marriage or offering schemes of registered partnerships as an alternative to marriage. As the chapter will show the situation is, however, far from homogeneous in member states and these issues remain highly contested in many countries.

Access to the right to marry and the right to found a family are essential parts of family life. The Universal Declaration of Human Rights proclaims, in Article 16, that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family". Moreover, the article states that "they are entitled to equal rights as to marriage, during marriage and its dissolution".⁵⁶⁵ The right to establish a family is seen as encompassing all steps towards the foundation of a family, including protection of the couple as the family founders, and the procreation of the family, which covers not only "natural" procreation⁵⁶⁶ but also assisted, as well as adoption and recognition of paternity and maternity.⁵⁶⁶

The UN Covenant on Civil and Political Rights (ICCPR) also includes in Article 23(2) the right to marriage. It states that "the right of men and women of marriageable age to marry and to found a family shall be recognised".

Article 16 of the Universal Declaration of Human Rights, as well as Article 23(2) of the ICCPR, have traditionally been interpreted as being exclusively applicable to different-sex couples. A literal interpretation of this right has been upheld, for instance, by the United Nations Human Rights Committee in the case of *Joslin v. New Zealand*, where it maintained an understanding of the right to marry as being between a man and a woman. The committee stated that the use of the term "men and women" in Article 23(2) must be understood as an obligation for the state to "recognise as marriage only the union between a man and a woman wishing to marry each other." Accordingly, the refusal to provide for marriage between same-sex couples was not considered a violation of the right to marry under the covenant.⁵⁶⁷

However, two members of the Human Rights Committee pointed out in a concurring opinion that the rationale for perceiving differences in the treatment of married couples and non-married different-sex couples as non-discriminatory was the ability of the non-married couples to choose whether to marry

564. European Court of Human Rights, *Schalk and Kopf v. Austria*, Application No. 30141/04, judgment of 24 June 2010.

565. United Nations, Universal Declaration of Human Rights, General Assembly Resolution 217A (III), UN Doc A/810 at 71 (1948).

566. See Lagoutte, S. and Árnason, A. T., "Article 16", in Alfredsson, G. and Eide, A. (eds), *The Universal Declaration of Human Rights – A Common Standard of Achievement*, Martinus Nijhoff Publishers, The Hague, 1999, p. 340.

567. Human Rights Committee, *Joslin v. New Zealand*, Communication No. 902/1999, UN Doc. A/57/40 at 214 (2002).

or not. According to the concurring opinion, where same-sex couples do not have the ability to choose to marry or to obtain other types of partnership status with consequences similar to those of marriage, the assumption must, therefore, be that “a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination ... unless otherwise justified on reasonable and objective criteria”.⁵⁶⁸ In addition it has been pointed out in the Joslin case that, although, for the time being, there is no obligation of states to formally recognise the right of same-sex couples to marry, “the wording of Article 23(2) ... does not necessarily rule out a broader interpretation in the future, taking into account the rapidly changing views in many societies in this respect”.⁵⁶⁹

Article 12 of the European Convention on Human Rights provides that “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”. Like Article 16 of the Universal Declaration and Article 23(2) ICCPR, the European Convention’s right to marry was, until 2010, interpreted as only applying to different-sex couples. However, given the “evolutive interpretation” of the Convention by the European Court of Human Rights, a significant change was noted in the Court’s judgment in the above-mentioned case, *Schalk and Kopf v. Austria*.⁵⁷⁰

the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently it cannot be said that Article is inapplicable to the applicants’ complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.⁵⁷¹

Article 9 of the EU Charter of Fundamental Rights states that the “right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. The wording of Article 9 is notable in that it does not refer specifically to marriage between different sexes. In the explanatory note to Article 9, the Convention drafting the charter stated that:

This Article is based on Article 12 of the Convention ... The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article [Article 9] neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the Convention, but its scope may be wider when national legislation so provides.⁵⁷²

Thus, Article 9 of the charter takes into account that in some EU member states same-sex couples are or might in the future be able to marry or obtain similar legal recognition as partners. On the other hand, Article 9 was not intended at the time of drafting to require the EU member states to legally recognise marriage between same-sex couples.

Principle 24 of the Yogyakarta Principles establishes that states recognising marriages or registered partnerships open to same-sex partners should take all necessary legislative, administrative and other measures to ensure that any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners. Moreover, the Yogyakarta Principles stipulate that similar protection should also be enjoyed by same-sex unmarried partners. Thus, it should be ensured that any obligation, entitlement, privilege or benefit is available to same-sex unmarried partners on conditions equal to those of different-sex unmarried partners.⁵⁷³

568. Individual opinion of committee members Mr Rajsoomer Lallah and Mr Martin Scheinin (concurring).

569. Nowak, M., “U.N. Covenant on Civil and Political Rights”, CCPR Commentary, 2nd edition, N.P. Engel Verlag, Kehl, 2005, pp. 526-527. This reasoning also finds support in European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis”, 2008, pp. 58-59.

570. European Court of Human Rights, *Schalk and Kopf v. Austria*, Application No.30141/04, judgment of 24 June 2010, paragraph 55.

571. *Ibid.*, paragraph 61.

572. See Draft Charter of Fundamental Rights of the European Union, Convention document CHARTE 473/00. See also Toggenburg, G. N., “LGBT’ Go Luxembourg: On the Stance of Lesbian, Gay, Bisexual and Transgender Rights before the European Court of Justice”, *European Law Reporter*, 5/2008, pp. 174-185, at p. 182.

573. It is, however, to be noted that the principles do not require states that do not recognise marriages or registered partnerships for same-sex couples, to endorse such marriage schemes or to ensure the enjoyment of marriage-related rights for LGBT persons living in de facto partnerships.

In countries where same-sex couples do not have the choice to marry or to enter into a legal partnership arrangement granting the same or similar rights, the question then becomes relevant as to whether differential treatment between married different-sex couples and unmarried same-sex couples constitutes discrimination on the grounds of sexual orientation. The jurisprudence of the European Court of Human Rights has evolved also in relation to this issue and has gradually narrowed the margin of appreciation given to states in relation to differential treatment between married different-sex couples and unmarried same-sex couples in situations in which same-sex couples do not have access to marriage.

Early decisions of the Court granted states a wide margin of appreciation when deciding on extending benefits to unmarried same-sex couples. In *Mata Estevez v. Spain*, the applicant had been denied social-security allowances for surviving spouses upon the death of his life partner because he was not married to the deceased person. This despite the fact that he had lived together with his late partner for more than 10 years and that national law at the time did not allow for same-sex couples to marry. The Court found that the national legislation regulating eligibility for survivor's allowances did result in differential treatment on grounds of sexual orientation, but that the legislation had a legitimate aim, in that it protected "the family based on marriage bonds." On this basis, the Court held that the difference in treatment fell within the responding state's margin of appreciation, and, as a result, the complaint was considered inadmissible.⁵⁷⁴

In *Karner v. Austria*, the Court examined whether the termination of a tenancy after the death of the same-sex partner of the person living in the apartment – the former had rented the apartment, but both partners had lived in the apartment – amounted to a violation of Article 14 in conjunction with Article 8. The Austrian Supreme Court had ruled that the Austrian Rent Act included unmarried different-sex partners but not same-sex partners as "life companions". The European Court of Human Rights was not convinced that it was necessary to exclude certain categories of people, in this instance persons living in a same-sex relationship, in order to pursue the aim of the Rent Act, and thus concluded that the Convention had been breached.⁵⁷⁵ The reasoning applied by the European Court of Human Rights in *Karner v. Austria* was also upheld in the following case, *Kozak v. Poland*.⁵⁷⁶ In the case of *Kozak v. Poland*, the Court held that "a blanket exclusion of a person living in a relationship from succession to a tenancy cannot be accepted ... as necessary for the protection of the family viewed in its traditional sense." The Court clearly upheld and strengthened its reasoning in the *Karner* case concerning the requirement to extend existing rights for unmarried different-sex couples to same-sex couples. Hence, it notes that no "convincing or compelling reasons [have] been advanced by the Polish Government to justify the distinction in treatment of heterosexual and homosexual partners at the material time".⁵⁷⁷

The Court has thus interpreted the Convention as implying that cohabiting same-sex couples must not be treated less favourably than cohabiting different-sex couples in the same situation, unless the less favourable treatment can be justified by very weighty reasons (that is, it must be shown that it was necessary in the circumstances).⁵⁷⁸ Similar was the position held by the Human Rights Committee in both *Young v. Australia* and in *X v. Colombia* when the committee found that where certain rights afforded to married couples are extended to unmarried different-sex couples, such as the rights to succeed to a life partner's pension or tenancy, it would constitute direct discrimination on grounds of sexual orientation not to afford same-sex couples living as *de facto* partners the same rights.⁵⁷⁹

The judgment of the European Court in *Schalk and Kopf v. Austria* strengthens the Court's arguments in *Karner v. Austria* and *Kozak v. Poland*, because it includes the recognition of the existence of

574. European Court of Human Rights, *Mata Estevez v. Spain*, Application No. 56501/00, inadmissibility decision of 10 May 2001.

575. European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003, paragraph 92.

576. European Court of Human Rights, *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010.

577. *Ibid.*, paragraph 99.

578. The Court also held in other cases that, where a difference of treatment is based on sexual orientation, the margin afforded to the state is narrow. See, for example, European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, judgment of 22 January 2008, paragraphs 91 and 93, *S.L. v. Austria*, Application No. 45330/99, judgment of 9 January 2003, paragraph 37, *Smith and Grady v. the United Kingdom*, Application Nos. 33985/96 and 33986/96, judgment of 27 September 1999, paragraphs 89 and 94, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003, paragraphs 37 and 41, and *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010, paragraph 92.

579. See the Human Rights Committee's Communication No. 1361/2005: *X v. Colombia*, 14 May 2007, CCPR/C/89/D1361/2005, and Communication No. 941/2000, *Young v. Australia*, 6 August 2003, CCPR/C/78/D/941/2000. European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003, and *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010.

“family life” in relation to same-sex couples. Although the Court⁵⁸⁰ does not recognise the right of same-sex couples to marriage, it reversed its previous stance on same-sex couples in relation to the notion of “family life”. The Court noted that “since 2001 ... a rapid evolution of social attitudes towards same-sex couples has taken place in many member states. Since then, a considerable number of member states have afforded legal recognition to same-sex couples ... Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of ‘family’.”⁵⁸¹ On this basis, the Court considers it “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. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would.”⁵⁸² This reasoning was also upheld by the Court in the subsequent judgment of July 2010 concerning the cases *P.B. and J.S. v. Austria* and *J.M. v. the United Kingdom*.⁵⁸³ In the first case, the Court in fact reiterated the argument that it is artificial to maintain that same-sex couples cannot enjoy “family life”.⁵⁸⁴ In its assessment the Court found a violation⁵⁸⁵ of Article 14 in conjunction with Article 8⁵⁸⁶ in relation to the differential treatment by the Austrian state of same-sex couples compared with different-sex couples with regard to the extension of health and accident insurance to the partners of civil servants.

For its part, the Committee of Ministers in its Recommendation CM/Rec(2010)5 urges states to guarantee a level of protection which is the equivalent of the one identified by the Court. Thus it recommends that, where legislation is in place, legal recognition of same-sex partnerships should be accompanied by legal status, rights and obligations equivalent to those of heterosexual couples in comparable situations.⁵⁸⁷ In relation to rights and obligations conferred to unmarried couples, the recommendation suggests that the member states should ensure that they apply in a non-discriminatory way to both same-sex and different-sex couples.⁵⁸⁸

Within the European Union, the Court of Justice of the European Union has, until recently, held that the general principle of equal treatment did not require that other forms of partnership be given the same benefits resulting from the legal status of marriage.⁵⁸⁹ However, as described in paragraph 2.1, in the case of *Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen* from 2008, the Court of Justice considered it possible that the national registered partnership scheme available under the national law of Germany “places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor’s benefit at issue in the main proceedings”. It left it to the German courts to decide whether a surviving partner in a same-sex relationship is in a situation comparable to that of a spouse who is entitled to a survivor’s benefit.⁵⁹⁰ In the affirmative, less favourable treatment of same-sex partners under that scheme compared with surviving spouses would constitute direct discrimination on grounds of sexual orientation in violation of the Employment Equality Directive.⁵⁹¹ The Court left open the question of the extent to which differential treatment would be legal in countries where no marriage-comparable status is available to same-sex couples. The German Federal Constitutional Court later ruled that provisions for dependants’ pensions should be evaluated under the requirements of the general prohibition of unequal treatment, and registered civil partners should thus not be treated less favourably than married partners.⁵⁹²

580. European Court of Human Rights, *Schalk and Kopf v. Austria*, Application No. 30141/04, judgment of 24 June 2010, paragraph 55.

581. *Ibid.*, paragraph 93.

582. *Ibid.*, paragraph 94.

583. European Court of Human Rights, *P.B. and J.S. v. Austria*, Application No. 18984/02, judgment of 22 July 2010; *J.M. v. the United Kingdom*, Application No. 37060/06, judgment of 28 September 2010 (final on 28 December 2010).

584. *Ibid.*, paragraph 30.

585. *Ibid.*, paragraph 50.

586. *Ibid.*, paragraphs 42 and 44. See also *J.M. v. the United Kingdom*, Application No. 37060/06, judgment of 28 September 2010 (final on 28 December 2010).

587. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, 2010, paragraph 24.

588. *Ibid.*, paragraph 23.

589. See Court of Justice of the EU, Joined Cases C-122/99 P and C-125/99 P, *D. and Kingdom of Sweden v. Council of the EU*.

590. The German Constitutional Court answered this question in the affirmative, BVerfG, 1 BvR 1164/07, 7 July 2009, see Hoppe, T., *DVBl* 2009, p. 1516.

591. Judgment of the Court (Grand Chamber), 1 April 2008, Case C-267/06. See Tobler and Waaldijk, in *Common Market Law Review*, 46, pp. 723-746, 2009, Kluwer Law International, the Netherlands, 2009.

592. BVerfGE (Federal Constitutional Court), Unequal treatment of marriage and same-sex life partnership, Case No. 1 BvR 1164/07, judgment of 7 July 2009.

There has also been an evolution in the jurisprudence of the European Court of Human Rights regarding transsexual persons wishing to exercise their right to marry. In early cases, such as in *Rees v. the United Kingdom* and *Cossey v. the United Kingdom*, the Court initially held the view that there was no obligation under Article 12 to recognise marriage between a transsexual person, who had undergone gender reassignment surgery, and a person of the opposite sex after gender reassignment.⁵⁹³ In more recent case law, notably the case of *Christine Goodwin v. the United Kingdom*, the Court held that the wording of Article 12 of the Convention could no longer be interpreted as referring to a determination of gender by purely biological criteria. According to the Court, Article 12 must therefore also protect transsexuals who wish to marry a person of the opposite sex after gender reassignment.⁵⁹⁴

6.1.2. National legislation

Marriage and partnerships available to same-sex couples

During the past decades, family and partnership legislation has developed extensively in many member states of the Council of Europe. Denmark was the first country in the world to introduce same-sex partnership in 1989 and the Netherlands was the first country to grant same-sex couples access to civil marriage in 2001.

Map 6.1: Legislation regarding same-sex partnerships



In the Council of Europe, seven member states (Belgium, Iceland, Netherlands, Norway, Portugal, Spain and Sweden) give same-sex couples access to (civil) marriage. In Luxembourg and Slovenia, adoption of legislation opening civil marriage to same-sex couples is being discussed. These two member states, together with 12 other member states (Andorra, Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland,⁵⁹⁵ Liechtenstein, Switzerland and the United Kingdom) currently offer registration schemes as an alternative to marriage. The categorisation above is somewhat simplified in order to provide an overview. Registration schemes similar to marriage, often called “registered partnerships”, can exclude a range of rights, such as access to joint adoption of children (for example, Austria and Finland), equal tax benefits (for example, Germany), or social security (for example, Slovenia). In Croatia, only cohabitation rights for same-sex partners are

593. European Court of Human Rights, *Rees v. the United Kingdom*, Application No. 9532/81, judgment of 17 October 1986, paragraphs 49-51; *Cossey v. the United Kingdom*, Application No. 10843/84, judgment of 27 September 1990, paragraphs 43-48; *Sheffield and Horsham v. the United Kingdom*, Application Nos. 22985/93 and 23390/94, judgment of 30 July 1998 (Grand Chamber), paragraphs 62-70.

594. European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, judgment of 11 July 2002, paragraphs 100-104. See also *I. v. the United Kingdom*, Application No. 25680/94, judgment of 11 July 2002.

595. Ireland has adopted registered partnership legislation, which came into effect in January 2011.

recognised. The Same-Sex Civil Unions Act adopted in 2003 only regulates the right to joint property and support by a partner.⁵⁹⁶

In the remaining 25 member states, no partnership rights for same-sex couples are recognised in national legislation. This is the case in Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Greece, Italy,⁵⁹⁷ Latvia, Lithuania, Malta, Moldova, Monaco, Montenegro, Poland, Romania, Russian Federation, San Marino, Serbia, Slovakia, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine.

The absence of legal recognition of same-sex partnerships in these 25 member states means that same-sex couples have no access to a number of rights reserved for spouses, for example in relation to inheritance, immigration, adoption, income tax benefits and spousal benefits in employment. It should be noted, however, that access to civil marriage or a registered partnership does not necessarily mean that LGBT persons actually enjoy the benefits to which they are entitled. This is illustrated in a Spanish study of Spanish same-sex married couples, some of whom did not claim some benefits attached to marriage (such as holiday entitlements) in order to avoid hostile reactions from peers or colleagues.⁵⁹⁸

An alternative trend in the field of family law can also be observed in a few member states. In Bulgaria, Latvia,⁵⁹⁹ Moldova⁶⁰⁰ and Romania⁶⁰¹ marriage is referred to as a union between a man and woman, thereby excluding same-sex couples. In these member states legal partnerships and marriages open to same-sex couples contracted in other countries are not recognised. In some other member states similar wording is sometimes used (for example in Lithuania, Montenegro, Serbia and Ukraine). Even in the absence of such explicit wording, the exclusion of same-sex couples from marriage or partnership may be less explicit in yet other member states, but just as real.

Marriage and partnership of transgender persons

Transgender people can be heterosexual, lesbian, gay or bisexual and thus can be in same-sex and different-sex relationships. Consequently, they might seek recognition of these relationships before the law. Transgender persons in many Council of Europe member states face specific problems regarding recognition before the law which have a subsequent impact on their access to marriage or partnerships. As a general rule, countries treat transgender people according to their legally recognised gender, including regarding their right to marry or enter into a registered partnership. As the legal framework chapter in this volume has shown, in a number of member states there is no legal basis providing for the possibility for a legal recognition of the preferred gender, despite the fact that the European Court of Human Rights has clearly set the standard that member states have to legally recognise gender reassignment of transsexual persons.⁶⁰² This may bring about a situation in which transgender people cannot marry in their preferred gender if the state formally perceives the relationship as existing between persons of the same sex.

Even when gender reassignment is recognised, there can be problems. For example in Malta a transgender woman who had successfully changed her sex to “female” on her birth certificate, was refused marriage with her male partner by the Maltese Marriage Registrar in 2007 on the basis that the applicant was a man and could not be authorised to marry a man. While the applicant’s initial request to marry was first upheld by the court, it was later successfully challenged by the Marriage

596. Almost all member states recognising marriages and/or registered partnerships of same-sex couples (alternative registration schemes) also recognise the cohabitation rights of non-married/non-registered same-sex couples.

597. Some local councils in Italy register civil unions, including same-sex couples. However, the value of these is primarily symbolic, FRA national contribution on Italy.

598. Pichardo, J. I., “Beyond Marriage. LGBT Families in Spain”, Universidad Autónoma de Madrid, unpublished document, 2008.

599. Article 110, Constitution of Latvia.

600. Article 15, Family Code of the Republic of Moldova. See also the national contribution (legal report) on Moldova, p. 4.

601. In Romania, the Family Code defines family in gender-neutral terms as “based on marriage between spouses as provided for by Article 48 of the Constitution” (Article 1.3, Family Code, 4 January 1953). Case law consistently interpreted this as spouse and wife. Registered partnerships are not recognised by Romanian legislation. However, the new Civil Code (Law 289/2009 on the Civil Code, 17 July 2009) adopted in 2009, which will enter into force at a later date, includes in Article 277 a prohibition on same-sex partnerships and marriage, and a prohibition on recognising the partnerships and marriages of same-sex couples that are registered in other countries.

602. European Court of Human Rights, *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, judgment of 11 July 2002.

Registrar. In view of this, the applicant filed a constitutional case alleging a violation of her right to marry and the Maltese Constitutional Court decided in her favour citing jurisprudence from the European Court of Human Rights. The Marriage Registrar, however, has appealed against this decision.⁶⁰³

The legal status of existing marriages of transgender persons and their partners can also be jeopardised. In at least 15 member states there is a legal obligation requiring transgender persons who are already married to their different-sex partners to divorce before their preferred gender can be legally recognised. This is particularly problematic in states which do not provide same-sex couples access to marriage, where gender reassignment would effectively lead to such a marriage. As access to marriage for same-sex couples is only possible in seven member states of the Council of Europe, married transgender persons find themselves forced to divorce prior to their preferred gender being officially recognised. This divorce may be against the explicit will of the married couple who wish to remain a legally recognised family unit especially if they have children in their care. In Sweden, where same-sex couples have access to marriage, the divorce requirement is still in force. The European Court of Human Rights has rejected two cases in which one of the partners had undergone gender reassignment and would have had to divorce in order to be legally recognised in the preferred gender, considering this requirement within the member state's margin of appreciation.⁶⁰⁴

Austria⁶⁰⁵ and Germany⁶⁰⁶ are interesting exceptions: the Austrian Constitutional Court granted a transgender woman the right to change her sex to female while remaining married to her wife. The court ruled that "changing a sex entry in a birth certificate cannot be hindered by marriage". The German Constitutional Court has ruled similarly. Following the decision of the German Constitutional Court, the Law on Transsexuals has been changed, ending forced divorce for married couples in which one of the partners is transgender.⁶⁰⁷ Both rulings call on the state to accept that protecting all individuals without exception from state-mandatory divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriage.

Attitudes towards marriage and registered partnership open to same-sex couples

The subject of legal recognition of marriage of same-sex couples has led to extensive debates in many Council of Europe member states. In some member states, the subject was raised in discussions in relation to the adoption of the EU Charter of Fundamental Rights and in relation to the adoption of non-discrimination legislation. For example, in "the former Yugoslav Republic of Macedonia" the opponents of inclusion of sexual orientation in the proposed non-discrimination law pointed out that inclusion would be the first step towards opening marriage to same-sex couples.⁶⁰⁸ In Turkey, the minister responsible for women and family affairs was quoted as saying: "I believe it is a biological disorder, a disease" and "something that needs to be treated. Therefore I do not have a positive opinion of gay marriage".⁶⁰⁹

A 2006 Eurobarometer survey asked respondents in EU member states whether "homosexual marriages should be allowed throughout Europe". The conclusions from the survey show that "44% of EU citizens agree that such marriages should be allowed throughout Europe. It should be noted that some member states distinguish themselves from the average result by very high acceptance levels: the Netherlands tops the list with 82% of respondents in favour of homosexual marriages."⁶¹⁰

603. *Cassar Joanne vs. Direttur Tar-Registru Pubbliku*, Application No. 43/2008, 30 November 2010, Civil First Hall. The final judgment is pending.

604. *Parry v. the United Kingdom*, Application No. 42971/05, admissibility decision, 28 November 2006; *R. and F. v. the United Kingdom*, Application No. 35748/05, admissibility decision, 28 November 2006.

605. Austrian Federal Court, Verfassungsgerichtshof, V 4/06-7, 8 June 2006.

606. German Federal Court, Bundesverfassungsgericht, 1 BvL 10/05, decision of 27 May 2008.

607. EU Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010.

608. National contribution (sociological report) on "the former Yugoslav Republic of Macedonia", p. 5.

609. *Hürriyet Daily News*, "It Is a Disease' Says Turkish Minister", 7 March 2010. For more on the case, see, for example: www.lambdaistanbul.org/php/main.php?menuID=5&altMenuID=6&icerikID=8669, <http://bianet.org/bianet/toplumsal-cinsiyet/120511-bdpli-kisanak-ve-chpli-soysal-ayrimci-bakan-kavaf-istifa-etsin>, and www.kaosgl.com/icerik/chp_milletvekili_sevigenden_kavaf_icin_soru_onergesi, accessed 26 May 2010.

610. Eurobarometer 66, 2006, www.ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf, pp. 43-46, accessed 7 December 2010.

Map 6.2: “Homosexual marriages should be allowed throughout Europe”



The Eurobarometer survey regarding attitudes towards giving same-sex couples access to marriage also found that “[a]ge is an important factor when it comes to understanding attitudes towards homosexuality. 55% of young Europeans agree that same-sex couples should have access to marriage throughout Europe, compared to just 28% of those aged 55 or more.”⁶¹¹

In some other Council of Europe member states, surveys have also been carried out on this topic. In Montenegro, 16% of the population believe that same-sex couples should have the right to marry, while 21% are of the opinion that they should be able to register their partnership.⁶¹² According to a Ukrainian survey, 53% of the population is of the opinion that same-sex couples should never have the right to register their relationship.⁶¹³ According to the same study, 34% of the population think that same-sex couples should have the same rights as the rest of the population. In a survey from Iceland, 82% of the population supported the possibility of marriage for same-sex couples.⁶¹⁴ In the Swiss referendum in 2006, 58% voted in favour of same-sex registered partnerships.

The attitudes in the member states towards marriage for same-sex couples correlate to a large extent with the level of legal recognition of same-sex partnerships – the most positive attitudes tend to be found in the member states with some kind of legal recognition of same-sex partnerships. This indicates an interrelation between public attitudinal changes and the granting of rights, which was also pointed out by the ombudsman in Spain, when he identified the introduction of marriage for same-sex couples as having a significant positive impact on attitudes towards LGBT persons.⁶¹⁵

6.2. Parenting and children

Many LGBT persons in Council of Europe member states, whether alone or with their partner, raise children. It is not possible to give scientifically validated figures, but surveys in different member states indicate that between 10% and 20% of LGB persons have children. Figures from surveys in Italy indicate that around 5% of LGB respondents have children and many LGB persons would like to have

611. Ibid., p. 44.

612. Human Rights Action, “Homophobia in Montenegro”. The survey was performed by the agency Ipsos Strategic Marketing, October 2009, p. 5.

613. Our World, “Ukrainian Homosexuals and Society: A Reciprocation – Review of the Situation: Society, Authorities and Politicians, Mass-media, Legal Issues, Gay Community”, Kiev, 2007, p. 65.

614. Westerlund, J., “Regnbågsfamiljers ställning i Norden. Politik, rättigheter och villkor”, Nordiskt institut för kunnskap om kön, Oslo, 2009.

615. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 34.

children,⁶¹⁶ with lesbian and bisexual women showing a stronger disposition towards children than gay and bisexual men. A German census from 2006 found that there were approximately 62 300 same-sex coupled households, and that 8% of those couples (approximately 5 000) had children.⁶¹⁷ A study in Belgium refers to “cultural reticence” in relation to discussing transgender parenthood and concludes that “the practice of transgender parenthood remains invisible and uninvestigated”.⁶¹⁸ Research in the United Kingdom suggests that around 50% of transgender women and a smaller proportion of transgender men have children.⁶¹⁹

There are different ways in which gay, lesbian and bisexual persons can become parents. In some member states of the Council of Europe, they have adopted a child or they have acquired legal custody of a child. Some couples have chosen to look for access to opportunities for assisted reproduction. LGBT persons can also be parents because they had a child in a previous relationship. For transgender persons becoming a parent is more complicated due to the fact that competent authorities may consider transgender persons not to be eligible when they are diagnosed with “gender identity disorder” (and thus be considered “not fit to raise a child”). From the outset it is crucial to emphasise that the best interests of the child should be a primary consideration in all actions concerning children and the way decisions are made regarding their family status.⁶²⁰ The definition of the “best interests of the child”, although not provided in the text of the Convention on the Rights of the Child, implies that the overall well-being of the child has to always be put at the forefront and has to be read and understood in relation to the child’s age and level of maturity, the absence or presence of parents, and the child’s environment.⁶²¹ This section of the report will describe the legal frameworks in place regarding custody, adoption and assisted reproduction.

6.2.1. Custody rights

The possibility of custody of a child subsequent to separation or divorce of the parents is protected by Article 8 of the European Convention on Human Rights. This should, however, be ensured in conjunction with the right of the child to have all decisions on parental guardianship, that is care and protection, education, personal relations and residence, taken in their best interests. This principle is laid down in Article 3, paragraph 1, of the UN Convention on the Rights of the Child.⁶²²

In a case regarding child custody, the European Court of Human Rights found that “that the applicant’s homosexuality was a factor which was decisive in the final decision” of the Lisbon Court of Appeal, which denied custody to the applicant. The Court of Appeal had observed that the applicant was a homosexual man living with another man and expressed the opinion that “[t]he child should live in ... a traditional Portuguese family”. It continued by noting that “[i]t is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations.”⁶²³ The European Court found “that the Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention”.

616. For example: Arcigay, “*Survey nazionale su stato di salute, comportamenti protettivi e percezione del rischio HIV nella popolazione omo-bisessuale*”, available at: www.salutegay.it/modidi/risultati_della_ricerca/report_finale.pdf, accessed 16 December 2010. Note also Monteiro, T. L., Policarpo, V. and Silva, F. V., “*Inquérito Nacional sobre Experiências da idade em Portugal*”, Centro de Investigação e Estudos de Sociologia, Instituto Superior de Ciências do Trabalho e da Empresa, Lisbon, 2006.

617. Eggen, B., “*Gleichgeschlechtliche Lebensgemeinschaften mit und ohne Kinder. Eine Expertise auf der Basis des Mikrozensus 2006*”, Staatsinstitut für Familienforschung an der Universität Bamberg, 2009.

618. Institute for Equality of Women and Men, “*Being Transgender in Belgium: Mapping the Social and Legal Situation of Transgender People*”, 2010, p. 74.

619. Ettner, R. and White, T., “*Disclosure, Risks and Protective Factors for Children Whose Parents Are Undergoing a Gender Transition*”, *Journal of Gay & Lesbian Psychotherapy*, Volume 8, Number 1/2, p.129 (2004).

620. “The best interests of the child” is a basic principle laid out in the United Nations Convention on the Rights of the Child. Article 3, paragraph 1, reads: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

621. UNHCR, “*UNHCR Guidelines on Formal Determination of the Best Interests of the Child, Provisional Release May 2006*”, available at: www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20release%20May%202006.pdf, accessed 16 December 2010.

622. United Nations Convention on the Rights of the Child (General Assembly Resolution 44/25 of 20 November 1989).

623. European Court of Human Rights, *Salgueiro Da Silva Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999, paragraph 34.

The best interests of the child in cases of discrimination due to the sexual orientation or gender identity of one of the child's parents has been highlighted in Committee of Ministers Recommendation CM/Rec(2010)5 to the member states. It states that the child's best interests should be the primary consideration in decisions regarding parental responsibility for, or custody of, a child and adds that it should be ensured that such decisions are taken without discrimination on the grounds of sexual orientation or gender identity.⁶²⁴

6.2.2. Specific obstacles to parenting by transgender persons

Transgender persons are also parents.⁶²⁵ Since in many member states gender reassignment surgery and being unmarried are preconditions for legal gender recognition, transgender persons face significant challenges in becoming parents. At the same time, however, they may have children from previous (or ongoing) relationships and in these cases the exercise of their parental rights may be problematic. In fact, in the 15 member states which currently require divorce as a precondition for legal gender recognition, transgender persons may face difficulties in obtaining or maintaining custody of their children since they may lose rights connected to the marriage status.

Recent case law in the European Court of Human Rights in *P.V. v. Spain*⁶²⁶ has shown the complexity of the issue at stake when the Court is asked to strike a balance between the best interests of the child and the exercise of parental rights by transgender persons. Moreover, requirements for legal recognition of one's preferred gender, such as that of transgender persons being childless, also impose a heavy burden on transgender parents wishing to have their preferred gender recognised. A similar problem also arises in Poland where transgender people's gender reassignment is not recognised if they have custody of children.⁶²⁷ In Russia, a transgender man, the biological "mother" of the child, has been taken to court by his former partner who tried to have custody transferred because of the transgender man's gender identity.⁶²⁸

6.2.3. Adoption

The UN Convention on the Rights of the Child sets the legally binding international standards for adoption. Article 21 of the convention, in putting at the forefront the "best interests of the child", sets the conditions under which the adoption process must take place and foresees inter-country adoption in cases in which the state cannot provide care for the child. Inter-country adoption is further regulated by the 1993 Hague Convention,⁶²⁹ which addresses the respect of the best interests of the child and the respect of fundamental rights in inter-country adoption as an indispensable principle. As for national adoption no specific global instrument exists.

In the European context the European Convention on the Adoption of Children (revised)⁶³⁰ addresses the issue of same-sex couples and the possibility of being considered as adoptive parents. Article 7 contains a provision stating that the law shall permit a child to be adopted by two persons of different sex who are either married to each other or, where such an institution exists, have entered into a registered partnership together, or by one person. Article 7 also provides that states are free to extend the scope of this convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this convention to different-sex couples and same-sex couples who are living together in a stable relationship. The 2008 revised convention does not oblige states to introduce a system providing access to registered

624. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraph 26.

625. Some 53% of the transgender women, 20% of the transgender men and 35% of the transgender respondents who did not (yet) undergo gender reassignment surgery in a UK study are parents. Scottish Transgender Alliance, "Transgender Experiences in Scotland – Research Summary", Equality Network, Edinburgh, 2008, p. 10.

626. European Court of Human Rights, *P.V. v. Spain*, Application No. 35159/09, judgment of 30 November 2010.

627. FRA national contribution (legal report) on Poland, p. 62; national contribution (legal report) on Ukraine, pp.39-40.

628. Russian LGBT Network Shadow Report for the 46th CEDAW Session, p. 13, http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LGBTNetwork_RussianFederation46.pdf, accessed 10 January 2011.

629. United Nations, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded May 1993, Vol. 1870, No. 31922.

630. European Convention on the Adoption of Children (revised), Strasbourg, 27 November 2008 (CETS No. 202), opened for signature in November 2008. Some 14 states have signed the revised version: Armenia, Belgium, Denmark, Finland, Iceland, Montenegro, Netherlands, Norway, Portugal, Romania, Serbia, Ukraine and the United Kingdom. Only Spain has ratified the convention. The original convention stems from 1967, but in recognition of the fact that society has changed over the past four decades, a revised convention was drafted.

partnerships into their national laws, but where such an institution exists, it can be argued under the European Convention on Human Rights that registered partners cannot be discriminated against and denied access to adopt jointly, in the same way as a married couple.⁶³¹

The protection of private and family life under Article 8 of the European Convention on Human Rights does not include a right to adopt children. The European Court of Human Rights has held in its case law that adoption means “providing a child with a family, not a family with a child”. Accordingly, where there are competing interests between those of the child and those seeking to adopt, the best interests of the child shall be the deciding factor.⁶³²

In earlier case law of the European Court of Human Rights (before *Christine Goodwin v. the United Kingdom*), for example in the case of *X, Y and Z v. the United Kingdom*, the Court was not convinced that it would be in a child’s best interests to have her transgender father recognised as her lawful parent.⁶³³ In the case of *Fretté v. France*, the Court held by four votes to three, that there had been no violation of the prohibition of discrimination in Article 14 of the Convention taken together with Article 8 of the Convention. The Court argued that there was no consensus in the scientific community regarding the effect gay parents might have on their children, based on which and considering the primacy of the child’s best interests, the Court found that it was not unlawful to deny a single gay man the possibility of adopting a child on the basis of his sexual orientation.⁶³⁴

This position changed with the case of *E.B. v. France*, where the applicant, a woman living in a relationship with another woman, had applied for adoption as a single parent. However, she was rejected as an adoptive parent with reference to, *inter alia*, her “lifestyle” in relation to her sexual orientation. The European Court of Human Rights noted that “French law allows for single persons to adopt, thereby opening up the possibility of adoption by a single homosexual”. Further, the Court noted that the applicant’s sexual orientation had been a determining factor for the domestic authorities’ rejection of the application for authorisation to adopt. On this basis, the Court held that in rejecting the applicant’s application for authorisation to adopt, the domestic authorities had made a distinction regarding her sexual orientation that was in violation of the principle of non-discrimination under Article 14 of the Convention in conjunction with the right to family life according to Article 8.⁶³⁵

In August 2010, the European Court of Human Rights declared admissible the case *Gas and Dubois v. France*, in which a same-sex couple complained of discrimination regarding the right to family life due to the refusal to grant adoption to the female partner of the child’s mother.⁶³⁶ The applicants had been living together since 1989 and in a civil partnership since 2002. One of them had given birth to a child that was wished for by both of them and in whose upbringing both were actively involved. One of the applicants (the non-legal parent) was denied adoption of the child, and claimed discrimination due to sexual orientation. Even though the French Government argued that the applicants had not been subjected to a “difference in treatment” that would amount to discrimination “as an unmarried heterosexual couple could have (been) met with the same refusal as Ms Gas”, the denial of adoption by one of the complainants was seen by the European Court as requiring further examination of the merits of the case.

The Committee of Ministers has recommended that 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.⁶³⁷

631. See, for commentary, Horgan, R. and Martin, R., “The European Convention on Adoption 2008: Progressing the Children’s Rights Polemic, Features”, *International Family Law*, September 2008, p. 155 ff.

632. European Court of Human Rights, *Pini and Others v. Romania*, Application Nos. 78028/01 and 78030/01, judgment of 22 June 2004, paragraphs 155-156. For further information, see Ovey, C. and White, R., *The European Convention on Human Rights*, Oxford University Press, 2006, pp. 259-261.

633. European Court of Human Rights: *X, Y and Z v. the United Kingdom*, Application No. 21830/93, judgment of 22 April 1997 (Grand Chamber).

634. European Court of Human Rights, *Fretté v. France*, Application No. 36515/97, judgment of 26 February 2002, paragraph 42.

635. European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, judgment of 22 January 2008, paragraphs 91-93.

636. European Court of Human Rights, *Gas and Dubois v. France*, Application No. 25951/07, decision of 31 August 2010.

637. Council of Europe Committee of Ministers Recommendation CM/Rec(2010) on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraph 27.

The Yogyakarta Principles lay down, in Principle 24, that states should take all necessary legislative, administrative and other measures to ensure the right to found a family and it explicitly mentions access to adoption as a means to found a family. As such, access to adoption should be ensured for LGBT persons without discrimination on the basis of their sexual orientation or gender identity.

There are three aspects related to adoption of a child by lesbian, gay or bisexual persons. A single gay or lesbian person may apply to become an adoptive parent (individual adoption). The second issue is “second-parent adoption”, which is a legal procedure that allows same-sex couples to adopt their partner’s biological or adopted children without terminating the first parent’s rights as a parent. Second-parent adoptions give the child two legal parents instead of one. It protects both parents by giving both of them legally recognised parental status. The final issue is joint adoption by a same-sex couple of an unrelated child (a child who is not the child of either partners).

The lack of second-parent adoption has been flagged by LGBT NGOs as having significant consequences for LGBT families.⁶³⁸ The main implications include the lack of rights of the child and the non-biological parent in the case of divorce, separation, the death of the biological parent or other circumstances that would prohibit the only legal parent from carrying out parental responsibilities.⁶³⁹ Furthermore, the lack of inheritance rights of the child in relation to the non-biological parent can be problematic. Finally, the lack of second-parent adoption hinders the possibility of parental leave, also affecting LGBT families financially.

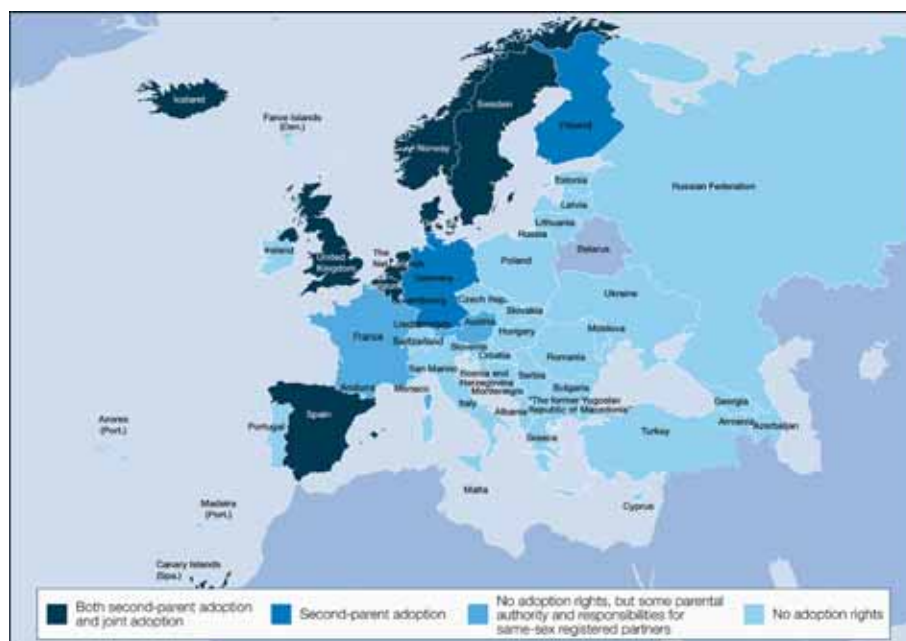
It has also been claimed by LGBT organisations, however, that second-parent adoption is not sufficient to solve such problems, and that equal treatment should allow joint adoption under the same rules as different-sex couples.⁶⁴⁰

638. Field trip meetings with LGBT NGOs, March-April 2008; for example: www.lbl.dk/uploads/media/Regnbuefamiliers_forhold_2008_01.pdf, accessed 10 June 2008.

639. The rights of the child (including the right to non-discrimination irrespective of the child’s or his/her parents’ sex, social origin or other status (Article 2)) are set forth in the UN Convention on the Rights of the Child, www2.ohchr.org/english/law/crc.htm, accessed 20 October 2010.

640. Laursen, S., “Regnbuefamiliers forhold 2008”, LBL (the national organisation for gays and lesbians), Copenhagen, 2008.

Map 6.3: Legislation regarding adoption by same-sex couples



Ten member states allow second-parent adoption to same-sex couples (Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom). Apart from Finland and Germany these member states also give access to joint adoptions for same sex couples. In Austria and France there is no access to second-parent adoption but same-sex couples in registered partnerships are allowed some parental authority or responsibilities.

No access to joint adoption or second-parent adoption is available in 35 member states: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine.

6.2.4. Assisted reproduction

Access to assisted reproduction is not explicitly mentioned in any legally binding human rights instrument. Similarly in its case law, the European Court of Human Rights did not identify a positive obligation for states to ensure a right to assisted reproduction. In the case of *Marckx v. Belgium*, the Court held that “by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family”⁶⁴¹ and added “that Article 8 of the Convention does not cover the aspiration to become a parent”⁶⁴².

However, building on the European Court’s argumentation in *E.B. v. France*,⁶⁴³ in which the Court concluded that the refusal of adoption by a single lesbian woman led to a distinction regarding her sexual orientation which was in violation of the principle of non-discrimination, states should have very weighty reasons to deny assisted reproduction facilities on the grounds of the sexual orientation of a single woman. This approach is also taken by the Committee of Ministers in its Recommendation CM/Rec(2010)5, where it recommends member states to permit single women the right to assisted

641. European Court of Human Rights, *Marckx v. Belgium*, Application No. 6833/74, judgment of 13 June 1979, paragraph 31.

642. European Commission of Human Rights, *Di Lazzaro v. Italy*, Application No. 31924/96, decision of 10 July 1997; and *X and Y v. the United Kingdom*, Application No. 7229/75, decision of 15 December 1977. In the latter case the Commission stated that “Article 12 does not guarantee a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned”.

643. European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, judgment of 22 January 2008, paragraphs 91 and 93.

reproductive treatment “without any discrimination on the grounds of sexual orientation”.⁶⁴⁴ Moreover, it could be argued that the ruling in *Karner v. Austria* may form the basis for extending access to assisted reproduction from cohabiting different-sex couples to cohabiting same-sex couples.⁶⁴⁵

Finally, the Yogyakarta Principles suggest, in Principle 24, that states should take all necessary legislative, administrative and other measures to ensure the right to found a family, and it explicitly mentions access to assisted procreation and donor insemination as a means to found a family. As such, access to procreating interventions should be ensured for LGBT persons without discrimination on the basis of their sexual orientation or gender identity.

Some Council of Europe member states, including Belgium, Denmark, Finland, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom⁶⁴⁶ give lesbian couples access to assisted reproduction. Other states make these services available only to married different-sex couples. For example, Denmark banned assisted insemination for women in same-sex couples and for single women in 1997, but reinstated the right in 2007. In Italy, donor insemination was made illegal in 2004 for single women and women living in long-term *de facto* relationships, among them lesbian women.⁶⁴⁷

6.2.5. Attitudes towards and research on parenting and children

Several research and attitude surveys have been published on the topics of adoption, and to a lesser extent on custody and access to assisted reproduction. The central issue in such publications is usually whether same-sex couples are “suitable parents” and to what extent being raised in such a family unit has a (negative) impact on the child. The situation of children being raised by transgender persons has been less researched.

One approach was the one found in a study examining Danish parliamentary debates from 1996 to 2002 on the right to assisted insemination for lesbian women and single women. This study identified arguments stating that it is the natural order and in a child’s best interest to have a father and a mother. Similarly, some politicians labelled lesbian women choosing to have a child without a known father as irresponsible.⁶⁴⁸ In Germany, conservative politicians have voiced the opinion during parliamentary debates, that parenting by same-sex couples is detrimental to the psychological well-being of children,⁶⁴⁹ and that the “well-being of children is in no way ensured” in an LGBT family.⁶⁵⁰

However, studies such as the one carried out at the German University of Bamberg point in the opposite direction.⁶⁵¹ The study summarises the following findings of existing research in the field of parenting by same-sex couples: (1) the sexual orientation of a parent does not affect the behaviour and development of the child, (2) children with same-sex parents are in some cases affected by societal or peer-group discrimination, but most often have the psychological strength to withstand it, and (3) children with same-sex parents are more tolerant towards homosexuality, although they are on average no more likely to be gay themselves. A Swedish Government report⁶⁵² concludes that:

The combined research shows that children with parents have developed psychologically and socially in a similar way to the children to which they were compared. Nor did any differences emerge as regards the children’s sexual development. ... Nor have any differences emerged from the research between

644. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraph 28.

645. European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003, paragraphs 37 and 41.

646. Overview based on: (FRA) national contributions. Also: ILGA-Europe, “Rainbow Europe Map and Country Index”, 2010.

647. FRA national contribution (sociological report) on Italy, p. 8.

648. Stormhøj, C., *Poststrukturalismer*, Hans Reitzels Forlag, Copenhagen, 2006.

649. Deutscher Bundestag, 105 Sitzung, Berlin, 21 June 2007, <http://dip21.bundestag.de/dip21/btp/16/16105.pdf>, accessed 12 March 2008.

650. *Tagesspiegel*, “Adoptionsrecht für Schwule. Karlsruhe entscheidet später”, 2006, available at: www.tagesspiegel.de/politik/div/art771,1938609, accessed 14 May 2006.

651. Eggen, B., “Gleichtgeschlechtliche Lebensgemeinschaften mit und ohne Kinder. Eine Expertise auf der Basis des Mikrozensus 2006”, Staatsinstitut für Familienforschung an der Universität Bamberg, 2009.

652. The Commission on the Situation of Children in Families, “Children in Families – Summary”, Statens Offentliga Utredningar (official Swedish Government reports), Stockholm, 2001, pp. 6-7.

homosexual and heterosexual parents as regards their ability to offer children good nurturing and care.⁶⁵³

A United Kingdom study based on interviews with children of lesbian and gay parents finds that many of the children see their families as special and different, but that it is not experienced as negative but rather as positive by the children. “Children with gay parents like having gay parents and wouldn’t want things to change but wish other people were more accepting [of gays and lesbians].”⁶⁵⁴

An expert report produced for the Council of Europe focused on the rights and legal status of children brought up in various forms of marital or non-marital partnership or cohabitation. It found that the well-being of children in families of same-sex partners depends not only on the families themselves, but on the legal framework that ensures or limits the stable protection they receive from their carers. It notes:

Children do not live in a vacuum, but within a family, and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood, or to deny significant carers legal rights and responsibilities, as it is to accord the child a different status and legal rights according to the circumstances of their birth or upbringing.⁶⁵⁵

Other research shows that LGBT families may face unique challenges because of societal stigma and the lack of legal recognition of their partnerships.⁶⁵⁶ The lack of legal recognition of the family may result in unequal treatment including tax and employment benefits, public housing designations, designation as “next of kin” for health services and recognition of a second parent in day-care or education. There are also problems in families where the transgender partner may lose acquired rights when having to go through divorce which is in many member states a legal requirement for legal gender recognition. All of these areas can cause economic and emotional uncertainty for the families involved.

In a Finnish study, 19% of LGBT respondents stated having experienced discrimination in services, such as health care services being designed for traditional heterosexual families. Furthermore, the respondents perceived discrimination in interactions with public officials and institutions such as day-care centres and schools. A fear of discrimination by various services also reportedly led LGBT families to be less likely to seek certain services such as family counselling.⁶⁵⁷

Particular problems are faced by same-sex couples (with or without children) who want to move from one country to another, for example for reasons of job opportunity or family reunification. The marriage certificate of the same-sex couple from the country of origin may not be recognised in the country where the couple wishes to settle. For example, in Armenia, Russian Federation and Ukraine marriages contracted abroad are not valid if they contradict national legislation, “morals” or “public order”. Even though there is no case law in these countries yet, it is assumed that such regulations prevent the recognition of same-sex partnerships or marriages.

This is relevant for same-sex couples married in Belgium, Iceland, Netherlands, Norway, Portugal, Spain or Sweden. An evaluation of Dutch legislation on registered partnerships and the Act on the Opening Up of Marriage commissioned by the Dutch Ministry of Justice⁶⁵⁸ came to the conclusion that legal recognition of the widened scope of marriage to same-sex partners and registered partnerships abroad, even within the European Union, is problematic. The situation for same-sex couples under alternative arrangements (registered partnerships) or those who have no access to any form of registered partnership is even more complex.

653. Ibid., pp. 6-7.

654. Guasp, A., “Different Families. The Experiences of Children with Lesbian and Gay Parents”, Stonewall and University of Cambridge, 2010.

655. Lowe, N., “A study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation”, Directorate General of Human Rights and Legal Affairs, Council of Europe Secretariat, 2010, p. 3.

656. The lack of an inclusive definition of the family can be seen in application forms for family reunification or registration forms at schools or health services. Institutions often assume a heterosexual couple or a mother and a father when devising services, benefits and procedures. See, for example, the Equality Authority for a Diverse Ireland, “Implementing Equality for Lesbians, Gays and Bisexuals”, 2002.

657. Jämsä, J. and Kuosmanen, P. (eds), “Finnish Rainbow Families in Social Welfare and Health Care Services and Schools”, Työministeriö, Helsinki, 2007.

658. Boele-Woelki, K. et al., *Huwelijk of geregistreerd partnerschap? Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap*, Kluwer, Deventer, 2007.

Some member states also wish to prevent their nationals entering into a same-sex partnership altogether. In order to register their partnership or marriage abroad, Polish citizens usually need to present a certificate issued by the Civil Status Office stating that the person concerned is unmarried. The Polish Ministry of Internal Affairs and Administration has instructed⁶⁵⁹ that such a certificate shall only be issued to persons who wish to enter into a different-sex marriage, and not same-sex partnership, as the latter is not regulated or recognised by Polish law. As a result of this situation, gay or lesbian people wishing to enter into marriage or partnership must obtain special notary certificates, confirming that they are not married to anyone. This imposes a supplementary burden and additional notary costs. Polish NGOs issued a petition which was presented to the European Parliament Petitions Committee on 31 May 2010⁶⁶⁰ which is now examining it.

On the question of adoption of children by same-sex couples, a Eurobarometer survey found “extremely different levels of agreement from one country to another: it ranges from 7% in Poland and Malta to 69% in the Netherlands. Sweden is the only other country where (just) more than half of the population support the view that the adoption of children should be authorised for couples throughout Europe.”⁶⁶¹ On average, 31% of Europeans feel that “same-sex couples should be allowed to adopt children”. The figures for each of the EU member states are shown on Map 6.4.⁶⁶²

Map 6.4: “Adoption of children should be authorised for homosexual couples throughout Europe”



The Eurobarometer survey further concludes: “the effect of age in determining people’s attitudes towards homosexuality is clearly evident: 44% of young Europeans agree, compared with 20% of Europeans aged 55 and over. Support further increases in line with the number of years people follow full-time education. People on the left of the political spectrum are far more supportive than are people who place themselves on the right of the political spectrum.”⁶⁶³

Survey findings on this topic from other (including non-EU) member states are scarce. According to a survey from Montenegro, 12% agree that same-sex couples should have access to adoption of

659. Instruction of the Deputy Director of Department of Information Technology Development and State Registries of the Ministry of the Interior of 3 April 2002, addressed to all governors of voivodships, statement of 3 April 2002, No. DIR-V-6000-21-2731/2002.

660. Campaign Against Homophobia, “KHP’s Success at the European Parliament Petitions Committee”, 1 June 2010, www.world.kph.org.pl/index.php?lang=en&doc=news&id=28&title=kphs_success_at_the_european_parliament_petitions_committee, accessed 28 September 2010.

661. Eurobarometer 66, www.ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf, 2006, p. 45, accessed 7 December 2010.

662. Ibid.

663. Ibid., p. 46.

children. Students are significantly more favourable (24%) to the statement.⁶⁶⁴ In an Icelandic survey from 2009, 53% of the population supported giving gays and lesbians access to adoption.⁶⁶⁵

Practical initiative – information to LGB parents: in Belgium, a pregnancy guidebook for female same-sex parents has been developed in collaboration between the LGBT NGO Holebifederatie and the Flemish Government.⁶⁶⁶ It covers two main chapters: a chapter on the pregnancy experiences of female same-sex couples and a chapter covering judicial and practical aspects of lesbian parenthood.

6.3. Homophobia and transphobia within the family

A final aspect of family life is the “coming out” of a family member as lesbian, gay, bisexual or transgender within the family. This applies especially to young people who grow up and live with their families and who may at some point discover their sexual orientation or gender identity. Research in Bosnia and Herzegovina,⁶⁶⁷ France,⁶⁶⁸ Germany,⁶⁶⁹ Italy,⁶⁷⁰ Latvia,⁶⁷¹ Malta,⁶⁷² Poland,⁶⁷³ Portugal,⁶⁷⁴ Slovenia,⁶⁷⁵ Slovakia,⁶⁷⁶ and the United Kingdom⁶⁷⁷ shows that a significant number of LGBT persons hide their sexual orientation from family members due to fear of or experiences of discrimination within their family. According to representatives from LGBT NGOs interviewed in member states non-acceptance, homophobia and transphobia are mayor problems, as well as the possible consequences thereof.

In a online survey 47% of Lithuanian LGB persons replied that their families did not know about their sexual orientation.⁶⁷⁸ In Georgia, NGO research showed that 87% of LGB persons still concealed their sexual orientation from their families.⁶⁷⁹ A survey in Serbia demonstrated that 70% of the population would not want one of their relatives to be gay or lesbian.⁶⁸⁰ In Croatia, 14% of men surveyed and 3% of women said they would disown a gay son.⁶⁸¹

The family may be experienced by LGBT persons as an institution of immediate social control. This imposes expectations on the gender roles of boys and girls alike, which can be problematic for LGBT children who do not meet them. NGO representatives in Armenia, Azerbaijan, Georgia and Turkey stressed the double discrimination facing lesbians and bisexual women in those states. As women, they are expected to marry and have children, and until they do they must come home directly from the workplace and not go out alone. Family honour is an influential concept.

664. Human Rights Action, “Homophobia in Montenegro”. The survey was performed by the agency Ipsos Strategic Marketing, October 2009, p. 5.

665. Westerlund, J., “Regnbågsfamiljers ställning i Norden. Politik, rättigheter och villkor”, Nordiskt institut för kunnskap om kön, Oslo, 2009, p. 269.

666. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 80.

667. Organization Q, “The Invisible Q? Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina”, Sarajevo, 2008.

668. FRA national contribution on France.

669. Senatsverwaltung für Schule, Jugend und Sport, Fachbereich für gleichgeschlechtliche Lebensweisen Berlin (SENSJS), “Sie liebt sie. Er liebt ihn. Eine Studie zur psychosozialen Situation junger Lesben, Schwuler und Bisexueller in Berlin”, Author, Berlin, 2001.

670. Saraceno, C. (ed.), *Diversi da chi? Gay, lesbiche, transsessuali in un’area metropolitana*, DeriveApprodi, Milan, 2003.

671. Locmelis, A., “Sexual Orientation Discrimination in Latvia”, in: *Sexual Orientation Discrimination in Lithuania, Latvia and Estonia*, The Open Society Institute & Kimeta Society, Vilnius, 2002.

672. Malta Gay Rights Movement, *Sexual Orientation Discrimination in Malta: A Report on Discrimination, Harassment, and Violence against Malta’s Gay, Lesbian and Bisexual Community*, Union Press, Malta, 2003.

673. Abramowicz, M., “Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report”, Campaign Against Homophobia and Lambda Warsaw, Warsaw, 2007.

674. Silva, F. V., Policarpo, P. and Monteiro, T. L., “Inquérito Nacional sobre Experiências da Homossexualidade em Portugal”, Centro de Investigação e Estudos de Sociologia, Instituto Superior Ciências do Trabalho e da Empresa, Lisbon, 2006.

675. Švab, A. and Kuhar, R., *The Unbearable Comfort of Privacy: The Everyday Life of Gays and Lesbians*, Politike, Ljubljana, 2005.

676. Daucikova, A., Jójárt, P. and Siposova, M., “Report on Discrimination of Lesbians, Gay Men and Bisexuals in Slovakia”, Documentation and Information Centre, Bratislava, 2002.

677. Dick, S., “Homophobic Hate Crime – The Gay British Crime Survey 2008”, Stonewall, 2008.

678. FRA national contribution (sociological report) on Lithuania, p. 7.

679. Inclusive Foundation, Discrimination survey conducted among 120 LGBT in Georgia – February 2006.

680. Gay Straight Alliance, “Prejudices Exposed – Homophobia in Serbia”. Public Opinion Research report on LGBT population, 2008. February-March 2008, p. 2.

681. Lesbian Group Kontra, “Violence against Lesbians, Gays and Bisexuals in Croatia: Research Report”, Zagreb, 2006, p. 7.

Insight into the consequences of lack of acceptance within the family indicates that homophobia is not just about recognition and acceptance. In some cases, it has further socio-economic consequences, such as loss of stable housing and periods of homelessness. In some member states, lack of acceptance by family members can lead to spells of homelessness for young LGBT persons. A study from the United Kingdom showed that 29% of lesbian respondents and 25% of gay ones had to leave their parents' home after "coming out".⁶⁸² Young people forced to leave home after "coming out" in Albania and Moldova, where children often live at home until they marry, had difficulty finding accommodation. Similarly, transgender persons report problems after "coming out" to their families. In the United Kingdom a study found that 45% of respondents experienced a breakdown of their relationship with their family as a result.⁶⁸³

In a Swedish report, 32% of transgender respondents (19% of gay respondents and about 10% of heterosexual respondents) said they lacked emotional support in their lives. Some 15% missed practical support (against 4% of the heterosexual population and 9% of the gay population), whilst 37% of transgender persons reported that they lacked confidence in most other people.⁶⁸⁴ Belgian research⁶⁸⁵ has shown that LGBT persons rely less on family members than on friendship networks when seeking social support.

An example from Ukraine shows that parents sometimes go very far in order to try to change their child's sexual orientation. In one case, a lesbian woman was reportedly "imprisoned" by her parents. In another case a mother went to court in order to force her son to undergo psychological treatment.⁶⁸⁶

Another family-related issue is domestic violence – reported by LGBT NGOs interviewed in the member states, not least by women/lesbian groups.⁶⁸⁷ An NGO in Azerbaijan reports cases of violence as the result of a member of the family coming out as lesbian or bisexual. The authors of an NGO shadow report on Azerbaijan for the UN Human Rights Committee consider domestic violence as especially problematic for LGBT women: "there is family violence, which we consider to be one of the most insidious forms of violence against women in general. The huge majority of more frank displays of violence against the lesbian and bisexual women occurs at home and includes oral and physical abusing, the internal confinement and compulsion, compulsory marriage, and possibility of crimes of honour. Information about crimes of family violence over the lesbian and the bisexual woman is virtually nonexistent, mostly because of the full social ostracism, which these women can encounter after reporting."⁶⁸⁸ The prevalence of domestic violence is difficult to assess, but all the LGBT NGOs interviewed mention family pressure, harassment, control and, in some cases, violence as under-reported or invisible problems facing LGBT persons – in particular LGBT youth. This does not only apply to lesbian or bisexual women.

In a UK (Scottish) survey, 46% of the respondents reported transphobic abuse in domestic relationships, mostly in the form of verbal abuse. However, threatening behaviour (17%), physical abuse (11%) and sexual abuse (4%) were also common.⁶⁸⁹ A follow-up study found even higher numbers.⁶⁹⁰

While data are largely unavailable on the problem, NGO reports from Azerbaijan refer to the maltreatment of a young transgender woman who was chained and beaten at her father's house for

682. Averill S., "How Can Young People be Empowered to Achieve Justice when they Experience Homophobic Crime?", Middlesex University, 2004, pp. 20-21.

683. Whittle S., Turner L. and Al-Alami M., "Engendered Penalties: Transgender and Transsexual People's Experience of Inequality and Discrimination", Wetherby: *The Equalities Review*, 2007, p. 68.

684. Statens Folkhälsoinstitut, "Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer", FHI, Östersund, 2005, p. 33 ff.

685. Dewaele, A., "De sociale netwerken van hobei's – Over vriendschap en andere bloedbanden", Antwerp University: Faculteit Politieke en Sociale Wetenschappen, Departement Sociologie, 2007-08.

686. Joint meeting with NGOs in Kiev, Ukraine, 18 May 2010.

687. For example, meetings with Lambdaistanbul in Turkey, 25 February 2010; national contribution (sociological report) on Georgia, p. 11; national contribution (sociological report) on Azerbaijan, p. 12; national contribution (sociological report) on "the former Yugoslav Republic of Macedonia", p. 10.

688. "The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report", submitted to the UN Human Rights Committee, July 2009, p. 13.

689. Scottish Transgender Alliance, "Transgender Experiences in Scotland – Research Summary", Equality Network, Edinburgh, 2008, p. 11.

690. Roch, A., Ritchie, G. and Morton, J., "Out of Sight, Out of Mind? Transgender People's Experiences of Domestic Abuse", Scotland: LGBT Youth Scotland, Equality Network, 2010.

eight months, and then forced to marry.⁶⁹¹ Transgender people in Moldova reported⁶⁹² beatings from their fathers in an attempt to “cure” them. Homophobic violence in the family was also reported by lesbian and bisexual women in, among others, Georgia⁶⁹³ and Azerbaijan.⁶⁹⁴

More research is needed to be able to accurately assess the level of rejection and violence that LGBT people face in the family. The Council of Europe’s 7th Conference of Ministers responsible for Equality between Women and Men recognised the need to combat discrimination against women and girls and transgender persons on account of their sexual orientation or gender identity. The conference resolution refers to the multiple-discrimination which they face, and the taking of “all necessary measures to ensure their full and equal enjoyment of all human rights and fundamental freedoms”.⁶⁹⁵ The conference also adopted an action plan which recommends that the Council of Europe “undertake research on the situation of lesbian, bisexual and transgender women with a view to drafting specific guidelines on preventing and combating all forms of discrimination against them” (Section VII).⁶⁹⁶

6.4. Conclusions

In the last two decades same-sex couples have gained increased recognition of the fact that they enjoy family life. Seven member states give access to marriage to same-sex couples. In a growing number of other member states (currently 14) a form of registered partnership has been introduced. One state has minimal cohabitation rights for same-sex partners.

The remaining 25 member states do not legally recognise same-sex couples through marriage, partnership registration or specific legislation on cohabitation rights. However, all member states of the Council of Europe should comply with the principle of the European Court of Human Rights’ judgment in *Karner v. Austria*, by extending to same-sex couples the same rights as unmarried different-sex couples.

The lack of access to marriage or partnership registration results in same-sex couples lacking access to all, most or some rights and benefits enjoyed by different-sex couples, such as inheritance, parental leave, custody and income tax and employment benefits.

Transgender people are, for marriage or partnership purposes, usually treated according to their legally recognised gender. They may face problems in member states where there is no legal basis providing for the possibility of recognising gender reassignment in contradiction with the jurisprudence of the European Court of Human Rights. This results in a situation where transgender people cannot marry in their preferred gender. The legal status of existing marriages of transgender persons and their partners can also be jeopardised. In 15 member states there is a legal obligation that transgender persons who are already married have to divorce before their preferred gender can be recognised. This implies that couples have to divorce even against their will.

Ten member states allow second-parent adoption to same-sex couples. Some 8 member states also give access to joint adoptions for same-sex couples. In two member states same-sex couples in registered partnerships are allowed some parental authority or responsibilities. No access to joint adoption or second-parent adoption is a reality in the other 35 member states.

Discrimination and intolerance against LGBT families takes place in all Council of Europe member states. Research shows that a significant percentage of LGBT persons hide their sexual orientation or gender identity from their families and that many experience discrimination, rejection or violence by their families. Homophobia and transphobia in the family is a problem for many young LGBT persons who come out to their parents as LGBT.

691. National contribution (sociological report) on Azerbaijan, p. 11.

692. National contribution (sociological report) on Moldova, p. 14.

693. National contribution (sociological report) on Georgia, p. 11.

694. “The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report”, submitted to the UN Human Rights Committee, July 2009, p. 13.

695. Paragraph 30.

696. Action Plan “Taking up the challenge of the achievement of de jure and de facto gender equality”, 25 May 2010, p. 5, 7th Council of Europe conference of ministers responsible for equality between women and men.

7. Asylum

7.1. Introduction

Persecution and criminalisation of consensual same-sex sexual acts (or homosexuality) is a reality in more than 76 countries around the world,⁶⁹⁷ even though such legislation may not always be (actively) enforced in each one of these countries. Also in countries where consensual same-sex sexual acts are not criminalised, laws to protect public morals are often disproportionately enforced against gay, lesbian, bisexual and transgender persons.

Within the framework of the United Nations General Assembly, a joint statement condemning human rights violations related to homophobia and transphobia was put forward in 2008.⁶⁹⁸ The statement was backed by a total of 67 states, including 41 member states of the Council of Europe, and concerned killings, torture and arbitrary arrests of LGBT persons, as well as the deprivation of their economic, social and cultural rights, including the right to health. Some 85 states sponsored a similar statement in March 2011 at the UN Human Rights Council; 43 Council of Europe member states were among these 85 states.⁶⁹⁹

LGBT persons in such countries may thus have a well-founded fear of persecution and decide to leave their country of origin. The UNHCR has noted in this respect: “Criminal laws prohibiting same-sex consensual relations between adults have been found to be discriminatory and to constitute a violation of the right to privacy. The very existence of such laws, irrespective of whether they are enforced and the severity of penalties they impose, may have far reaching effects on LGBT persons’ enjoyment of their fundamental rights. ... An applicant may exceptionally be able to demonstrate a well-founded fear of persecution even if a law criminalising LGBT is no longer enforced.”⁷⁰⁰

This chapter begins with an overview of the international, European and national human rights frameworks which support the protection of asylum seekers and refugees from persecution based on their sexual orientation and gender identity. In the following section, quantitative data on asylum cases (to the extent available) are presented as well as information on specific cases. In the third section of this chapter, trends in adjudication of LGBT-related asylum claims will be explored. This section will include reflections on the protection concerns in the countries of origin and asylum, including persecution and criminalisation of same-sex consensual relations, lack of physical safety and protection from *refoulement*. It pays special attention to the practice, in some countries, on the “imposition of discretion” put on LGBT asylum seekers. The final section focuses on the conditions for LGBT asylum seekers in asylum centres.

7.2. The international and European legal framework

The right to seek and to enjoy asylum from persecution in a country other than that of one’s origin is enshrined in Article 14 of the UN Universal Declaration of Human Rights. Any individual is thus vested with a right to apply for protection if subjected to violations of the human rights contained in the declaration.

The 1951 Convention relating to the Status of Refugees⁷⁰¹ (hereafter: the 1951 Convention) and its Protocol of 1967⁷⁰² give further substance to the right to seek and enjoy asylum. At the moment, 44 of the 47 member countries of the Council of Europe are parties to both the 1951 Convention and to the

697. ILGA-Europe, “State-Sponsored Homophobia. A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults”, May 2010, available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf, accessed 5 November 2010.

698. See General Assembly, Sixty-third session, Agenda Item 64 (b), 22 December 2008, A/63/635, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms.

699. United Nations, Human Rights Council, Sixteenth session, Agenda item 8, 22 March 2011, Follow-up and implementation of the Vienna Declaration and Program of Action.

700. UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, 2008, pp. 10-11.

701. United Nations, Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950.

702. United Nations, Protocol relating to the Status of Refugees, 606 UNTS 267, entered into force on 4 October 1967.

1967 Protocol, the only exceptions being Andorra and San Marino, which have never been parties to the convention, and Monaco which is party to the 1951 Convention only.

The convention introduces a general definition of the term “refugee” and establishes minimum standards for the treatment of refugees covering work, social security and housing. The definition of “refugee” given in Article 1A(2) of the convention reads as follows: “the term refugee shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

Article 33 of the convention spells out the *non-refoulement* principle by virtue of which states are prohibited from expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of the grounds mentioned in Article 1A(2) of the convention. For Council of Europe member states protection against *refoulement* is further granted on grounds of Article 3 of the European Convention on Human Rights, which prohibits torture and other forms of ill-treatment or inhuman or degrading punishment, and which thus goes beyond the mere scope of the 1951 Convention.

In addition to refugee status there is subsidiary or complementary protection in situations where the individual does not fulfil the requirements for obtaining refugee status but is in need of international protection. Subsidiary or complementary protection may be invoked notably on grounds relating to the rights and freedoms contained in the UN Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the UN International Covenant on Civil and Political Rights (Article 7) or the European Convention on Human Rights (Article 3). Article 15 of the EU Qualification Directive provides for protection in case of risk of serious harm, which is defined as including a threat to life, torture or inhuman or degrading treatment or punishment, and indiscriminate violence in situations of armed conflict. Persons fleeing generalised violence may also come under the UNHCR’s mandate.

According to the “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, lesbian, gay, bisexual and transsexual persons may fall within the 1951 Convention’s definition of refugee, if subjected to abuse, discrimination or criminalisation.⁷⁰³ Whether or not a fear of persecution is well founded should be assessed by authorities whilst taking into account the statements of the claimant in the context of background information concerning the situation in the country of origin, as indicated by the UNHCR in its handbook on procedures and criteria for determining refugee status.⁷⁰⁴ Fear of persecution is well founded when it can be considered as involving serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm. Also, a pattern of harassment and discrimination could, on cumulative grounds, reach the threshold of persecution.⁷⁰⁵

While sexual orientation or gender identity are not explicitly addressed in the list of grounds of the 1951 Convention, the UNHCR guidance note maintains that these two grounds might be subsumed under the grounds of “political opinion”,⁷⁰⁶ “religion”⁷⁰⁷ or “membership of a particular social group”.⁷⁰⁸ The rationale for such an interpretation is found in the following passage from the guidance note: “the transgression of social or religious norms, including by expressing one’s own sexual orientation or identity, may be analysed in terms of politics, religion or membership of a particular social group”.⁷⁰⁹

For the purposes of granting refugee status to LGBT asylum seekers, it is particularly the ground of “membership of a particular social group” that has turned out to be the most relevant. According to the UNHCR Guidelines on International Protection No. 2: Membership of a Particular Social Group, “Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the

703. UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, 21 November 2008, paragraph 3.

704. UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees” (paragraphs 42-43), HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992.

705. UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, 21 November 2008, paragraph 10.

706. *Ibid.*, paragraph 30.

707. *Ibid.*, paragraph 31.

708. *Ibid.*, paragraph 32.

709. *Ibid.*, paragraph 29.

Status of Refugees”, the following is required for the recognition of such membership: the presence of “(1) an innate, unchangeable characteristic, (2) a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it”.⁷¹⁰ Accordingly, sexual orientation and gender identity can be said to present the characteristics outlined in these guidelines.⁷¹¹ In fact, the UNHCR guidelines conclude that this ground is increasingly applied in cases relating to the sexual orientation of asylum seekers.⁷¹²

Moreover, although also not explicitly included as a ground in the 1951 Convention, gender-related persecution as a ground can be relevant for LGBT asylum seekers to the extent that their asylum claims relate to gender-related persecution.⁷¹³ This can be particularly relevant for transgender asylum seekers in cases in which the “gender element”⁷¹⁴ is recognised in their asylum applications.

The issue of refugee status and *refoulement* of persons who have been persecuted due to their sexual orientation or gender identity, or fear of being subjected to such treatment, was also raised in 2004 by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. In his report, the rapporteur argues that the fact of belonging to any identifiable group, for instance because of one’s own sexual orientation, for which the persons can be targeted by the authorities or, with the connivance of the authorities, risk being subjected to persecution or systematic discrimination amounting to torture or other cruel, inhuman or degrading treatment or punishment, should be taken into account in determining the *non-refoulement* issue.⁷¹⁵

In Europe, the Council of Europe Committee of Ministers has stressed the need for the member states bound by the 1951 Convention to recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for granting refugee status and asylum. The *non-refoulement* principle is considered as leading to an obligation for the member states to ensure that asylum seekers are not sent to a country where their life is threatened due to, *inter alia*, their sexual orientation or gender identity, or where they may face the risk of torture, or inhuman or degrading treatment or punishment.⁷¹⁶ Moreover, in Recommendation Rec(2004)9 the Committee of Ministers has provided a definition of the concept of “a particular social group”, which considers this a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state or the persecutors.⁷¹⁷

In its judgment *Soering v. the United Kingdom*, the European Court of Human Rights has clearly stated that “expulsion by a Contracting State may give rise to an issue under Article 3 [ECHR], and hence engage the responsibility of that State under the Convention, where substantive grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.”⁷¹⁸ Two relevant cases in this regard are pending before the European Court of Human Rights.⁷¹⁹ They involve a lesbian woman from Zimbabwe and a homosexual man from Iran who fear that they run the risk of being subjected to ill-treatment if returned to their countries of origin.

710. UNHCR, “Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees” (HCR/GIP/02/02), paragraph 6.

711. UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, 21 November 2008, paragraph 32.

712. Cf. HCR/GIP/02/02, 7 May 2002, paragraph 1.

713. UNHCR, “Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees”, paragraphs 14-16.

714. *Ibid.*, paragraph 16.

715. UN General Assembly, UN Doc. A/59/324, 1 September 2004, paragraph 39.

716. Cf. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 42-44.

717. Cf. the Explanatory Memorandum to Recommendation CM/Rec(2010), 1081st Meeting of the Ministers’ Deputies, 31 March 2010.

718. European Court of Human Rights, *Soering v. the United Kingdom*, Application No. 14038/88, judgment of 7 July 1989, Series A No. 161, p. 35, paragraph 88, and *Chahal v. the United Kingdom*, Application No. 22414/93, judgment of 15 November 1996, paragraph 74.

719. European Court of Human Rights, *D. B. N. v. United Kingdom*, No. 26550/10, case pending; European Court of Human Rights, *K. N. v. France*, No. 47129/09, case pending.

Within an EU context, the Charter of Fundamental Rights establishes that the right to asylum should be guaranteed in accordance with the obligations laid down in the 1951 Convention.⁷²⁰ This fundamental right is elaborated in Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter: the Qualification Directive),⁷²¹ which seeks to ensure that the EU member states apply common criteria for the identification of persons in need of international protection. The directive defines a “refugee” following the wording of the 1951 Convention, and provides for subsidiary protection.⁷²² The formulation “member of a particular social group” is spelled out in Article 10(1)(d) and explicitly mentions sexual orientation to the extent to which this cannot be said to include acts which are explicitly criminalised according to the national legislation of the EU member states.

Gender identity is not referred to in the Qualification Directive but may be included under the grounds of “membership of a particular social group”, especially in light of the wording in Article 10(1)(d) of the Qualification Directive (“gender related aspects”).⁷²³ The European Union Agency for Fundamental Rights (FRA) has in this regard released an opinion in which it states that “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’”.⁷²⁴ In light of the recast of the Qualification Directive, ILGA-Europe also proposes that persecution on grounds of gender identity should be recognised.

Where domestic legislation does not explicitly include sexual orientation, and instead replicates the definition of the 1951 Convention, the reference to “membership of a particular social group” should therefore be interpreted in accordance with the Qualification Directive for the member states bound by the directive.

As for subsidiary protection, Chapter V of the Qualification Directive provides that states shall grant subsidiary protection status to individuals who do not qualify as refugees, but fear serious harm upon their return to their country of origin. Serious harm includes death, as well as “torture or inhuman or degrading treatment or punishment of an applicant in the country of origin”. This protection would thus apply if a person faces the death penalty in the country of origin, because of the real or perceived sexual orientation of the individual. The protection would also apply, if that person were to face risk of inhuman or degrading treatment either by state actors or by non-state actors.

Furthermore, the Qualification Directive considers family members as including both spouses and unmarried partners in a stable relationship, in situations where the member state concerned treats unmarried couples in a comparable manner to married couples under its relevant laws. These EU member states must guarantee that the family unity remains intact by granting residence permits to family members.⁷²⁵

The Yogyakarta Principles also address the issue of asylum. Principle 23 reiterates that everyone has the right to seek and enjoy, in other countries, asylum from persecution, and adds that this includes persecution related to sexual orientation or gender identity. Moreover, it underscores that the protection from a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment also covers fear of such treatment due to sexual orientation or gender identity.⁷²⁶

720. Cf. Article 18 of the charter.

721. Cf. Council Directive 2004/83/EC, Article 10(1)(d).

722. Cf. Article 2(e) and Article 15.

723. Article 10(d) of the directive states “sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the member states”.

724. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, Vienna, 2010, p. 10.

725. Council Directive 2004/83/EC of 29 April 2004, Article 10(1)(d) and Article 23.

726. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006. In the chapter on the overall legal framework, a list is provided of countries that have officially endorsed the principles.

7.3. National legislation and data on asylum and refugee cases

7.3.1. National legislation in the Council of Europe member states

In all member states, with the exceptions of Andorra, Monaco and San Marino,⁷²⁷ refugee status and subsidiary protection is granted in accordance with the definitions laid out respectively in the 1951 Convention and its 1967 Protocol, and the European Convention on Human Rights. With regard to the application of the 1951 Convention in Turkey,⁷²⁸ it should be stressed that Turkey only accepts and grants asylum to European refugees. Consequently, the only solution available to non-European refugees is resettlement in a third country. They can stay in Turkey temporarily, but Turkey does not grant them refugee status. During their stay in Turkey, refugees are dependent on the UNHCR's assistance, whilst they can also receive assistance from NGOs. Asylum seekers coming from Near Eastern countries, for example, Iran or Palestine, must give the name of the third country in which they want to resettle and until they can resettle, they stay in one of the satellite cities to which they are assigned by the government.

There are 26 member states that have explicitly recognised sexual orientation as included in the notion of "membership of a particular social group" contained in the definition of "refugee" laid down by the 1951 Convention and its 1967 Protocol. Most member states which are also members of the European Union (23) have come to this explicit recognition as the result of transposition into their national legislation of the Qualification Directive.⁷²⁹ Currently, three EU member states still do not have an explicit mention in their legislation: Estonia, Greece and the United Kingdom,⁷³⁰ while one member state (Denmark) has not adopted the Qualification Directive.⁷³¹ Outside the EU, three other member states have an explicit mention of sexual orientation being included in the notion of "membership of a particular social group": Croatia, Iceland and Moldova.⁷³² In seven member countries in which no explicit mention in legislation exists (Denmark, Greece, Norway, Turkey, Ukraine, Switzerland and the United Kingdom) sexual orientation has been recognised as grounds of persecution in asylum claims as result of court decisions. A last group includes 12 member states which do not explicitly recognise persecution on the basis of sexual orientation as valid grounds for asylum claims, neither in legislation nor in case law, but in which the situation may change as a result of possible future applications filed by LGBT asylum seekers (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina,⁷³³ Estonia, Georgia, Liechtenstein, Monaco, Montenegro, Russian Federation, Serbia and "the former Yugoslav Republic of Macedonia").

At present, it is difficult to find information on explicit recognition in national legislation of gender identity as a notion of "membership of a social group" for the purposes outlined by the 1951 Convention and its 1967 Protocol. For the EU member states bound by the Qualification Directive, it is safe to conclude that the protection granted to gay, lesbian and bisexual asylum seekers should logically extend to both transgender and transsexual persons,⁷³⁴ although the wording remains formulated in rather vague terms.⁷³⁵ As for the other member states, the only one to date explicitly mentioning gender identity as being encompassed in the notion of "membership of a particular social

727. Andorra and San Marino have never been parties to the Convention while Monaco is party to the 1951 Convention only.

728. National contribution (legal study) on Turkey. See also: Helsinki Citizen's Assembly – Turkey and the Organisation for Refuge, Asylum and Migration (ORAM), "Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual, and Transgender Asylum Seekers and Refugees in Turkey", 2009.

729. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 10(1)(d) and Article 23.

730. European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", Vienna, 2010, p. 55.

731. Denmark constitutes an exception since it has not adopted the Qualification Directive and the Aliens Act does not explicitly recognise "sexual orientation" as grounds of persecution: "the term 'sexual orientation' is not generally considered by the Danish authorities to be covered by section 7(1) of the *Udlaendingsloven* (Aliens Act), which refers to membership of a 'social group' as grounds for persecution", *ibid.*, pp. 55-56.

732. National contribution (legal report) on Croatia, pp. 5-6; National contribution (legal report) on Iceland, pp. 8-9; National contribution (legal report) on Moldova, pp. 8-9.

733. A Bosnian NGO reported one case in which persecution on grounds of sexual orientation was involved in the claim, national contribution (legal report) on Bosnia and Herzegovina, p. 9.

734. European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", Vienna, 2010.

735. "The various language versions are not consistent enough to ensure inclusiveness", European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", Vienna, 2010.

group” in its national legislation on asylum is Iceland.⁷³⁶ A few cases in which transgender persons have been granted asylum have been reported in member states (Austria, Belgium, Cyprus, the Netherlands and Switzerland).⁷³⁷ However, the lack of systematic collection of data concerning case law on asylum claims of transgender persons makes it difficult to assess on which grounds (sexual orientation, gender identity or grounds of sex or gender) courts have granted asylum to transgender applicants.

7.3.2. Quantitative data on asylum cases

Practice in member states is difficult to assess due to the scarcity of data. In only two member states are official statistics collected (Belgium and Norway). In Belgium⁷³⁸ 116 cases were handled in 2006 of which 33 people were granted refugee status. For 2007 these figures were 188 (60 people granted refugee status) and in 2008 the figure increased to 226 (96 were granted refugee status or subsidiary protection). In 2009 the figure further increased to 362 (with 129 persons granted refugee or subsidiary protection status) and in 2010 the number of 522 was reached, out of which 156 received refugee protection. In Norway, partial statistics are published by the Immigration Appeals Board. Data suggest that in a one-year period (2008-09) 11 persons had claimed asylum on grounds of sexual orientation.⁷³⁹ A tentative overall overview dating back to 2002 would suggest that approximately 41 cases involved an individual seeking asylum for persecution or ill-treatment due to their sexual orientation.⁷⁴⁰

In the other member states no official statistics are available on the number of persons who were granted or refused asylum (or subsidiary protection) because of persecution on the grounds of sexual orientation or gender identity.

Information provided by the UNHCR⁷⁴¹ and collected during the country studies provided additional information. UNHCR information, in the form of partial figures, shows that 10 out of 25 LGBT asylum seekers were granted asylum in the Czech Republic (2007-10); 19 applicants were granted subsidiary protection and one applicant was granted asylum in Denmark (2004-09); of the 19 applications received in the last six years (2004-10), six persons were granted asylum in Hungary and one person in Slovakia (2007). Fragmented data have been collected in a few member states. For example, in Bulgaria and Malta, there is one known case in each country which has not been examined due to lack of credibility. In Estonia, one known case was rejected and referred to another EU member state, in accordance with the Dublin Regulation, stating that asylum seekers must apply for asylum in the first safe country of entry, and another is still pending.

Quantitative data on cases of successful asylum claims from transgender applicants are also difficult to retrieve. Research has highlighted case law in which applicants have been granted protection in a handful of member states.⁷⁴² These figures, however, are in no way comprehensive, as other national courts may have granted refugee status or subsidiary protection to transgender asylum seekers, including on other grounds than “sex” or “gender”, for example on “humanitarian grounds”.

Rejection rates for LGBT asylum seekers seem, in a handful of member countries which provide unofficial estimates, to be significantly high – in some cases higher than those of non-LGBT asylum seekers. As for the United Kingdom, NGO estimates suggest a much higher initial rejection rate for LGBT asylum seekers (reaching approximately 98-99%) compared to 73% for non-LGBT asylum seekers. This difference is mainly because of issues relating to the presumed credibility of the

736. National contribution (legal report) on Iceland, p. 20.

737. See FRA national contributions (legal report) on Cyprus, p. 15; FRA national contributions (legal report) on the Netherlands, p. 42; national contribution (legal report) on Switzerland, pp. 17-18; European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 58.

738. Information provided by the Commissariat Général aux Réfugiés et aux Apatrides (CGRS). The figures cover sexual orientation and gender identity asylum cases, but do not distinguish between the two.

739. UNHCR, “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia”, Research Paper No. 181, 2009, www.unhcr.org/4b18e2f19.pdf, p. 4.

740. *Ibid.*, p. 4.

741. Information provided by the UNHCR to the Office of the Commissioner for Human Rights.

742. See FRA national contribution (legal report) on Cyprus, p. 15; FRA national contribution (legal report) on the Netherlands, p. 42; national contribution (legal report) on Switzerland, pp. 17-18; European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 58.

claimant.⁷⁴³ In Switzerland only two out of 90 LGBT asylum seekers have been found to be credible,⁷⁴⁴ in Denmark, asylum claims on grounds of sexual orientation represent 1.3% of all cases but the rejection rate is 84.6%,⁷⁴⁵ and in Norway approximately 85% of applications from LGBT asylum seekers are turned down for lack of credibility.⁷⁴⁶

In certain member states, rough assessments are made of the number of applications on grounds of sexual orientation and gender identity. In 2002, the Swedish Migration Board estimated that the number of applicants seeking asylum in Sweden on grounds of sexual orientation or gender identity is approximately 300 per year.⁷⁴⁷ In the Netherlands, a study was carried out in 2007, on the basis of which it was estimated that applications from homosexual and transgender asylum seekers numbered approximately 200 per year.⁷⁴⁸ In Italy, according to the Ministry of Internal Affairs, in the period from 2005 to the beginning of 2008, at least 54 cases were filed, of which at least 29 were granted refugee status or humanitarian protection.⁷⁴⁹ Such figures, uncertain and varying as they might be, indicate that the annual number of LGBT persons seeking asylum in the Council of Europe member states, officially on the basis of persecution on the grounds of sexual orientation or gender identity, or on other grounds, could amount to several thousands.

The lack of data is, as this chapter has shown, a big obstacle in addressing the exact nature of problems of LGBT asylum seekers. In this regard the research project “Fleeing Homophobia, Seeking Safety in Europe”, launched in September 2010 and co-funded by the Dutch Ministry of Justice, should contribute to filling the data gap concerning practices regarding LGBT asylum seekers, to identify best practices in the handling of LGBT asylum cases in the EU member states and to make policy recommendations.⁷⁵⁰

7.3.3. Asylum cases

The majority of cases identified in the member states regarding persecution on grounds of sexual orientation and gender identity concern applicants from Africa, the Middle East and Iran. However, applicants are also identified from Asia, South America and eastern Europe – among them, some have fled from Council of Europe member states. Some examples follow.

In Poland, an asylum claim by an applicant from Moldova is subject to an appeal, and a lesbian asylum seeker from the Russian Federation (a Chechen from Ingushetia) was, in 2007, granted asylum on the grounds of her sexual orientation.⁷⁵¹ In France, a Russian applicant (of Ingush descent) was granted asylum in 2006, because it was assessed that his sexual orientation was publicly known, and that there was widespread hostility towards LGBT persons in the local population. In 2006, a citizen from Bosnia and Herzegovina was granted subsidiary protection because it was assessed that the authorities in Bosnia and Herzegovina would not be able to offer protection from reprisals.⁷⁵²

Since the year 2000, the Danish Refugee Appeals Board has dealt with asylum appeal cases concerning sexual orientation and gender identity from applicants from the following Council of Europe member states: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Russian Federation and Ukraine.⁷⁵³ None of the applicants were granted asylum or subsidiary protection – this was due to varying reasons: lack of credibility, because the applicants had not complained to national

743. UK Lesbian & Gay Immigration Group, “Failing the Grade, Home Office Initial Decisions on Lesbian and Gay Claims for Asylum”, available at: www.uklgig.org.uk/docs/publications/Failing%20the%20Grade%20UKLIG%20April%202010.pdf, accessed 22 September 2010.

744. Information provided by the UNHCR.

745. Ibid.

746. Ibid.

747. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 60.

748. IND Informatie- en Analysecentrum, “Evaluatie Gendergerelateerd Vreemdelingenbeleid in Nederland”, The Hague, Ministry of Justice, 2008.

749. FRA national contribution on Italy.

750. This project is implemented by COC Netherlands, the Free University (VU, Amsterdam) in co-operation with the European Council on Refugees and Exiles (ECRE), the Hungarian Helsinki Committee and the Italian Association of Lawyers for LGBT Rights, Rete Lenford, ILGA-Europe and the UNHCR.

751. FRA national contribution (sociological report) on Poland, p. 11.

752. FRA national contribution (legal report) on France, pp. 26-27.

753. Laursen, S. and Jayaseelan, M. L., “Disturbing Knowledge. Decisions from Asylum Cases as Documentation of Persecution of LGBT Persons”, LBL – the Danish National LGBT Organisation and the Danish Refugee Council, 2009.

authorities in their country of origin after the decriminalisation of same-sex sexual acts, or because the discrimination identified was not found to amount to persecution.

In 2005, a 40-year-old gay man from Georgia applied for asylum in Norway, but was denied asylum. Upon his return to Georgia, he was stabbed to death in his apartment in the city of Gori.⁷⁵⁴

7.4. Trends in adjudication and issues related to LGBT refugees

There are several issues of particular relevance in relation to asylum applications based on persecution on the grounds of sexual orientation or gender identity.⁷⁵⁵ Some of these issues are procedural while others concern more substantive aspects of the asylum process. Among procedural issues concern is expressed regarding situations in which there is a clear absence of LGBT-sensitive procedures in treating the claims of asylum seekers who have experienced persecution or ill-treatment on grounds of their sexual orientation or gender identity (see 7.4.4). Substantive aspects, as illustrated by case law in some member states, relate to issues such as the criminalisation of same-sex sexual activity in the country of origin and assessments of asylum claims in national courts (7.4.1), the imposition of discretion⁷⁵⁶ (7.4.2) and the credibility of the asylum seeker (including questions like how to prove one's sexual orientation or gender identity,⁷⁵⁷ see 7.4.3).

All the above-mentioned aspects will be addressed, highlighting the problems and difficulties that LGBT asylum seekers are confronted with in making their claim and the difficulties faced by authorities in assessing asylum claims on the grounds of sexual orientation and gender identity. A key observation is the different approaches between member states regarding LGBT asylum seekers and refugees.

7.4.1. Criminalisation of same-sex sexual activity in the country of origin

Criminalisation of consensual same-sex relations in the countries of origin of the applicants is often interpreted differently by the competent bodies in the Council of Europe member states which decide on asylum claims. Often the nature of the legislation and its potential impact on the safety and life of the applicant is evaluated, in terms of the degree of gravity that the persecution has to attain in order for it to be considered as a threat to the asylum seeker. The limited available case law does not give a clear picture of how severe or prolonged discrimination must be in the countries of origin before it amounts to "persecution".⁷⁵⁸ Member states deal differently with the implications of the criminalisation of same-sex sexual acts in countries of origin, and the case law from certain member states illustrates the existence of these differences.

For example, French competent authorities have in the past decided that the prohibition of homosexual conduct under the laws of certain states constituted sufficient evidence to prove persecution of homosexuals.⁷⁵⁹ This, however, did not in itself qualify an applicant for refugee status, which must be based on proof of individual persecution, as is also the case in many other Council of Europe member states. In Denmark, Norway and Sweden, the existence of criminal provisions prohibiting homosexual conduct is not sufficient in itself to justify the granting of refugee status.⁷⁶⁰ While the risk of criminal prosecution against LGB persons may constitute grounds for the recognition of refugee status, the criminal sanction must attain a certain gravity in order to lead to such recognition. Yet in other member states (for example in Luxembourg⁷⁶¹ and Germany⁷⁶²) there have

754. Jansen, K., "Kameraten drebt etter avslag på asylsøknad", *Bergens Tidende*, Bergen, 2 February 2006; national contribution (sociological report) on Georgia, p. 12.

755. See, for example, the policy paper of Human Rights First: "Persistent Needs and Gaps: the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugees: An Overview of UNHCR's Response to LGBTI Refugees and Recommendations to Enhance Protection", available at www.humanrightsfirst.org/pdf/Persistent-Needs_LGBTI_Refugees_FINAL.pdf.

756. For example *RG (Colombia) v. Secretary of State for the Home Department* [2006] EWCA Civ 57.

757. *R v. Secretary of State for the Home Department Ex Parte Vraciu*, 1995 Appeal No. HX/70517/94; *J v. Secretary of State for the Home Department* [2006] EWCA Civ 1238.

758. *Ibid.*

759. CRR, 1 December 2006, 579547, Ms N; CRR, 18 May 2006, 559666, Mr J.

760. UNHCR, "Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia", Research Paper No. 181, 2009.

761. Grand Duchy of Luxembourg Administrative Tribunal, docket number 22023 (Tribunal administrative du Grand-Duché de Luxembourg, Numéro 22023 de rôle).

762. FRA national contribution on Germany.

been cases of refusal of asylum to claimants in cases where their country of origin criminalises homosexuality.

7.4.2. The imposition of discretion

A practice found in some member states is that LGB asylum seekers are denied refugee status or subsidiary protection if the asylum authorities assess that the applicant can avoid persecution by living discreetly, meaning that they conceal their sexual orientation or live “closeted”. If the asylum authorities observe that the public authorities in the country of origin do not know of the sexual orientation of the claimant, he or she is expected to return to the country of origin and live without revealing his or her sexual orientation. This indicates that homosexuality is regarded as something private, secret and as such limited to sexual practice. As, for example criticised by the UNHCR in the case of Norway: “Norwegian immigration authorities generally consider that LGBT [persons] must be required to keep their sexual orientation or gender identity hidden from their local community if spreading this knowledge could lead to persecution.”⁷⁶³

In other member states, for example in Belgium, Netherlands⁷⁶⁴ and Sweden competent authorities have recognised in certain cases the right of lesbian and gay refugees to live openly in their countries of origin. They have removed the inconsistency between asylum claims based on sexual orientation, and those based on race, religion or political opinion, as members of ethnic or religious minorities, and political dissidents have never been asked to hide their ethnicity, religion or political beliefs. A ruling in the United Kingdom in 2010 also reached such a conclusion. The reasoning of this interpretation is as follows:⁷⁶⁵

the tribunal must first ask itself whether it is satisfied on the evidence that [the applicant] is gay, or ... would be treated as gay by potential persecutors ... If so, the tribunal must then ask itself whether ... gay people who lived openly would be liable to persecution in the applicant’s country of nationality. If so, the tribunal must go on to consider what the ... applicant would do if he were returned to that country. If [he] would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living “discreetly”. If ... [he] would in fact live discreetly and so avoid persecution, [the tribunal] must go on to ask itself *why* he would do so. If ... [he] would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, for example, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them [nor against discrimination that falls short of persecution, which often involves imprisonment, or physical violence committed by state or private actors]. ... If ... the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution.

The case described above challenges a case of the European Court of Human Rights from 2004. In *Fashkami v. the United Kingdom*,⁷⁶⁶ the European Court of Human Rights considered that an individual fearing persecution in Iran due to the intolerance of homosexuality in that country, and the resulting risk of harassment unless he concealed his sexual orientation, did not constitute an obstacle to his removal from the territory. The Court seems thus to suggest in this case that, as a gay person can conduct his/her homosexuality in the private sphere in his home country, the mere obligation imposed on that person to refrain from publicly exhibiting homosexual conduct in his home country should not be seen as a sufficiently severe restriction on his right to respect for private life to justify prohibiting the return of that person to his home country. Such a position has also been adopted, for instance, by certain courts in Italy.

In yet other member states, for example Germany,⁷⁶⁷ different courts have adopted either position. The German judiciary has in the context of this “discretion requirement” referred questions for a

763. UNHCR, “Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia”, 2009, p. 13.

764. In the Netherlands this is policy, as confirmed by the Vreemdelingen Circulaire, para C2/2.10.2.

765. 7 July, in *H.J. (Iran) & H.T. (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31, the UK Supreme Court, paragraph 82.

766. European Court of Human Rights, *Fashkami v. United Kingdom*, No. 17341/03, judgment 22 June 2004.

767. FRA national contribution (legal report) on Germany, pp. 20-23.

preliminary ruling concerning homosexual asylum seekers to the Court of Justice of the European Union to get clear guidance to the question whether a homosexual person can be expected to live with his or her sexual orientation in his or her home country in secret.⁷⁶⁸

The 2004 position of the European Court of Human Rights in *Fashkami v. the United Kingdom* may have been influenced by the perception that the public morals of the country of return must be taken into account when evaluating the severity of the infringement on the rights of the individual facing the threat of deportation.⁷⁶⁹ However, even if, according to the decision of the Court, member states are not obliged to refrain from deporting an LGBT person merely because that person may be subject to a climate of intolerance in the state of return, harassment on grounds of sexual orientation may constitute either persecution leading to recognition of the individual concerned as a refugee if he/she were to seek asylum, or a form of inhuman or degrading treatment leading to subsidiary protection in line with the 1951 Convention and its 1967 Protocol and to the Qualification Directive for member states of the EU.

Another problem arising in connection with the recognition of the asylum claims of LGBT persons is that often national courts reject a claim suggesting that the applicant could be internally relocated in his/her country of origin where his/her sexual orientation or gender identity is not known of and may therefore escape persecution. The UNHCR guidance note, however, indicates that the issue of internal flight/relocation is often not a solution, since in most cases homophobia “tends to exist nationwide rather than merely being localised”.⁷⁷⁰ Moreover, anonymity or concealment of one’s sexual orientation or gender identity in the area of relocation is not seen as being required in order for the applicant to escape persecution. Therefore, the guidance note indicates that, in order to be “relevant and reasonable”,⁷⁷¹ the place of relocation has to offer the applicant meaningful and genuine protection from the state. Relocation does not, in the majority of cases, solve the problem of persecution of LGBT persons, but simply displaces the discrimination and the ill-treatment, or the fear of it, from one location to another within the country of origin, and therefore does not constitute, in a significant number of cases, a valid alternative to recognition of the validity of the asylum claim.

7.4.3. Credibility of the asylum seeker

Assessing the credibility of the asylum seeker is a crucial part of the examination of asylum applications. In relation to cases involving sexual orientation and gender identity the UNHCR has noted that: “Self-identification as LGBT should be taken as an indication of the individual’s sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity.”⁷⁷²

There are several accounts where those assessing asylum claims do not believe that an asylum seeker is really LGBT.⁷⁷³ The UNHCR notes that stereotypical images of LGBT persons should be avoided when assessing LGBT asylum claims. However, a Swedish study on the Swedish asylum procedures finds that “distrust is often based on stereotypical preconceptions of sexual orientation and gender expression”.⁷⁷⁴ An example of such preconceptions is found in the resumé of a case from the Danish Refugee Appeals Board from 2004 regarding an applicant from Azerbaijan: “The applicant is homosexual, which he had never tried to hide, as he, for example, wore an earring, had long hair and tight pants. All unambiguous signs of homosexuality.”⁷⁷⁵

768. Court of Justice of the European Union, C-563/10, *Kashayar Khavand v. Federal Republic of Germany*, case pending.

769. For such an approach, see the case law of the German courts: Federal Court of Administration (Bundesverwaltungsgericht), BVerwG 79, p. 143 ff; Court of Administration (Verwaltungsgericht) Frankfurt an der Oder, judgment of 27 January 2005, Case No. 4 K 652/01.A; Court of Administration (Verwaltungsgericht) Potsdam, judgment of 11 September 2006, Case No. 9 K 189/03.A.

770. UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, 2008, p. 15.

771. *Ibid.*, p. 15.

772. *Ibid.*, p. 15.

773. Drud-Jensen, M. T. and Knudsen, S. P., “Grænsekontrol – når ikke-heteroseksuelle søger asyl i Danmark”, *Kvinder, Køn & Forskning* [Women, Gender & Research], No. 4 (Vol. 17), 2008. Borg, H., Törner, E. and Wolf-Watz, O., “Norm-Critical Study of the Swedish Asylum Examination”, produced for the Swedish Migration Board by Ramböll Management Consulting, 2010.

774. Borg, H., Törner, E. and Wolf-Watz, O., “Norm-Critical Study of the Swedish Asylum Examination”, produced for the Swedish Migration Board by Ramböll Management Consulting, 2010, p. 4.

775. The Danish Refugee Appeals Board, “Formandskabet 13. Beretning 2004”, 2004, p. 146.

Asylum officers may also not accept asylum claims based on sexual orientation, because, for example, an applicant is married in a heterosexual relationship or has children. The data presented above from Sweden and Denmark illustrate that certain identities, expressions and practices are perceived to be more credible than others, and there is no reason to believe that this should be different in other member states. This is all the more worrying since the perception of sexual orientation, gender identity or “LGBT persons” in various parts of the world, from which the applicants come from, may differ significantly from that of immigration authority staff in various national contexts in Europe.

Differences in the rate of success of asylum claims by LGBT applicants is witnessed in relation to lesbian and bisexual persons in comparison to gay, transgender and intersex persons. Lesbian and bisexual persons in fact seem to have a higher rejection rate for their claims in comparison to the latter, according to NGOs.⁷⁷⁶ In particular this may be the result of different reasons. Lesbian women are less likely to escape their country of origin, due to the fact that in many countries they need the permission of a man in order to leave. Furthermore, they are more likely to follow social and family pressure and enter into forced marriages or engage in heterosexual practices in order to avoid persecution. This implies that in making their asylum claims on grounds of their sexual orientation they are believed to be less credible because of the existence of previous heterosexual relationships, presence of children or absence of tangible proof of their homosexual sexual orientation. As for the asylum claims of bisexual persons, difficulties may also arise regarding credibility due to the existence of previous heterosexual relations. Furthermore, a misunderstanding of bisexuality makes it seem reasonable that the applicant can be expected to go back to their country and to “choose” just partners of the opposite sex.

Another issue specific to LGBT asylum cases is that asylum claims on grounds of sexual orientation and gender identity touch upon intimate private life matters. They may be regarded as sensitive or taboo by the applicant as well as by the immigration officer dealing with the case (who may or may not be well informed about the situation of LGBT asylum seekers). Out of such fear and insecurity LGBT asylum seekers may not dare to bring up the subject at all or only in an advanced stage of the procedure, thereby risking that the information is not accepted. The asylum seeker may also be regarded as untrustworthy since the information was not shared from the beginning. An asylum seeker put it in the following way: “It was very difficult to talk about my sexuality because I was very sensitive and didn’t know who to trust” (Ugandan woman seeking asylum in the UK).⁷⁷⁷

The inquiry into issues of sexual orientation and gender identity might lead to discriminatory practices. Phallometric testing has been used in several cases in the Czech Republic in order to “test” whether the applicants were gay or not.⁷⁷⁸ Due to scarcity of data, it cannot be said for sure that phallometric tests do not take place in other member states. The use of such tests, and their results, can infringe a person’s right to be free from inhuman or degrading treatment under Article 3 of the European Convention on Human Rights, as was also acknowledged in a decision by a regional administrative court in Germany⁷⁷⁹ in 2009 ordering the stay of transfer under the Dublin II Regulation of an Iranian gay man because of the possible use of “phallometry” in the Czech Republic. There is a strong need for using sensitive interview techniques and training asylum officers in line with UNHCR guidelines.⁷⁸⁰

7.4.4. LGBT sensitivity in asylum procedures

There are a number of crucial obstacles in creating LGBT-sensitive asylum procedures which may relate to lack of information on the conditions in the countries of origin of the applicant, and lack of knowledge concerning sexual orientation and gender identity in the asylum application procedures.

776. UK Lesbian and Gay Immigration Group, “Failing the Grade, Home Office Initial Decisions on Lesbian and Gay Claims for Asylum”, available at: www.uklgig.org.uk/docs/Failing%20the%20Grade%20UKLIG%20April%202010.pdf, accessed 22 September 2010.

777. Quoted in: Webster, A., “Insane Asylum: How Britain Betrays Lesbian Asylum Seekers”, 2008, www.divamag.co.uk/diva/features.asp?AID=3139&s=1, accessed 25 July 2008.

778. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, pp. 58-59; “Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings”, ORAM, 2010, accessible at: www.oraminternational.org/images/stories/PDFs/oramtestingsexualorientationdec2010.pdf.

779. Schleswig-Holsteinisches Verwaltungsgericht, 6 B 32/09, 7 September 2009.

780. UNHCR, “Guidelines on International Protection No. 1: “Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, HCR/GIP/02/01, 7 May 2002.

The amount of information about sexual orientation, gender identity and conditions for LGBT persons in their country of origin may be very limited in the reports used by the immigration authorities in the refugee status determination procedures. As the immigration authorities in Council of Europe member states have to rely on the same material drafted by international organisations or immigration authorities from other countries, it is fair to assume that this is an obstacle in all member states.

The lack of knowledge also affects asylum seekers' lawyers or legal advisers in the sense that it makes it difficult to navigate the asylum system and gain knowledge of conditions related to sexual orientation or gender identity asylum claims. The limited available case law, for example, does not give a clear picture of how severe, or prolonged, discrimination must be before it amounts to persecution. Moreover, lack of information on how sexual orientation and gender identity are regarded in the country where the asylum seeker is applying for asylum, as well as lack of information about the fact that it is actually possible to get refugee status or subsidiary protection if one has been persecuted on grounds of sexual orientation or gender identity, further complicates the matter.⁷⁸¹ This is underlined by the fact that, since the asylum application is highly dependent on the individual story of the asylum seeker, it is important that the applicant is precise and consistent from the beginning of the process. This is not easy if one is insecure about the process, the legal framework and possible reactions from immigration and police officers as well as interpreters when revealing one's LGBT status.

Individual cases of persecution are often complex and involve a variety of backgrounds, with the consequence that LGBT asylum seekers in some cases do not mention their sexual orientation or gender identity right away when making their asylum claims. This is a result of the difficulties some face in talking about such matters in the context of an asylum application hearing. In some instances, the applicant does not self-identify as LGBT. In other instances, asylum officers are biased and reproduce stereotypes. There is a strong need to develop sensitive interview techniques and sensitisation of trained asylum practitioners. LGBT-sensitive procedures in interviewing asylum seekers would imply in the first instance that emphasis should be put not on a description of sexual acts but, on the contrary, the "applicant's realisation and experience of sexual identity".⁷⁸² Secondly, claimants may be initially reluctant to speak overtly about their sexual orientation or gender identity to interpreters who might come from the same national or cultural background. In this context the "UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees" indicate that "interviewers and interpreters should also be aware of and responsive to any cultural, religious sensitivity or personal factors such as age and level of education".⁷⁸³

Moreover experiences of torture, rape or sexual violence may have been repressed in the memories of the applicant⁷⁸⁴ and therefore more time would be required for the person to speak about his/her sexual orientation or gender identity. Similarly, when making their claims, applicants should not be burdened with the requirement to show proof of their sexual orientation or gender identity upon arrival in the country where the asylum claim is made: having experienced various types of violence, applicants may not have felt ready to engage in sexual activity or enter into a relationship for significant periods.⁷⁸⁵

Practical initiative – the Gensen project was launched in October 2010 and funded by the European Refugee Fund (ERF) Community Actions programme and carried out by various NGOs. It aims at promoting and enhancing gender sensitivity in asylum procedures as well as developing practices and instruments to help the most vulnerable asylum seekers, such as women or LGBT persons.⁷⁸⁶ The project targets several countries (Bulgaria, France, Germany, Greece, Hungary, Italy, Malta, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom) and it is structured around four modules. These modules encompass comparative research on national asylum policies, legal developments and administrative practices; the exchange of good practices among participants by means of regional

781. UNHCR, "Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia", Research Paper No. 181, 2009.

782. UNHCR, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity", 2008, paragraph 36.

783. UNHCR, "Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", HCR/GIP/02/01, 7 May 2002.

784. Stonewall UK, "No Going Back: Lesbian and Gay People and the Asylum System", 2010, p. 16, available at: www.stonewall.org.uk/what_we_do/research_and_policy/2874.asp, accessed 5 November 2010.

785. *Ibid.*, p. 16.

786. Information received by the Office of the Commissioner for Human Rights.

training; national workshops for the capacity-building of national stakeholders; and a final conference which will present the results of the project.

7.5. Conditions in asylum centres

LGBT asylum seekers in asylum centres may face difficult conditions relating to the possible disclosure of their sexual orientation or gender identity and subsequent reactions by other asylum seekers or personnel. Problems may arise, in particular, in relation to discrimination and harassment from other asylum seekers. Such a situation is for example addressed in a report of the Helsinki Citizen's Assembly on LGBT asylum seekers in Turkey:

Lesbian, gay, bisexual and transgender (LGBT) individuals are among the most vulnerable asylum seekers and refugees in Turkey today. Having escaped persecution in their countries of origin, they arrive in Turkey to confront significant new challenges to their safety, security and protection. Required to live in small towns in Turkey's interior, they wait a year or more to be recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR) and then to be "resettled" in third countries. During the wait, they often fear leaving their homes due to targeted violence from local communities.⁷⁸⁷

Throughout the member states, the standard and type of accommodation for asylum seekers varies significantly depending on the allocated resources and the number of applicants received. However, a common feature identified is that asylum seekers, including LGBT asylum seekers, have to share rooms, sometimes with people from the same country of origin who may have negative views on homosexuality.

Placement in unsafe living conditions (for example, with transphobic/homophobic compatriots) has been reported from Denmark, France, Lithuania, Netherlands and Switzerland. In some cases, these unsafe conditions were remedied after attacks had taken place.⁷⁸⁸ The Norwegian Lesbian, Gay, Bisexual and Transgender Organisation (LLH) report being approached by asylum seekers afraid of returning to the centres because of the risk of abuse.⁷⁸⁹

Gender segregation in the centres is problematic for transgender persons, and no special arrangements have been detected to accommodate the needs of this group of asylum seekers. Transgender women who do not have their legal gender recognised as such may be accommodated with men (or vice versa), which will put them at risk of becoming victims of transphobic abuse and violence, which was the very reason they fled their country.

Another specific problem for transgender persons is access to trans-specific health care while being in an asylum centre or in the asylum procedure. Data is inconclusive about the ability of asylum seekers to obtain trans-specific health care in countries where this is available to legal residents. There may not be any possibility of accessing hormonal treatment or other therapy. This may lead to grave health problems as interrupting hormonal treatment is detrimental for mental health, which will put a further burden on a person already traumatised.

FRA identified a practical initiative from Sweden where the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL) provides counselling for LGBT persons and assists them in the asylum application procedure.⁷⁹⁰

7.6. Conclusions

Some 26 member states have explicitly recognised sexual orientation as included in the notion of "membership of a particular social group". In seven other member states in which no explicit mention in legislation exists, sexual orientation has been recognised as grounds of persecution in asylum claims as a result of court decisions. Information on explicit recognition in national legislation of gender

787. Helsinki Citizen's Assembly – Turkey and the Organisation for Refuge, Asylum and Migration (ORAM), "Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual, and Transgender Asylum Seekers and Refugees in Turkey", 2009.

788. European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation", 2009, p. 99-100.

789. UNHCR, "Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia", Research Paper No. 181, 2009. Interview with the Norwegian Lesbian, Gay, Bisexual and Transgender Organisation, 26 April 2010.

790. European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation", 2009, p. 100.

identity as a notion of “membership of a social group” is more difficult to retrieve. The only member state explicitly mentioning gender identity as being encompassed in the notion of “membership of a particular social group” in its national legislation on asylum is Iceland. A few cases in which transgender persons have been granted asylum have been reported in a few other member states, e.g. Austria, Belgium, Cyprus, the Netherlands and Switzerland. However, the lack of systematic collection of data concerning case law on asylum claims of transgender persons makes it difficult to assess on which grounds (sexual orientation, gender identity, “sex” or “gender”) courts have granted asylum to transgender applicants.

Only Belgium and Norway collect official statistics regarding LGBT asylum seekers. In the other member states, no official statistics are available on the number of persons who were granted/refused asylum (or subsidiary protection) because of persecution on grounds of sexual orientation or gender identity.

LGBT persons face particular difficulties in the process of seeking asylum, as such information can be difficult to present to authorities, including immigration authorities. Moreover, data indicate that the staff and interviewing techniques often do not recognise this difficulty. If issues of sexuality or gender identity are not presented in a consistent way, in detail, at the beginning of the application process, and in a way intelligible for the staff, the credibility of the applicant may be questioned, and the application may fail.

There are accounts indicating that LGBT asylum seekers are met with scepticism and are perceived as being untrustworthy by asylum officers. Certain authorities also have a bias that if LGBT persons are discreet about their sexual orientation or gender identity then they need not seek asylum, let alone be granted it. Also, if it is assessed that they can avoid persecution by confining this element of their identity to the private sphere they may be rejected. A 2010 court ruling from the United Kingdom challenges this practice stating that if the material reason for an asylum applicant living discreetly on the applicant’s return would be a fear of the persecution which would follow if the applicant were to live openly, then, as with other persecution grounds, the application should be accepted.

Immigration authorities’ knowledge about conditions for LGBT persons in countries of origin, used to determine refugee status, may be inadequate and based on prejudices about notions of homosexuality and issues concerning gender identity. In addition, authorities often do not adopt procedures that are sensitive to the nature of the information furnished by the claimants concerning their sexual orientation or gender identity. The experience of member states who have invested in the capacity and knowledge-building of immigration authorities shows a greater understanding of LGBT asylum-seeker issues. LGBT asylum seekers in asylum centres experience social isolation and abuse because of their sexual orientation or gender identity. Lack of privacy in particular affects LGBT asylum seekers.

The overall system of protection of asylum seekers who have experienced or have a well-founded fear of persecution on grounds of their sexual orientation or gender identity was the subject of an UNHCR expert meeting in 2010.⁷⁹¹ During this meeting, the UNHCR announced that it would adopt guidelines in 2011 concerning the international protection of LGBT asylum seekers, that it will continue to develop and apply practical and legal guidance concerning asylum claims on grounds of sexual orientation or gender identity, and that it will revise its policies and general guidelines in order to enhance sensitivity and attention to the specific needs of LGBT persons.

791. Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity – Expert roundtable organised by the United Nations High Commissioner for Refugees, Geneva, Switzerland, 31 September-1 October 2010.

8. Education

8.1. Introduction

There are several reasons why education is a key area for LGBT persons. Firstly, normative perceptions and expressions of gender and sexuality are to a large extent shaped during the years of primary and secondary school.⁷⁹² Adolescence is the time when “girls learn to be girls and boys learn to be boys”, that is, gender roles are learned and enforced by society at large as well as by teachers, friends and family.⁷⁹³ During this formative period, many LGBT persons become aware and further strengthen their awareness of their sexual orientation and gender identity.⁷⁹⁴ It is thus of utmost importance that educational policies, teaching methodology, textbooks and curricula include objective information on homosexuality, transgenderism, gender roles and diversity.

Secondly, LGBT persons should have access to education in a safe environment: schools or institutions that are free from verbal or physical violence, bullying, social exclusion or other forms of discriminatory and degrading treatment. Education has an important role to play in the way homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity are combated. As this chapter will show, LGBT students as well as students perceived to be LGBT may in some cases face social exclusion or outright threats and physical violence.

Research for this study demonstrates that many problems exist in the above-mentioned areas. Stakeholders across member states generally paint a bleak picture of frequent bullying, harassment and lack of objective teaching materials in school curricula. Homophobia and transphobia are reported to be widespread in school environments, which can result in serious consequences for LGBT students, teachers and other staff at schools. In contrast, case law on sexual orientation and gender identity discrimination in education is scarce. Cases have only been reported from eight member states (Bulgaria, Croatia, Greece, Italy, Romania, Russia, Sweden and Turkey). The lack of case law suggests, on the one hand, that in many member states national legislation may not extend the principle of non-discrimination on grounds of sexual orientation or gender identity to the field of education. At the same time, this absence of significant data also suggests that LGBT persons who are discriminated against in education do not sufficiently report the incidents to the authorities or bring them before courts.

This chapter first examines the international and European legal framework on the right to education. The subsequent sections explore the situation in the member states. In this regard curricula, teaching materials and textbooks will be discussed. The discrimination and harassment of LGBT students and teachers are described as well as their impact. In the final section the role of school management will be explored in combating these phenomena.

8.2. *The international and European legal framework*

Article 26 of the Universal Declaration of Human Rights establishes the right to education. It confers this right on everyone and states that “education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.⁷⁹⁵ The effective enjoyment of the right to education is closely linked to other rights discussed in this report, such as the right to work and the right of everyone to an adequate standard of living, including adequate food, clothing and housing.

792. Luria, Z. and Thorne, B., “Sexuality and Gender in Children’s Daily Worlds”, *Social Problems*, Vol. 33, No. 3 (February 1986), pp. 176-190, University of California Press on behalf of the Society for the Study of Social Problems.

793. Takács, J., “Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender (LGBT) People in Europe”, ILGA-Europe and IGLYO, Brussels, 2006.

794. In a Dutch survey, young LGB respondents felt they became aware of their same-sex (as well as opposite-sex) sexual attraction around the age of 13 (Keuzenkamp, S., “Steeds gewoner, nooit gewoon. Acceptatie van homoseksualiteit in Nederland”, Sociaal en Cultureel Planbureau, The Hague, 2010).

795. UN, Universal Declaration of Human Rights, GA Resolution 217A (III), UN Doc A/810 at 71 (1948).

The International Covenant on Economic, Social and Cultural Rights lays down the right to education in a comprehensive provision in Article 13. The core of the right is expressed along the same lines as Article 26 in the Universal Declaration, but adds that education shall be directed to the human personality's "sense of dignity" and shall "enable all persons to participate effectively in a free society".⁷⁹⁶

The UN Committee on Economic, Social and Cultural Rights has stated that the right to education should be viewed not only as a human right in itself, but as an indispensable means of realising other human rights.⁷⁹⁷ By identifying four interrelated and essential features for the realisation of the right to education, the committee has spelled out a specific criterion on adaptability, encompassing the flexibility of education to adapt to the needs of changing societies and communities, as well as responding to the needs of students within their diverse social and cultural settings.⁷⁹⁸ The committee has also noted that the principle of non-discrimination extends to all persons of school age. States are therefore encouraged to closely monitor relevant institutions, policies, programmes, budgetary provisions and other practices related to education so as to identify and take measures to avoid any *de facto* discrimination, including on grounds of pupils' sexual orientation.⁷⁹⁹

Articles 28 and 29 of the UN Convention on the Rights of the Child set forth the right of the child to education which is directed towards "the development of the child's personality, talents and mental and physical abilities to their fullest potential". The Committee on the Rights of the Child has also stressed the principle of non-discrimination in accessing education, and particularly pointed out that sexual orientation is a prohibited ground of discrimination in the context of the convention.⁸⁰⁰ Gender identity has not explicitly been mentioned by the committee. Finally, in General Comment No. 3, the CRC has emphasised that children have the right to (information about) preventive health care, sex education and family planning education. Bearing in mind the imperative not to discriminate on grounds of sexual orientation, this implies that sexual education must include objective and balanced information about sexual orientation and gender identity. The committee has recommended that states include sexual education in the official programmes of primary and secondary education.⁸⁰¹

Laws or policies designed to prevent young people from accessing information and education relevant to their sexual orientation conflict with the convention. The Committee on the Rights of the Child has expressed its concern about young people who "do not have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation".⁸⁰²

Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) calls on States Parties to "take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education". Article 10(c) of CEDAW further states that: "The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods". The Committee on the Elimination of Discrimination against Women has called upon states to provide sexual education in a compulsory and systematic manner in schools, including in vocational training.⁸⁰³ The committee has also recognised that sexual orientation and gender identity are discrimination grounds which must be legally recognised as they could intersect with and have a compounding negative impact on women.⁸⁰⁴

796. International Covenant on Economic, Social and Cultural Rights. Article 13, paragraph 1.

797. Committee on Economic, Social and Cultural Rights, General Comment No. 13, E/C.12/1999/10, paragraph 1.

798. *Ibid.*, paragraph 6(d).

799. *Ibid.*, paragraph 37.

800. Committee on the Rights of the Child, General Comment No. 4 (2003), paragraph 6.

801. Committee on the Rights of the Child, "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Antigua and Barbuda", CRC/C/15/Add.247, paragraph 54; and Committee on the Rights of the Child, "Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Trinidad and Tobago", CRC/C/TTO/CO/2, paragraph 54.

802. Committee on the Rights of the Child, "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland", CRC/C/15/Add.188, 9 October 2002, "Adolescent health" – paragraph 43.

803. See documents CEDAW/C/MDA/CO/3, paragraph 31; and CEDAW/C/TKM/CO/2, paragraph 31.

804. CEDAW/C/2010/47/GC.2, paragraph 18.

The UN Special Rapporteur on the right to education⁸⁰⁵ has stressed that “sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality without being discriminated against on grounds of sexual orientation or gender identity”. He also pointed out that sexual education is an important tool to combat discrimination against LGBT persons.

The Yogyakarta Principles state in Principle 16 that the right to education should be ensured, without discrimination on the basis of, and taking into account, a person’s sexual orientation and gender identity. This encompasses, amongst other things, equal access to education, and equal treatment of students as well as education methods, curricula and resources that serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities.⁸⁰⁶

The European Convention on Human Rights includes the right to education in Article 2 of the first Protocol to the Convention. It states that “no person shall be denied the right to education”.⁸⁰⁷

The revised European Social Charter in Article 17 stipulates that “With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, ... to take all appropriate and necessary measures designed ... to ensure that children and young persons ... have ... the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose”.⁸⁰⁸ The Charter includes an open-ended non-discrimination provision in Article E with reference to the enjoyment of the rights set out in the charter. Although sexual orientation and gender identity are not directly mentioned among the prohibited grounds of discrimination, in 2009 the European Committee of Social Rights affirmed “that educational materials should not reinforce demeaning stereotypes and prejudice which contribute to the social exclusion, discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation”.⁸⁰⁹

The Committee of Ministers has highlighted the importance of effectively enjoying the right to education without discrimination on grounds of sexual orientation or gender identity. This includes, among others, “safeguarding the right of children and young people 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”. The Committee of Ministers also stresses that “objective information with respect to sexual orientation and gender identity” should be provided, “for instance in school curricula and educational materials”.⁸¹⁰

Article 14 of the EU Charter of Fundamental Rights confers the right to education to everyone. This right is seen as a right which enables persons, adults and children alike, to participate fully in their communities.⁸¹¹ Interpreted in combination with Article 21 of the same charter which prohibits all forms of discrimination, including on grounds of sex and sexual orientation, the charter guarantees the right to education regardless of one’s sexual orientation.⁸¹² However, the charter is only binding in the application of European Union law in member states; because education remains an exclusively national competence, the charter has no binding effect in the field of education.

805. United Nations, “Report of the United Nations Special Rapporteur on the Right to Education”, Document A/65/162, 23 July 2010, available at: www.interights.org/app/webroot/userimages/file/SR%20Education%20Report-Human%20Right%20to%20Sexual%20Education.pdf, accessed 30 November 2010.

806. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

807. European Convention on Human Rights, first Protocol, Article 2.

808. Council of Europe, European Social Charter (revised), 3 May 1996, ETS No. 163, available at: www.conventions.coe.int/Treaty/EN/Treaties/html/163.htm, accessed 30 November 2010.

809. See European Committee of Social Rights, *International Centre for the Legal Protection of Human Rights (Interights) v. Croatia* – Collective Complaint No. 45/2007, decision of 30 March 2009, paragraphs 60-61.

810. See Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 31 and 32.

811. See EU Network of Independent Experts on Fundamental Rights, “Commentary of the Charter of Fundamental Rights of the European Union”, 2006, p. 141.

812. The right to education regardless of one’s gender identity is not guaranteed as such. To date, only transsexual persons who have already undergone gender reassignment are covered in this regard on grounds of “sex”.

8.3. *The inclusion of information on homosexuality and transgenderism in school curricula and textbooks*

8.3.1. General considerations

Education systems in the Council of Europe member states vary greatly. Some systems are characterised by strong national co-ordination (curriculum prescribed at a national level for all schools), while other systems have decentralised structures with greater autonomy for schools and teachers. These differences in educational systems make it difficult to assess access of LGBT pupils and students to objective information regarding sexual orientation and gender identity.

Data collected for this study show that when information on homosexuality and transgenderism is provided in schools, it is most commonly provided in sex education classes, ethics classes or “life skills” classes, or during religious education. NGOs stated that in some member states religious institutions have had some bearing on the existence or content of these classes (e.g. in Italy, Malta and Poland). In some instances priests are directly involved in the provision of such education. The LGBT NGOs in Armenia and Moldova that were consulted as part of this study stated that religious institutions influence the curriculum.⁸¹³ In Moldova, a UNESCO Life Skills programme, which included HIV/Aids education, has allegedly been removed from the school curriculum due to pressure from religious figures.⁸¹⁴

There are no reliable data on the extent to which teachers provide objective information regarding sexual orientation and gender identity. The Council of Europe Committee of Ministers has explicitly affirmed that member states should provide “necessary information,⁸¹⁵ protection and support to enable [pupils and students] to live in accordance with their sexual orientation and gender identity”.⁸¹⁶ Lack of systematic data in this field renders difficult any attempt at generalisation and therefore hampers the possibility of providing an overview on how issues concerning sexual orientation and gender identity are dealt with in schools across member states.

Although not confirmed by large-scale research, data retrieved for this study suggest that these topics tend to be ignored by teachers or, when addressed, they are often defined in negative terms. Indeed issues related to sexual orientation or gender identity are, in many school settings across Europe, still regarded as taboo. In Latvia⁸¹⁷ research on teachers’ attitudes toward homosexuality presented mixed results. When asked about their possible reaction to the fact that a 16-year-old pupil in their class might be in a same-sex relationship, 57% were supportive, and 16% reported that they would have talked about the “harmfulness and inadmissibility of homosexuality” and another 23% affirmed that tolerance was a “forced agenda” and that it was better for students not to be aware of contentious issues because harsh reactions to them arose as a consequence of this requirement to speak about tolerance.⁸¹⁸ Research in Poland showed that the reason teachers did not address these issues was mainly out of fear of losing their jobs.⁸¹⁹ A Norwegian study made by the Ministry of Education demonstrated reluctance among teachers to teach all topics of sexual education.⁸²⁰ As a consequence of little knowledge among teachers on how to address LGBT issues, the study examined school curricula in the schools with regard to gender identity and sexual orientation as well as ethics, in the

813. FRA national contribution on Italy, Malta and Poland, and interviews carried out in Armenia and Moldova in March and May 2010.

814. UNESCO has developed evidence-based guidelines on sex education, which include sexual diversity, available at: <http://unesdoc.unesco.org/images/0018/001832/183281e.pdf>, accessed 7 December 2010. For information about the programme: UNESCO and UNAIDS, “EDUCAIDS Country Snapshots. Moldova, 2007”, available at: <http://unesdoc.unesco.org/images/0015/001538/153884e.pdf>, accessed 23 September 2010.

815. Also the Committee on the Rights of the Child has indicated that lack of information on sexual orientation does not enable young people to live their sexual orientation, “Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland”, CRC/C/15/Add.188, 9 October 2002, “Adolescent health” – paragraph 43.

816. Council of Europe Committee of Ministers Recommendation CM/Rec(2010) on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraphs 31 and 32.

817. FRA national contribution on Latvia.

818. Austers, I., Golubeva, M. and Strode, L., “Skolotāju tolerances barometrs”, 2007, Providus, available at: www.politika.lv/index.php?id=14838, accessed 7 December 2010, p. 13.

819. FRA national contribution on Poland.

820. Røthing, Å. and Bang Svendsen, S. H., *Seksualitet i skolen – perspektiver på undervisning*, Cappelen Akademisk Forlag, Oslo, 2009.

4th, 7th and 10th grades, and resulted in guidelines designed to help the teachers teaching issues related to sexual orientation and gender identity.

Students may also show reluctance to approach these topics or may perceive sexual orientation and gender identity as being taboo issues. A comprehensive study in Irish schools goes in this direction, showing that institutional invisibility was reinforced by a lack of vocabulary to name and discuss differences of sexual preference. Discussions on sexual orientation in class or focus groups resulted in silence, discomfort, fear and hostility.⁸²¹

The World Health Organization removed homosexuality from the International Classification of Diseases in 1990.⁸²² However, NGO representatives from Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Lithuania, Montenegro, Poland, Serbia, Slovakia and Turkey, stated that information in curricula and educational materials about homosexuality was either absent or presented in a biased way, that is to say homosexuality was depicted as a disease or as “abnormal”. Objective and balanced portrayals of LGBT issues are still lacking in member states and even when governmental support exists for a more inclusive approach toward LGBT persons in textbooks, implementation may lag behind. A Spanish case is illustrative of this difficulty. In 2006 the Ministry of Education introduced a new subject “Civic Education and Human Rights”.⁸²³ The preamble of the law introducing this subject clearly recognises as one of the aims of education the “recognition of emotional-sexual diversity”.⁸²⁴ However, an analysis of textbooks carried out by a NGO showed that only three publishing houses complied with the minimal standards set by the law.⁸²⁵ Similarly, Dutch research showed that 50% of textbooks pay some attention to lesbian and gay but not transgender issues.⁸²⁶

The scarcity of data concerning initiatives to broaden the perspective on issues concerning sexual orientation and gender identity suggests that school curricula remain predominantly characterised as “heteronormative” or “traditional”.⁸²⁷ Surveys in Malta,⁸²⁸ Slovenia⁸²⁹ and Sweden⁸³⁰ indicate that homosexuality and bisexuality are often invisible due to the cultural predominance of heterosexuality in the school environment. Further research in Italy, Belgium, Bulgaria, Denmark, Hungary, Ireland, Malta, Russian Federation, Slovenia and Serbia shows that the issue of homosexuality is not addressed in a systematic manner in the education system.⁸³¹ Research from Norway indicated that teachers often depicted gays and lesbians as “the others”, with the consequence that homosexuality was represented as problematic and different, whereas heterosexuality was depicted as normal and natural – regardless of the good intentions of the teachers.⁸³² In Norway, on the other hand, objective and positive information about gender identity is part of the curriculum for public schools.⁸³³

821. Department of Education & Science, NUI Maynooth, Gay and Lesbian Equality Network “Valuing visibility: an exploration of how issues of sexual orientation arise and are addressed in post-primary schools”, Dublin, p. 15.

822. To be found at: www.who.int/classifications/icd/en, accessed 20 August 2010.

823. FRA national contribution on Spain.

824. Ministry of Education, Ley orgánica 2/2006, de 3 de mayo, de Educación, *BOE* número 106, jueves 4 mayo 2006, available at: www.educacion.es/dctm/mepsyd/horizontales/prensa/documentos/2008/loe.pdf?documentId=0901e72b80027758, accessed 10 December 2010.

825. Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales, “La diversidad afectivo-sexual y familiar en los manuales de Educación para la Ciudadanía y los Derechos Humanos”, Un estudio de los manuales de Educación para la Ciudadanía”, 2008, available at: www.felgtb.org/files/docs/515606cf6c7e.pdf, accessed 10 December 2010.

826. “Homoseksualiteit in leermiddelen”, available at: www.tolerantescholen.net/beleid/onderzoek/nicl_2001, accessed 7 December 2010. The biggest Dutch publisher of school books, Noordhoff, recently stressed the importance of textbooks that reflect all aspects of society. This publisher thinks that references to homosexuality should move beyond biology or history courses to also include same-sex couples doing the shopping in the arithmetic examples in textbooks. The publishing company is planning to feature gay and lesbian couples in the assignments, questions and examples it uses in its teaching materials.

827. FRA national contribution on the EU member states and field trips carried out for this study between February and July 2010.

828. FRA national contribution (sociological report) on Malta, p. 10.

829. FRA national contribution on Slovenia (sociological report), p. 7 and Kuhar, R. and Švab, A., “Homophobia and Violence against Lesbians and Gays in Slovenia”, *Revija za Sociologiju*, Vol. XXXIX, No. 4, 2008, pp. 267-281.

830. Reimers, E., “Always Somewhere Else – Heteronormativity in Swedish Teacher Training”, in Martinsson, L., Reimers, E. and Reingarde, E. and J. (eds), *Norms at Work. Challenging Homophobia and Heteronormativity*, TRACE – Transnational Co-operation for Equality, 2006, pp. 59-61.

831. Study conducted by Landsforeningen for Bøsser og Lesbiske (now LGBT Denmark) found in FRA national contribution on Denmark.

832. Røthing, Å., “Gode intentioner, problematiske konsekvenser. Undervisning om homofili på ungdomsskolen”, *Norsk Pædagogisk Tidsskrift*, Vol. 91, 2007, pp. 485-497. And: Røthing, Å., “Homonegativisme og homofobi i klasserommet. Marginaliserte maskuliniteter, disiplinerte jenter og rådvillige lærere”, *Tidsskrift for ungdomsforskning*, 7 (1), 2007, pp. 27-51.

833. In the subject called “Naturfag”, between 5th and 7th grade, for course content in Norwegian, see: www.udir.no/grep/Lareplan/?laereplanid=117461&visning=5, accessed 23 September 2010.

Studies and information on the way transgender issues are represented in curricula are even rarer. It seems that education about transgender issues is sparse and, where it exists, is conducted in a non-informed and/or negative way. In Croatia, for example, instructions for teachers when addressing the topic of human sexuality include a reference to “wrong forms of sexuality (prostitution, incest, transvestites ...)”. Transvestites are further depicted as “wrong sexualities” in school books.⁸³⁴ No further examples of inclusion of factual or positive information on gender identity and gender expression in curricula or school books could be found during the study.

In the United Kingdom the Equality and Human Rights Commission (EHRC) reports how transgender people can be discriminated against in education.⁸³⁵

- “Single-sex services and facilities, especially those which require people to share living, changing or sleeping spaces, for example: boarding school dormitory facilities, single-sex student halls of residence, physical education changing and showering facilities, and toilets within schools, colleges and universities.
- School uniforms which are specific for boys and girls, for example: girls must wear skirts.
- Records which may hold personal information regarding a trans person’s previous name and gender, for example: learner records, student union societies, and alumni organisations.
- Documents which specify the recipient’s name and require to be reissued if the recipient undergoes gender reassignment, for example: student matriculation cards, and education qualification certificates and examination results transcripts.”

Another aspect in relation to the curriculum is the reproduction and transmission of stereotypical portrayals of LGBT persons in educational materials. As referred to above, the European Committee of Social Rights has stated in relation to the case against Croatia that “educational materials [should] not reinforce demeaning stereotypes and perpetuate forms of prejudice”. Portrayals of non-traditional family forms or relationships and gender roles are usually not presented in educational materials. The lack of, or directly negative, representations of LGBT persons may contribute to bullying and harassment. In a study from Hungary, the lack of inclusion of LGBT issues in curricula at the institutional level is seen as instrumental in maintaining the invisibility of LGBT people, and thus is an instance of discrimination in itself.⁸³⁶ A Slovenian study takes this assessment further and finds that: “The absence of education on homosexuality can be one of the generators of homophobic violence in schools.”⁸³⁷

The absence of educational materials which deal with LGBT issues in a non-prejudicial and objective way reinforces invisibility, impedes the dissemination of objective information and strengthens the already existing taboos on sexual orientation and gender identity. Pathologisation of LGBT persons in educational materials contributes to the creation of a hostile school environment for LGBT students or for those perceived as being LGBT leading to isolation, stigmatisation and bullying.

8.3.2. Primary education

For the primary educational sector there is relatively little known about curricula, teaching materials and educational tools which include references to LGBT persons. Teaching about homosexuality to children at such a young age is considered by many as inappropriate in itself. However, research from

834. Kontra, “2009 Annual Report on the Status of Human Rights of Sexual and Gender Minorities in Croatia”, Zagreb, 2009. The programme of Catholic Religious Education in Primary Schools was approved by the Ministry of Education and implemented from the beginning of the 2003/04 school year.

835. EHRC, “Provision of Goods, Facilities and Services to Trans People: Guidance to Public Authorities in Meeting your Equality Duties and Human Rights Obligations”, pp. 39-40, available at: www.equalityhumanrights.com/uploaded_files/PSD/psd_trans_guidance.pdf.

836. Takács, J., Mocsonaki, L. and Tóth, T. P., “Social Exclusion of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Hungary”, Institute of Sociology, Hungarian Academy of Sciences, 2008.

837. Kuhar, R. and Švab, A., “Homophobia and Violence against Lesbians and Gays in Slovenia”, *Revija za Sociologiju*, Vol. XXXIX, No. 4, 2008, p. 271.

Stonewall UK⁸³⁸ has highlighted the fact that many primary school teachers in the United Kingdom think that lesbian and gay issues should make the subject of a lesson, since children in primary schools often “do not understand the meaning behind their homophobic remarks”.⁸³⁹

Age-appropriate educational materials focusing on gender, sexuality and relationships are scarce. Some practical initiatives, however, do exist: for example, in the United Kingdom, “No Outsiders: Researching Approaches to Sexualities Equality in Primary Schools”,⁸⁴⁰ which is considered as the first evidence-based primary school project in this field. In the Netherlands the project “Leefvormen” has been developed with focus groups from schools, but no research has been carried out yet to evaluate its impact and draw conclusions.⁸⁴¹

8.3.3. Secondary education

Some materials have been identified regarding curricula and teaching materials on homosexuality at secondary schools in the Council of Europe member states. However, there has been no Europe-wide objective research in this area and programmes used in schools have usually not been assessed on their effect and impact.

An important standard was set on 30 March 2009 when the European Committee of Social Rights in a case against Croatia found a breach of Article 12, paragraph 2, of the European Social Charter relating to the non-discrimination provisions of the Charter.⁸⁴² The committee concluded that: “Certain educational materials which are used in the regular teaching programme are biased, discriminatory and degrading, especially concerning the way in which people whose sexual orientation is different from heterosexual are described.” This conclusion of the committee was based on an examination of the content of a textbook for biology for the third year of high school which was approved by the Ministry of Education. The result was that the textbook was withdrawn.⁸⁴³

In a similar case in “the former Yugoslav Republic of Macedonia” in 2009, the Coalition for the Protection and Promotion of the Sexual and Health Rights of Marginalised Communities addressed a request to the Minister for Education to withdraw from use a chapter of the textbook *Pedagogy* (for secondary education), on “Negative aspects of sexual life” describing homosexuality as “abnormal”, and homosexuals as “highly neurotic and psychotic persons” who participate in an “abnormal, unnatural and degenerated sexual life”.⁸⁴⁴ The coalition pointed out that the 10th revision of the International Classification of Diseases (ICD-10) explicitly states that homosexuality is not considered to be a disorder. The coalition also directed an appeal to the Ministry of Education for systematic revision of educational programmes as a whole, in order to correct and prevent all possibilities of homophobic (and other types of) hate speech and discrimination in the educational system. The Ministry of Education has not issued a reply to these requests.

In the Netherlands,⁸⁴⁵ the School Inspectorate released a report in 2009, the findings of which provide a mixed picture. Whereas management of secondary schools indicate that in vocational training (87%) and in high schools (83%) lessons on sexual diversity are given, only between 15% and 35% of teachers confirm that they pay attention to sexual diversity in practice. Students even indicate this rarely happens. Whether or not education is provided depends a lot on individual teachers, whereas

838. Stonewall UK, “Homophobic Bullying in Britain’s Schools – The Teachers’ Report”, available at: www.stonewall.org.uk/documents/the_teachers_report_1.pdf, accessed 10 December 2010.

839. Ibid.

840. Office for Democratic Institutions and Human Rights (ODIHR), “Human Rights Education in the School Systems of Europe, Central Asia and North America: A Compendium of Good Practice”, available at: www.hrea.org/pubs/Compendium.pdf, accessed 30 November 2010, p. 231.

841. van der Drift, R. and Dankmeijer, P., *Reader met drie lessenseries voor onderbouw, middenbouw en bovenbouw in het basisonderwijs* (1999) 2003, available at: www.empower-ls.com/producten/publicaties/leefvormen, accessed 30 November 2010.

842. See *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* – European Social Charter Complaint No. 45/2007, decision of 30 March 2009, paragraphs 60-61. Also described in: Kontra, “2009 Annual Report on the Status of Human Rights of Sexual and Gender Minorities in Croatia”, 2009, p. 32. The book was written by Ivana Regula and Milivoj Sljepčević and published by Školska Knjiga.

843. Meeting with Kontra, 15 April 2010, and Zagreb Queer Festival, 16 April 2010.

844. Coalition for the Promotion and Protection of the Sexual and Health Rights of Marginalised Communities, “2009 Annual Report on Sexual and Health Rights of Marginalised Communities”, Skopje, 2009, p. 54.

845. Netherlands Inspectorate of Schools, “Weerbaar end divers, Onderzoek naar seksuele diversiteit en seksuele weerbaarheid in het onderwijs”, available at: www.onderwijsinspectie.nl/binaries/content/assets/Actueel_publicaties/2009/Weerbaar+en+divers.pdf, accessed 30 November 2010.

school management seems often reluctant to encourage this. In the Netherlands a guide for school managers was therefore developed.⁸⁴⁶

FRA identified in this regard two practical initiatives in Belgium: in 2006, an educational guidebook on homophobia at school was distributed at primary and secondary schools in the French-speaking region. In 2007, the Flemish Government subsidised a project which aimed to create a brochure and a website on gender diversity and transgender issues for high school pupils. The project attempts to break taboos about transgender issues and is the first of its kind in Belgium.⁸⁴⁷

8.3.4. Higher education

This study found a wide variety of examples of how information on sexual orientation and gender identity is addressed in higher education in Council of Europe member states. In some member states, textbooks are used in higher education where homosexuality is depicted as a disease or LGBT persons as deviant. In other member states, lectures or courses on LGBT-related topics are organised. This is either in the framework of gender studies or queer studies or in the form of (extra-curricular) lectures organised by teachers and students. The latter was, for example, mentioned by LGBT NGOs in (but not limited to) Albania and the Russian Federation as well as in Turkey.⁸⁴⁸

The Coalition against Discrimination in Moldova reports that homosexuality is still being taught as a disease at the Medical University.⁸⁴⁹ The LGBT NGO GenderDoc-M from Moldova reports that the textbooks used at the university are still from the time when homosexuality was criminalised and was listed as a disease by WHO.⁸⁵⁰

The issue of old education material from the Soviet era was also emphasised in Armenia with the consequence that information about homosexuality is either absent or presented as a medicalised issue.⁸⁵¹ A study from “the former Yugoslav Republic of Macedonia” concludes that: “There is still significant lack of direct tackling of issues of sexuality in academic curricula. A worrisome fact is that textbooks which explicitly promote homophobic attitudes are still put in circulation and are supported by the state university or the Government itself. However, recent years also have showcased very few positive examples of inclusion of courses in the official curricula treating sexuality in a non-heteronormative and non-homophobic manner.”⁸⁵² A Russian sociological candidate thesis from 2004 states that “Academic discourse often presents homosexuality as a curable disease; there is no analogue of the LG-studies, widespread in western universities. Even if homosexuality is present in the educational programmes, it is treated as a deviation from the norm, as pathology.”⁸⁵³

In the Russian Federation,⁸⁵⁴ a former postgraduate student in the Public Administration Faculty of Moscow State University claimed that denial of approval for the dissertation topic “Legal Regulation of the Status of Sexual Minorities”, in 2001, amounted to discrimination based on sexual orientation. The court of first instance dismissed the claim and indicated that the topic proposed by the plaintiff had a right to exist, but was outside the research agenda of the faculty. The Judicial Division for Civil Cases of the Moscow City Court also found the plaintiff’s claim groundless. The plaintiff has consequently filed an application with the European Court of Human Rights which, as of November 2010, had not yet been considered.⁸⁵⁵

846. Schouten, M. and Dankmeijer, P., “Een roze draad in veiligheid op school. Seksuele diversiteit in een brede aanpak van omgangsvormen; een handreiking voor schoolleiders”, Empowerment Lifestyle Services, Amsterdam, February 2008.

847. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 78.

848. Meetings with Aleanca LGBT, Tirana, 30 April 2010, the Russian LGBT Network, St Petersburg, 14 May 2010, and Kaos GL, Ankara, 3 March 2010.

849. Meeting with the Coalition Against Discrimination, 20 May 2010.

850. Meeting with GenderDoc-M, 20 May 2010.

851. Meeting with PINK, 4 March 2010.

852. Dimitrov, S., “Sexualities in Transition: Discourses, Power and Sexual Minorities in Transitional Macedonia”, Euro-Balkan – Institute for Humanities and Social Science Research, Skopje, 2009, p. 86.

853. Kurpinova, I. S., “Construction of Gender Norms in Modern Russian Society”, abstracts of a thesis for a Degree in Sociological Studies, Saratov, Russia, 2004. Available in Russian: www.profsouz-saratov.narod.ru/Society/Kuprianova_konstruirovaniye.htm, accessed 30 November 2010.

854. National contribution (legal report) on the Russian Federation.

855. Ibid.

8.3.5. Non-formal education and other educational initiatives

Non-formal education is an important sector in addition to the formal educational sector. LGBT NGOs and other organisations frequently offer schools the possibility of supplementing official curricula with educational activities promoting acceptance, human rights and non-discrimination of LGBT persons, either by providing educational material or visiting schools. On some occasions this is done as part of the good co-operation that exists with school authorities. Such projects are carried out by volunteers, and invitations to schools depend on the “goodwill” of school authorities or individual teachers.⁸⁵⁶ However, this study has identified examples in Bosnia and Herzegovina, Bulgaria, France, Luxembourg, Malta, Netherlands and Poland of LGBT NGOs being blocked or ignored by school authorities or otherwise facing difficulties from school authorities when attempting to raise awareness and combat homophobia and transphobia in schools.⁸⁵⁷ For example in Bulgaria, of 144 high schools invited to participate in an initial project meeting to discuss a educational activities in this field, 15 schools responded and seven participated. A Bulgarian high school teacher was quoted by the newspaper *24 Chasa*: “There are no fags in my classroom; we are not going to talk about this.”⁸⁵⁸

Another example is from Bosnia and Herzegovina, where a youth group from the NGO Human Rights House realised a project in 2009 including education regarding the notions of sexuality and gender. They initially planned to visit 25 schools, but ended up visiting just nine. The reason was that the Ministry of Education did not want to issue permission to visit the schools, which forced the organisers to rely on the goodwill of the directors of the high schools willing to co-operate. Different incidents were reported by the students who attended the presentations, e.g. isolation from their peers and bullying. During the project, the booklet “Creation of Sex? Gender?” drafted by Organization Q and the Women’s Room from Croatia was disseminated.⁸⁵⁹

As already referred to,⁸⁶⁰ in May 2005, the release and distribution of the Polish version of a Council of Europe manual for human rights education for young people led to the dismissal of the director of the government agency which financed and distributed the manual, because the then Polish minister for Education objected to the manual’s chapter on homosexuality and homophobia.⁸⁶¹

Practical initiative – teaching aid on sexual identity in 2003: the Peace Institute in Slovenia issued a CD-Rom, “Diversity Makes Us Richer, Not Poorer: The Everyday Life of Gays and Lesbians”. The CD-Rom features three short films on the experiences of discrimination by gays and lesbians in everyday life. It also includes six sets of interviews with lesbians and gays discussing the issues of “coming out”, family, violence, workplace, friends, and so on. It is intended to assist teachers in classroom discussions on homosexuality.⁸⁶²

8.4. The position of LGBT pupils, students and teachers

8.4.1 Bullying and harassment of LGBT youth at school

Bullying and harassment of LGBT pupils, students and teachers is a widespread problem in many Council of Europe member states. The Parliamentary Assembly pointed this out in its 2010 report: “Homophobia and transphobia have particularly serious consequences for young LGBT persons. They face widespread bullying, sometimes unhelpful or hostile teachers, and curricula which either ignore LGBT issues or propagate homophobic or transphobic attitudes.”⁸⁶³ The Parliamentary Assembly

856. FRA national contribution on the EU member states.

857. Meeting with the Human Rights House, Sarajevo, 13 April 2010, and FRA national contribution on Bulgaria, France, Luxembourg, Malta, Netherlands and Poland.

858. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 78.

859. Meeting with the Human Rights House, 13 April 2010.

860. See paragraph 4.2.1.

861. The Secretary General of the Council of Europe, Terry Davis, reacted to events: “Naturally, I asked the Polish authorities for a clarification of a decision which seemed, to put it mildly, unusual in the light of Poland’s membership of the Council of Europe and its commitment to the values it represents. These values are not a smorgasbord from which governments can pick and choose as they like.” Source: Article by Terry Davis, published in *Gazeta Wyborcza* of 2 October 2006, www.coe.int/t/secretarygeneral/sg/Oped/2006/Finding_the_compass_200906_EN.asp, accessed 25 March 2011.

862. For information on the project: www.mirovni-institut.si, accessed 23 September 2010.

863. Council of Europe, Parliamentary Assembly, “Discrimination on the basis of sexual orientation and gender identity”, report, Committee on Legal Affairs and Human Rights, Doc. 12185, 23 March 2010.

recommended to the Committee of Ministers that more action was needed: “in the framework of its work on children and violence, address in particular the issue of homophobic and transphobic bullying at school”. Committee of Ministers Recommendation CM/Rec(2010)5 stressed the need to safeguard “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”.⁸⁶⁴ The UN Special Rapporteur on the right to education has referred to cases of discrimination and exclusion where girls have been expelled from educational institutions for displaying any kind of affection for fellow students of the same sex.⁸⁶⁵

According to studies carried out across member states⁸⁶⁶ and supported by some government research, LGBT students suffer from bullying from both peers and teachers. In the United Kingdom, research from 2010 by the Equality and Human Rights Commission states that two thirds of lesbian, gay and bisexual students in the UK are regularly being bullied. Nearly half of all secondary schoolteachers in England acknowledge that such bullying is common, and just one in six believe that their school is very active in promoting respect for LGB students.⁸⁶⁷ A 2006 survey of 1 100 LGB youth in the United Kingdom produced similar findings.⁸⁶⁸ At the same time, however, research from the Department for Education of the United Kingdom has also pointed out that the display of homophobia by students is more frequent in public than in private, meaning that students in groups may share homophobic remarks or jokes, but they privately disapprove of anti-gay sentiment and acknowledge its pervasive influence in schools.⁸⁶⁹

Research from the UK Equality and Human Rights Commission from 2009 reported⁸⁷⁰ that: “A higher percentage of trans people experience bullying at school (75%) than lesbian, gay and bisexual (LGB) people (25%). ... Research conducted by the Equality Challenge Unit (ECU)⁸⁷¹ in 2009 suggests that trans students encountered higher levels of negative treatment than LGB students, and disturbingly high levels of threatening behaviour, physical abuse and sexual abuse – particularly from other students. In particular the ECU survey reported that of the trans student respondents: 22.6% have been bullied or discriminated against since starting university; 17.2% have been made to feel uncomfortable in class by lecturers and other students in group work. The ECU also suggested that such accounts perhaps contribute to explaining why 28.5% of trans students have taken time out of their course which is higher than the national average, and suggest a need for the sector to provide more formal support for LGBT students, and training for higher education institution staff about the need to be sensitive to the types of issue that may affect LGBT students’ academic performance.”

Research carried out among young LGBT persons from 37 European countries⁸⁷² shows that 61% of the LGBT respondents had negative experiences at school related to their sexual orientation or gender identity. Over 50% of reported having been bullied.⁸⁷³

National surveys and research also show similar patterns of hostility and bullying of LGBT students. In this regard, for instance, almost a quarter of secondary school pupils in a Dutch survey regarded the

864. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity.

865. United Nations, Commission on Human Rights, “Economic, Social and Cultural Rights, Girls’ Right to Education, Report Submitted by the Special Rapporteur on the Right to Education, Mr. V. Muñoz Villalobos”, paragraph 113, available at: www.ungei.org/resources/files/ECOSOC_VernorMunozReport_ENG.pdf, accessed 30 November 2010.

866. Takács J., “Social Exclusion of young lesbian, gay, bisexual and transgender (LGBT) people in Europe”, ILGA-Europe and IGLYO, 2006. Also research in Albania, Bosnia and Herzegovina, Belgium, Germany, Hungary, Malta, Montenegro, the Netherlands, Norway, Ireland, Serbia, Slovenia, Turkey, Ukraine and the United Kingdom, and by ILGA-Europe.

867. “How Fair is Britain? The First Triennial Review”, available at: www.equalityhumanrights.com/key-projects/triennial-review/full-report-and-evidence-downloads, accessed 30 November 2010.

868. Hunt, R. and Jensen, J., “The Experiences of Young Gay People in Britain’s Schools. The School Report”, Stonewall, London, 2007.

869. Department for Education and Skills, “Homophobia, Sexual Orientation and Schools: A Review and Implications for Actions”, 2004, available at: www.publications.education.gov.uk/eOrderingDownload/RR594.pdf, accessed 9 December 2010.

870. EHRC, “Provision of Goods, Facilities and Services to Trans People: Guidance to Public Authorities in Meeting Your Equality Duties and Human Rights Obligations”, pp. 40-41, www.equalityhumanrights.com/uploaded_files/PSD/psd_trans_guidance.pdf.

871. Equality Challenge Unit, “The Experience of Lesbian, Gay, Bisexual and Trans Staff and Students in Higher Education”, 2009, www.ecu.ac.uk/publications/files/lgbt-staff-and-students-in-he-report.pdf/at_download/file.

872. Takács, J., “Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender (LGBT) People in Europe”, ILGA-Europe and IGLYO, Brussels, 2006. Including respondents from the following countries covered by this study: EU27 (except Bulgaria), Albania, Bosnia and Herzegovina, Croatia, Moldova, Montenegro, Norway, Russian Federation, Serbia, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine.

873. Ibid.

school climate as gay-unfriendly, compared to 10% of students in further education.⁸⁷⁴ Bullying is not only done by peers but it may also be by teachers who treat LGBT pupils or students less favourably, as a Hungarian study shows.⁸⁷⁵ In his report on his visit to the Netherlands in 2008, the Commissioner for Human Rights also identified a worrying trend in schools in the Netherlands: that hostility towards LGBT pupils and teachers occurs frequently. In light of this, he welcomed the Dutch Government's support of LGBT-friendly environments in schools, as reflected in "Simply Gay – Dutch Government's LGBT Policy Document 2008-2011".⁸⁷⁶

In a Turkish survey,⁸⁷⁷ 14% of LGBT respondents had experienced discrimination in schools, and in studies from Bosnia and Herzegovina the figure was 17%, and Ukraine 35%.⁸⁷⁸ In a survey carried out among high schools in Belgrade, Serbia, 21% of the students have verbally attacked or threatened somebody they thought was gay or feminised, while 13% have participated in the beating of such a person. Moreover, 60% of the respondents affirmed that violence toward homosexual persons was always justified.⁸⁷⁹

A survey in the United Kingdom on the experiences of transgender persons recorded that "64% of natal females with a male identity reported experiencing some kind of harassment or bullying at school, and 44% of natal males with a female identity experienced harassment or bullying at school".⁸⁸⁰ Both peers and teachers are among those who bullied. NGO studies in Malta and Ukraine found that transgender students have dropped out of school, or skipped classes, because of bullying, harassment or lack of understanding by teachers and students.⁸⁸¹

An example from Portugal shows what a deep impact such bullying can have: "I was beaten up by some girls in the locker room after gym class when they found a paper with the website of a LGBT forum ... They said they wouldn't tell anyone if I promised to do everything they told me to. And so I did. I missed a lot of classes and never finished high school because I just can't go back to that high school again!" (Female, 18).⁸⁸² In Malta, a 23-year-old female student stated: "The bullying I experienced in secondary school, aged between 11 and 16, was mainly verbal and written abuse. Other pupils wrote on my own books and a diary that I liked a particular teacher and that I was attracted to girls, while I was not ready to face my feelings."⁸⁸³

ILGA-Europe and Transgender Europe reported on the experiences of a university student in Germany which showed a pattern and repetitiveness of transphobic discrimination in university. The student was not only mocked by his professor, his wish to be addressed with the male pronoun was constantly ignored, and his professional capability questioned. In the next course the same student was given a lower mark by the professor. Co-students stated that the learning environment was constantly disturbed by the professor's transphobia.⁸⁸⁴

The following is an example of discrimination against a transgender student by teachers in Ukraine: "They won't let me enter the school building, they'd made me to go home and change ... It was the principal of the school, who checked every morning what the students were wearing to school and she would always let me through. But then another teacher told her that I am a girl, and then it started. I was never allowed through, and even in the 9th grade, they didn't let me attend my history exam (case

874. Keuzenkamp, S., "Steeds gewoner, nooit gewoon. Acceptatie van homoseksualiteit in Nederland", Sociaal en Cultureel Planbureau, The Hague, 2010.

875. Takács, J., Mosconaki, L. and Tóth, T. P., "Social Exclusion of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Hungary", Institute of Sociology, Hungarian Academy of Sciences, 2008.

876. Report by the Commissioner for Human Rights on his visit to the Netherlands, 21-25 September 2008, Strasbourg, 2009.

877. Survey carried out by Lambdaistanbul, results presented at a meeting with Lambdaistanbul, 22 February 2010.

878. Organization Q, "The Invisible Q? Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina", Sarajevo, 2008. Nash Mir, "Gay Rights Are Human Rights – Report about Discrimination on the Grounds of Sexual Orientation in Ukraine", Kiev, 2005.

879. CARE International and International Centre for Research on Women, Young Men Initiative for Prevention of Gender-Based Violence in Western Balkans, "Baseline Research Technical Brief – Country Report. Serbia, 2009", p. 8.

880. Whittle, S., Turner, L. and Al-Alami, M., "Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination", *Equalities Review*, Wetherby, 2007, p. 65.

881. Malta Gay Rights Movement, "Sexual Orientation Discrimination in Malta: A Report on Discrimination, Harassment, and Violence against Malta's Gay, Lesbian and Bisexual Community", Union Press, Malta, 2003. Insight, "The Situation of Transgender Persons in Ukraine – A Research Report", Kiev, 2010.

882. Takács, J., "Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender (LGBT) People in Europe", ILGA-Europe and IGLYO, 2006, p. 49.

883. *Ibid.*, p. 48.

884. "Joint Contribution by ILGA-Europe, Transgender Europe and OII-Germany Towards the European Commission's Assessment of the State of Affairs Vis-à-Vis Gender Discrimination in Education and the Provision of Financial Services", p. 6.

of a transgender woman).⁸⁸⁵ Similarly another case occurred in Bulgaria, where in 2003 a student took an exam at the University of National and World Economy in Sofia and was removed by the police from the examination room because his ID contradicted his appearance.⁸⁸⁶

In an Italian study, two thirds of students attending upper secondary schools had heard homophobic offences against boys. One student out of 13 witnessed at least one homophobic attack during the previous month, 20% of the students had committed at least one homophobic act in their life and 4% said that they had suffered a physical attack.⁸⁸⁷ Many LGBT NGOs and national human rights structures identify the use of the word “gay” as a common derogatory term in schools – just as various slang expressions referring to LGBT persons are used in a derogatory way.⁸⁸⁸

Research from the United Kingdom, based on a survey of 1 000 secondary and 1 000 primary school staff,⁸⁸⁹ presenting the views of teachers on homophobic bullying at schools highlighted the fact that overtly homophobic language is in widespread use in schools. Some 90% of secondary schoolteachers said that pupils in their schools are bullied, harassed or called names for being – or for being perceived to be – homosexual. And half of teachers who say that they are aware of homophobic bullying in school say that the overwhelming majority of incidents are never officially reported or dealt with. Research in Ireland among teachers found similarly high figures.⁸⁹⁰

Some cases related to discrimination of LGBT persons in an educational setting are brought to court. In Italy, a court reviewed the case of an under-age student who accused his schoolteacher of using offensive adjectives such as “stupid”, “idiot” and “gay” against him. The teacher was found guilty and filed a petition before the Supreme Court for misjudgement in interpretation of the law. The Supreme Court confirmed the previous decision, but maintained that in this case, regardless of the student’s sexual orientation, the adjective “gay” was considered offensive not in itself but in the light of the aim pursued by the teacher, which was to humiliate the student. Therefore, the word “gay” was to be considered offensive only if it is used with contempt.⁸⁹¹ In Poland, in 2009, a similar case was reported, though in another setting, when a Polish court banned a woman from publicly using derogatory terms like “queer” or “fag” to describe her young gay neighbour.⁸⁹²

In Belgium, the Institute for Equality of Women and Men supported a transgender girl so she could continue her education as a ballet dancer. Her ballet teacher had refused to allow the girl to take the ballet tests as a female and was outspokenly transphobic. The school was at first reluctant to take up the complaint made by the girl’s family as they feared losing the teacher in the dispute.⁸⁹³

In Greece the ombudsman reported, in 2006,⁸⁹⁴ the case of a postgraduate student from “the former Yugoslav Republic of Macedonia” who was in Greece on a Greek Government scholarship. The student accused the administration of a department of the University of Athens of discriminatory behaviour against him, due to his sexual orientation. Specifically, he protested to the ombudsman against the administration of the university, claiming that while he reported harassment by his fellow students, the administration took measures against him and threatened him with expulsion as the person responsible for disturbing the smooth running of the department. The investigation carried out by the ombudsman demonstrated that the university quite correctly understood that there could be a conflict between students that was based on problematic personal relationships rather than on the sexual orientation of the complainant. However, the ombudsman disagreed with the possibility of expelling the student. So, following the intervention of the ombudsman, the recommendation of

885. National contribution (legal report) on Ukraine, p. 21.

886. FRA national contribution (sociological report) on Bulgaria, p. 8.

887. Arcigay, “Homophobic Bullying at School”, Rome, 2010, available at: www.arcigay.it/bullismo-omofobico-risultati-della-ricerca-nazionale-arcigay, accessed 20 August 2010.

888. FRA national contribution on the EU27 and interviews carried out for this study, February-July 2010.

889. Stonewall UK, “Homophobic Bullying in Britain’s Schools – The Teachers’ Report”, available at: www.stonewall.org.uk/documents/the_teachers_report_1.pdf, accessed 10 December 2010.

890. James, N., Galvin, M. and McNamara, G., “Straight Talk: Researching Gay and Lesbian Issues in the School Curriculum”, Dublin, Centre for Educational Evaluation, Dublin City University, 2006.

891. FRA national contribution on Italy.

892. Szczecin Regional Court, *Ryszard Giersz v. Anna Szmit*, Case File No. I C 764/08, judgment of 4 August 2009.

893. Oral presentation at the Equinet High-Level Legal Seminar on Legal Developments and Concepts in the Field of Equality and Non-Discrimination in Europe, 1-2 July 2010, Brussels.

894. “The Greek Ombudsman’s First Year as a Specialised Body for the Promotion of the Principle of Equal Treatment”, available at: www.synigoros.gr/docs/SYNIG_2005_32SEL_ENGL_INTERN.pdf, accessed 1 December 2010.

expulsion was withdrawn and the student in question was allowed to continue his studies as a scholarship student.

The findings from the studies presented above were confirmed by LGBT NGOs interviewed throughout the member states. Many NGOs interviewed receive regular complaints from LGBT pupils and students about being bullied and discriminated against by their peers and teachers in primary and secondary education.

It should be noted that most LGBT pupils and students are not open about their sexual orientation or gender identity. In an Albanian survey, 93% of LGB persons who were questioned were not open about their sexual orientation at school.⁸⁹⁵ According to a Polish study, 79% hid their sexual orientation,⁸⁹⁶ and LGBT NGOs in many member states have similar observations. As visibility increases, there is a risk of harassment, in particular towards young people who do not adhere to normative and traditional notions and expressions of gender.

Practical initiatives – a Dutch national handbook on student counselling services includes a chapter on counselling needs of LGBT students.⁸⁹⁷

In Ireland, the Equality Authority and an Irish NGO carried out a joint anti-homophobic school bullying initiative entitled “Making Your School Safe”.⁸⁹⁸ Posters were distributed which contained the message: “Homophobic bullying is not acceptable in our school”. The campaign provided practical guidance on what schools can do to develop anti-bullying and anti-harassment policies and codes of behaviour.

Practical initiative – in September 2010 the project “It gets better” was launched in the United States after a dramatic series of suicides committed by gay teenagers.⁸⁹⁹ The aim of the campaign was to help young LGBT persons experiencing bullying and harassment in schools and to prevent them from attempting suicide. The campaign was successful; it has now been launched in the United Kingdom by Stonewall UK⁹⁰⁰ and been followed up in many other European countries. President Obama in the United States, and Prime Minister Cameron in the United Kingdom, among others, have posted a video on YouTube to say to LGBT youth that “it gets better”.

8.4.2. Rectification of name and gender in diplomas and other related documents

Transgender persons often face the obstacle of changing their sex or name on their diplomas which were issued before legal gender recognition. The Dutch Ministry of Education issued an order that all universities are to change the diplomas of their graduates upon legal gender recognition. This change was brought about after a former student had taken the University of Amsterdam to the Equal Treatment Commission.⁹⁰¹ In Germany, TransInterQueer, a German transgender, intersex and queer organisation, received complaints about former students at secondary educational facilities having problems in getting their university-entry diploma rectified after legal gender recognition. Moreover, ILGA-Europe and Transgender Europe state that they “have good reason to believe that such problems are still commonplace in the rest of Europe”.⁹⁰²

895. GISH, “Survey Research with the LGBT Community in Albania”, Tirana, 2006.

896. Abramowicz, M., “Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report”, Campaign Against Homophobia and Lambda Warsaw, Warsaw, 2007.

897. Dankmeijer, P., “Homo- en transseksuele aandachtspunten in de leerlingenbegeleiding”, in *Toolkit Leerlingenbegeleiding*, Kluwer, November, 2006.

898. The Equality Authority, www.equality.ie/index.asp?docID=593, accessed 17 October 2008.

899. “It Gets Better Project”, www.itgetsbetter.org/pages/about-it-gets-better-project, accessed 13 December 2010.

900. “It Gets Better Today”, Stonewall UK, www.stonewall.org.uk/what_you_can_do/campaigning_opportunities/it_gets_better_today/4844.asp, accessed 13 December 2010.

901. Equal Treatment Commission Netherlands, Decision No. 2010-175, 30 November 2010. See www.cgb.nl/oordelen/oordeel/221409/een_universiteit_maakt_verboden_onderscheid_op_grond_van_geslacht_door_een_man_die_transseksueel_is_een_nieuw_getuigschrift_met_zijn_huidige_mannelijke_voornamen_te_weigeren.

902. “Joint Contribution by ILGA-Europe, Transgender Europe and OII-Germany Towards the European Commission’s Assessment of the State of Affairs Vis-à-Vis Gender Discrimination in Education and the Provision of Financial Services”, p. 6.

In the Russian Federation, orders of the Ministry of Education and Science stipulate that in basic professional,⁹⁰³ secondary professional⁹⁰⁴ and higher professional educational⁹⁰⁵ institutions a change of surname, name or patronymic name on medical grounds is possible. Thus, upon application and presentation of the relevant decision by a medical commission, transgender students should be able to have their educational documents altered accordingly. A similar undertaking for basic general and general secondary education institutions was also reported.⁹⁰⁶ The regulations specify that in order to protect privacy, “the decision of the rector of the educational institution, application of the person and documents confirming the change of the name (surname, patronymic name) must be kept in the personal file of the graduate of the educational institution. Documents with the old name (surname, patronymic name) must be withdrawn by the educational institution and destroyed according to established procedures.”

8.4.3. The situation of LGBT teachers

Teachers who are gay, lesbian, bisexual or transgender can also suffer discrimination and harassment from their colleagues, students or their employer.

In the Russian Federation, a report from the Moscow Helsinki Group shows that teachers who choose to come out, or are assumed to be gay or lesbian, may be subject to bullying and harassment by their colleagues and students. The report includes incidents of discrimination against teacher students. One case is the story of a 20-year-old lesbian from St Petersburg studying at the teachers’ college. When she came out, she and her girlfriend studying at the same college were reportedly regularly called to the dean’s office. The dean would ask them to “work on themselves”, hide their sexual orientation and get treatment. Both women were directed to a psychologist. Their fellow students started harassing them and the teachers told them that they would not pass their exams, unless they “corrected themselves”. The college made it clear that either she would be expelled or she would have to go to a district psychiatric hospital for children. After choosing to go to the hospital, she was given a prescription for neurological medicine and the hospital diagnosed her as having “suicidal syndrome”. She was reinstated at her college after missing almost a year of her studies. She was also asked to “act normally” and “love men” or drop out of school. The college would not let her, or her girlfriend, attend an internship, because they did not correspond to the “moral image of a Russian teacher”.⁹⁰⁷

In Romania the ministries of Education and Health jointly introduced psychological testing for teachers in 2003 and forbade gay and lesbian persons to teach. Although the regulation was repealed, it was replaced in 2006 by another joint order, listing homosexuality among grounds for exclusion.⁹⁰⁸

In some member states, including in the Netherlands and Lithuania, discussions have taken place regarding the equal treatment laws in these countries and the extent to which schools based on religion or belief may or may not be able to lawfully refuse to employ a gay or lesbian teacher (Netherlands) or limit educational awareness-raising activities on LGBT issues (Lithuania).⁹⁰⁹

In Turkey, Article 27 of the Law on Elementary and High School Teacher’s Promotion and Discipline Number 1702 stipulates that teachers whose behaviour is deemed “impure” on the basis of two conditions shall be dismissed. The first condition states that if the teacher’s behaviour is deemed “impure” in relation to the students in the school, he/she will be dismissed. The second condition

903. Order of the Ministry of Education and Science of the Russian Federation “On approval of Instruction on the order of issue of State-standard documents of basic professional education and level of qualification, completion and keeping of relevant forms of documents”, No. 92 from 23 March 2007, registered in the Ministry of Justice of the Russian Federation on 26 April 2007 under No. 9348.

904. Order of the Ministry of Education and Science of the Russian Federation “On approval of Instruction on the order of issue of State-standard documents of secondary professional education, completion and keeping of relevant forms of documents”, No. 80 from 9 March 2007, registered at the Ministry of Justice of the Russian Federation on 26 April 2007 under No. 9349.

905. Order of the Ministry of Education and Science of the Russian Federation “On approval of Instruction on the order of issue of State-standard documents of higher professional education, completion and keeping of relevant forms of documents”, No. 65 from 10 March 2005, registered at the Ministry of Justice of the Russian Federation on 13 April 2005 under No. 6508.

906. FtM Phoenix Group, “Transphobia and Discrimination on Grounds of Gender Identity in Russia”, 2010, contribution to the national contribution (legal study) on the Russian Federation.

907. Moscow Helsinki Group and the Russian LGBT Network, “Situation of Lesbians, Gays, Bisexuals and Transgender People in the Russian Federation – 2008”, 2009, p. 25.

908. Romanian Ministry of Education and Research, Ministry of Health and the National Health Insurance Authority, Order No. 4840/IR 38342/2796/2005 on mandatory health check of school personnel.

909. European Union Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, pp. 25-26.

states that if the teacher's out-of-school behaviour (in relation to anyone) is deemed "impure", he/she will be dismissed. In other words, "impure" behaviour by the teacher at any time – even in private – can result in his/her dismissal. In a case reported by the media, a teacher was dismissed because of his sexual orientation.⁹¹⁰

In Croatia in November 2009, the Lesbian NGO Kontra was approached by a professor at a university in a small town. His colleagues were mocking him and insulting him on the basis of his sexual orientation. A lawyer sent a letter, on behalf of the professor, to the faculty with a request to protect the rights pertaining to working relations, as guaranteed by the Constitution of the Republic of Croatia. Subsequently, the dean of the faculty conducted an investigation, and the professor received a written apology from his colleagues because of their previous behaviour.⁹¹¹

The results of a survey indicate that such incidents of discrimination of transgender teachers are not uncommon: a representative study from Scotland found that 30% of respondents expressed unease about a transsexual primary school teacher.⁹¹² Similar reports are also found in Austria.⁹¹³ In Germany, a teacher at a private school came out during his gender reassignment treatment to the principal of the school. He was instructed to keep silent about it. Soon after, his temporary contract was not prolonged. Students and parents reacted in different ways, some supportive and some objecting. The colleagues of the teacher were also divided in their opinion, and the fact that the teacher turned to equality bodies was perceived as whistle-blowing. The teacher went on sick-leave as the court proceedings caused him great psychological stress.⁹¹⁴

Practical initiative – some of the most important actors in promoting non-discrimination of teachers are the teachers' unions. In this respect, the call of the Dutch General Teachers' Union, AOB, for a specific policy on homosexuality in secondary schools is a practical measure backing non-discrimination and inclusion in school settings.⁹¹⁵

8.5. Impact of discrimination, safety at schools and the role of school management and policies to combat discrimination

The negative consequences of bullying may be enormous. NGOs and studies in several member states point to the negative impact that bullying has on the school performance of LGBT students. Lesbian, gay, bisexual or transgender adolescents may not seek support from their families and/or community because they have not yet "come out" with their sexual orientation or gender identity, or because they had previously been rejected for doing so. Several studies show that a homophobic or transphobic environment at school may lead to higher drop-out rates of LGBT young persons from secondary school. They are also more likely to contemplate self-harm and engage in high-risk behaviour.⁹¹⁶ A study in the Russian Federation made similar findings: bullying and harassment of LGBT youth by their classmates and teachers at schools, sometimes coupled with disapproval of their coming out on behalf of their parents, reduces LGBT youngsters' capacity and motivation to attend school, and participate in social life together with their peers, and leads to high levels of depression and isolation.⁹¹⁷

Stress and social isolation are most acute for young people who become aware of their homosexuality during their years at school. Homophobia and bullying in school may damage the academic work of

910. National contribution on Turkey, see also: www.radikal.com.tr/Default.aspx?aType=RadikalYazar&ArticleID=1031426&Yazar=EZG%DD&Date=05.12.2010&CategoryID=97.

911. Kontra, "2009 Annual Report on the Status of Human Rights of Sexual and Gender Minorities in Croatia", Zagreb, 2009.

912. Bromley, C., Curtice, J. and Given, L., "Attitudes to Discrimination in Scotland: 2006, Scottish Social Attitudes Survey", Scottish Government Social Research, Edinburgh, 2007.

913. Newspaper article "Transsexuelle HTL-Lehrerin darf weiter unterrichten", <http://transgender.at/presse/shownews.cgi?id=1126759115>, accessed 10 January 2011.

914. Case reported by the TGEU and mentioned in *Jungle World*, No. 37, 11, September 2008, accessible at: <http://jungle-world.com/artikel/2008/37/22930.htm>.

915. FRA national contribution on the Netherlands.

916. Jenett, M., "Stand up for us: Challenging homophobia in schools", Yorkshire, Crown Copyright, 2004, p. 10; IGLYO and ILGA-Europe, Written contribution to Schools for the 21st Century Commission Staff Working Paper (SEC (2007) 1009), December 2007; Averill, S., "How Can Young People Be Empowered to Achieve Justice When They Experience Homophobic Crime?", undated, available at: www.schools-out.org.uk/research/docs/Partners%20An%20update%20to%20tackling%20homophobia.pdf, accessed 1 October 2010.

917. Moscow Helsinki Group, "Situation of Lesbians, Gays, Bisexuals and Transgenders in the Russian Federation", Moscow, 2009, pp. 29-30.

LGBT pupils and destroy their self-image and confidence. Studies moreover suggest that bullying has a negative impact on the health of LGBT persons⁹¹⁸ but the social stigma surrounding LGBT issues has delayed concerted public health research in member states.

The failure of school staff and school management (school directors and/or the board of the school) to respond to homophobic and transphobic language or to take adequate measures to prevent discriminatory practices in schools was highlighted by LGBT NGOs and some national human rights structures. The school management has a duty to provide a safe environment for pupils and students in order to create a climate in which all can function and perform their tasks. There is a clear need for schools to protect LGBT students and teachers from bullying. However, there is very little research on the role of school management and the impact of setting up “diversity policies” in this regard. NGOs report that school management is often reluctant to take name-calling and other types of harassment seriously.⁹¹⁹

Schools in only few member states have anti-bullying and equality policies in place. Even fewer specifically include LGBT pupils.⁹²⁰ However, even when anti-bullying policies are in place, they may provide inadequate protection or be insufficiently implemented. A United Kingdom study found that out of 300 schools observed, 82% were aware of verbal homophobia and 26% of physical homophobic bullying, even though almost all of these schools had anti-bullying policies in place.⁹²¹ Research in 2009 from the United Kingdom EHRC reported that a higher percentage of transgender persons experience bullying at school (75%) than lesbian, gay and bisexual persons (25%).⁹²²

Practical initiative – in the Netherlands, the Dutch National Straight/Gay Education Alliance developed a benchmark for managing a LGBT-safer school.⁹²³

Practical initiative – both the Netherlands and the Norwegian governments have developed LGBT action plans. Both governments’ action plans include a focus on education. The Norwegian action plan sets as a goal that the quality of life among LGBT persons in 2009-10 needs to be improved. This includes a focus on school and education so as to achieve an inclusive environment, increase knowledge, combat bullying and develop teaching materials.⁹²⁴ The measures include surveys and initiatives against bullying, new guidance materials for teachers on sexual relations and sexuality, new material for pupils in primary and secondary schools to increase visibility of LGBT lives, mainstreaming LGBT topics in educational provisions and research projects.⁹²⁵

8.6. Conclusions

Many LGBT students face problems in accessing objective information with respect to sexual orientation and gender identity in school curricula and educational materials. They neither receive objective information during sex education nor have the possibility of raising questions concerning sexual orientation or gender identity in relation to their own physical and emotional development as well as in regard to their socialisation with their peers. This often results in a serious limitation to the possibility to access relevant information which is essential for the free development of LGBT students’ personality and the full enjoyment of human rights more generally.

If addressed at all, information on homosexuality, bisexuality or gender identity can often be presented in negative or pathologising terms in educational materials and by teachers. Gender identity is rarely referred to at all and when it is, there are negative connotations. Teachers are often not prepared or inclined to discuss issues related to sexual orientation and gender identity.

918. For example, National Institute for Working Life. “Arbetsvillkor och utsatthet”, Sweden, 2003; Jenett M., “Stand up for us – Challenging homophobia in schools”, Department for Education and Skills, London, 2004, p. 8.

919. FRA national contribution on the EU27 and interviews carried out for this study.

920. See for example Norman, J., Galvin, M. and McNamara, G., “Straight Talk: Researching Gay and Lesbian Issues in the School Curriculum”, Dublin, Centre for Educational Evaluation, Dublin City University, 2006.

921. Averill, S., “How can young people be empowered to achieve justice when they experience homophobic crime?”, 2004, p. 20.

922. “Provision of Goods, Facilities and Services to Trans People: Guidance to Public Authorities in Meeting Your Equality Duties and Human Rights Obligations”, p. 40.

923. Schouten, M. and Dankmeijer, P., “De roze draad in veiligheid op school”, February 2008, available at: www.empower-ls.com/producten/publicaties/een_roze_draad, accessed 30 November 2010.

924. Interview with the Norwegian Lesbian, Gay, Bisexual and Transgender Organisation, 26 April 2010.

925. Norwegian Ministry of Children and Equality, “The Norwegian Government’s Action Plan – Improving Quality of Life Among Lesbians, Gays, Bisexuals and Trans Persons, 2009-2012”, 2008.

Such lack of, or outright negative, LGBT representations may contribute to the harassment and bullying of LGBT persons by their peers or teachers and may result in exacerbating young lesbian, gay, bisexual and transgender students' isolation in schools. Reports from many Council of Europe member states show that LGBT pupils, students and teachers face repeated harassment in schools, universities and other educational settings. Episodes of violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to their sexual orientation or gender identity often go unnoticed. Such experiences can lead to marginalisation, poor health or dropping out of school. Verbal homophobia is commonplace, and negative words for "LGBT" are often used as derogatory terms.

Bullying and harassment have significant consequences for LGBT youth, including those affecting school performance and well-being. Bullying by peers may often be perceived as harmless and innocent, and so does not need to be punished. At the same time, homophobic bullying has been experienced by a significant proportion of those who were perceived by the others as being LGBT but who, at the same time, tended not to disclose their sexual orientation and gender identity for fear of hostile reactions from schoolmates and educators.

Introduction and implementation of policies to tackle homophobia and transphobia at school, and to respond to homophobic incidents in class, have been identified in only a few member states. Public authorities and equality bodies have addressed the problem in some member states. Even so, very few school authorities across member states pay any attention to homophobia and LGBT bullying. Teachers lack the awareness, incentives and tools to recognise and tackle such problems. Nevertheless, some practical initiatives in this respect were identified including programmes on LGBT issues in school curricula as well as for awareness-raising and training of teachers.

9. Employment

Work is essential both for personal development and for social and economic independence.⁹²⁶ In financial terms, it implies to be able to ensure an adequate standard of living for oneself and one's dependants. However, there is discrimination on the labour market, and harassment at the workplace is a problem for many people. This chapter describes the situation of LGBT persons in the labour market. It starts with an outline of the European and international legal framework regarding the right to work. In the second part, national legislation is presented. In the third section, specific issues related to discrimination of LGBT persons in employment will be discussed. The fourth section focuses on the impact of discrimination and means of combating discrimination in the workplace.

9.1. *The international and European legal framework*

Article 23 of the UN Universal Declaration of Human Rights⁹²⁷ defines the right to work as a universal right. The right to work forms an inseparable and inherent part of human dignity which is essential for realising other human rights. As an economic right, it implies the right to be able to work and ensure maintenance for oneself and one's family, including an adequate standard of living. Moreover it imposes an obligation on states to ensure free access to the labour market and the free choice of the individual to choose an occupation.

The right to work is enshrined in several legally binding international documents. Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹²⁸ protects the right to work. It constitutes an obligation for member states to recognise "the right of everyone to the opportunity to earn his living through work which he freely chooses or accepts". The member states shall ensure the right not to be deprived of work unfairly⁹²⁹ and to ensure that compulsory work by the authorities is prohibited.⁹³⁰ The International Labour Organization Convention No. 122 also stresses states' obligation to ensure the absence of forced labour.⁹³¹

The right to work is further protected under Article 8 of the International Covenant of Civil and Political Rights (ICCPR)⁹³² concerning the prohibition of forced and compulsory labour, in Article 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁹³³ prohibiting discrimination on grounds of racial or ethnic origin with regard to the enjoyment of the right to work, as well as in Article 11 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁹³⁴ In Article 32 of the UN Convention on the Rights of the Child (CRC)⁹³⁵ the prohibition of exploitation of child labour is explicitly stated. Finally, the right to work is also mentioned in the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁹³⁶ and in Article 27 of the UN Convention on the Rights of Persons with Disabilities.⁹³⁷

The principal obligation of states is to ensure the progressive realisation of the exercise of the right to work. Certain obligations do, however, have immediate effect, among these, the obligation for states

926. UN Committee on Economic, Social and Cultural Rights, General Comment No. 18, 24 November 2005, Article 6, paragraph 4. See also General Comments Nos. 14, 15 and 20.

927. Universal Declaration of Human Rights, GA Resolution 217A (III), UN Doc A/810 at 71 (1948).

928. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

929. UN Committee on Economic, Social and Cultural Rights, General Comment No. 18 of 24 November 2005 on Article 6, paragraphs 1, 4 and 6.

930. See Källström, K. and Eide, A., "Article 23", in Alfredsson, G. and Eide, A. (eds), *The Universal Declaration of Human Rights, A Common Standard of Achievement*, Kluwer Law International, 1999, p. 494.

931. See also the ILO Convention concerning the Abolition of Forced Labour, C105, Geneva, 40th Session of the conference, date of adoption: 25 June 1957, date of entry into force: 17 January 1959.

932. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 (Article 8, paragraph 3(a)).

933. International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 (Article 5, paragraph (e)(i)).

934. Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, GA Resolution 34/180, UN GAOR, 34th Session, Supp. No. 46, at 193, UN Doc. A/34/46 (1979) (entered into force on 3 September 1981).

935. Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

936. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158 of 18 December 1990.

937. Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, Doc. A/61/611.

to guarantee that the right to work can be exercised without discrimination of any kind.⁹³⁸ Indeed, the non-discrimination principle in relation to the right to work constitutes an important part of state obligations which has also been addressed in the 1958 ILO Discrimination Convention No. 111.⁹³⁹ Hence, a specific legal obligation to respect the right to work must be seen as implying an obligation to refrain from denying or limiting equal access to decent work for all persons, especially disadvantaged or marginalised individuals and groups, including members of minorities.⁹⁴⁰ To this end, the UN Committee on Economic, Social and Cultural Rights has underlined that states are, in particular, bound by an obligation to respect the rights of women and young persons to have access to decent work and to take measures to combat discrimination and promote equal access and opportunities.⁹⁴¹

More generally, the right to work is seen as a prerequisite for protection against discrimination.⁹⁴² Implementation of the non-discrimination principle is highlighted by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 18, according to which “the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of ... sex ..., sexual orientation ... which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality”.⁹⁴³ While sexual orientation is explicitly referred to, gender identity is not specifically addressed in the document. However, in General Comment No. 20 regarding non-discrimination in economic, social and cultural rights, both sexual orientation and gender identity receive explicit mention in the list of prohibited grounds of discrimination, within the concept of “other status”. In particular, it is recognised that “persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace”.⁹⁴⁴

The Yogyakarta Principles reiterate in Principle 12 the international obligations, as they suggest that everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity. This includes an obligation to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration.⁹⁴⁵

Within the Council of Europe, the revised European Social Charter is the treaty guaranteeing social and economic rights, including the right to work.⁹⁴⁶ Article 1 of the Charter imposes an obligation on the member states to protect effectively the right of the worker to earn his or her living in an occupation freely entered upon. The principle of non-discrimination applies to all rights set forth in the Charter.⁹⁴⁷ The list of discrimination grounds does not refer explicitly to sexual orientation or gender identity, but is non-exhaustive and thus open for dynamic interpretation. A specific obligation to ensure the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination is spelled out in Article 20 in relation to gender.

Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 has explicitly stated that discrimination in employment motivated by sexual orientation and gender identity is prohibited.⁹⁴⁸ The recommendation stipulates that member states should provide effective protection against discrimination in employment and occupation in the public as well as the private sector. A specific provision covers the effective protection of privacy of transgender persons in relation to, for example, employment applications, and with regard to disclosure of their gender identity history.⁹⁴⁹

938. Cf. UN Committee on Economic, Social and Cultural Rights, General Comment No. 18 of 24 November 2005 on Article 6, paragraph 19.

939. See International Labour Organization, Convention concerning Discrimination in Respect of Employment and Occupation, C111, 1958.

940. *Ibid.*, paragraph 23.

941. UN Committee on Economic, Social and Cultural Rights, General Comment No 20 on non-discrimination, paragraph 32.

942. See Källström, K. and Eide, A., “Article 23”, Alfredsson, G. and Eide, A. (eds), *The Universal Declaration of Human Rights, A Common Standard of Achievement*, Kluwer Law International, 1999, p. 490.

943. UN Committee on Economic, Social and Cultural Rights, General Comment No. 18 of 24 November 2005 on Article 12(b).

944. UN Committee on Economic, Social and Cultural Rights, General Comment No. 20 on non-discrimination, paragraph 32.

945. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

946. The European Social Charter was adopted in 1961 (ETS No. 35) and in a revised version in 1996 (ETS No. 163).

947. See Part V, Article E.

948. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity.

949. Cf. paragraphs 29 and 30.

While the right to work is not directly protected in the European Convention on Human Rights, in the case of *Smith and Grady v. the United Kingdom*⁹⁵⁰ and in the case of *Lustig-Prean and Beckett v. the United Kingdom*,⁹⁵¹ the Court recognised that the dismissal from the army of gay and lesbian personnel solely based on their sexual orientation had been unlawful and had violated Article 8 of the Convention which protects the right to respect for private life of the applicants.

In the European Union, as an important point of departure, Article 2 of the Treaty on European Union (TEU) affirms the centrality of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”⁹⁵² as a grounding principle of the Union. Article 2 thus explicitly refers to equality as one of the founding values of the Union and it further reads that member states share these values in a society in which non-discrimination prevails.⁹⁵³ This article can be read in conjunction with Article 21 of the EU Charter of Fundamental Rights, which prohibits discrimination on several grounds, among which “sex” and “sexual orientation” are explicitly included. The charter further stipulates the freedom to choose an occupation and the right to engage in work in Article 15.

The legal basis for EU legislation to combat employment discrimination on the grounds of sexual orientation is provided by Article 19 of the Treaty on the Functioning of the EU (TFEU) while Article 10 of the TFEU is an important provision on equality mainstreaming throughout all policies and actions of the European Union. Council Directive 2000/78/EC (hereafter: the “Employment Equality Directive”) is the main secondary legislation on this topic.

The Employment Equality Directive prohibits in Article 3(1) discrimination on grounds of sexual orientation, including direct and indirect discrimination, harassment and the instruction to discriminate, and is applicable in the private and the public sectors, and in work and employment, as well as in relation to conditions for access to employment, to self-employment or to occupation, access to vocational guidance or vocational training, employment and working conditions, and membership of, and involvement in, organisations of workers or employers. Moreover, the directive allows EU member states to provide for positive action as a means to ensure equal treatment and foresees a shared burden of proof, according to which the victim of discrimination shall establish the fact of discriminatory behaviour, whereas the respondent shall prove that there has been no breach of the principle of equal treatment.⁹⁵⁴ The Employment Equality Directive does not, however, create an obligation for member states to set up or designate a body to promote equality and combat discrimination unlike the Racial Equality Directive.

The Employment Equality Directive was to be implemented by EU member states by 2 December 2003. There are variations between EU member states in the implementation of the equality directives as concluded by the European Commission in a 2009 overview,⁹⁵⁵ including regarding the transposition of the Employment Equality Directive in relation to combating sexual orientation discrimination. Difficulties arise for example in connection with employers with a religious ethos. It should be noted that the European Commission has launched infringement procedures against some EU member states for incorrect implementation of the Employment Equality Directive.⁹⁵⁶ The current outstanding infringement procedures focus on eight EU member states: Belgium, Greece,

950. European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Application Nos. 33985/96 and 33986/96, judgment of 27 September 1999.

951. European Court of Human Rights, *Lustig-Prean and Beckett v. the United Kingdom*, Application Nos. 31417/96 and 32377/96, judgment of 27 September 1999.

952. European Union, Consolidated Version of the Treaty on European Union, OJ C 115/13, 9 May 2008.

953. *Ibid.*, Article 2.

954. Cf. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Articles 7 and 10 respectively.

955. See the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [SEC(2008)524], accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0225:FIN:EN:HTML>. See also “Developing Anti-Discrimination Law in Europe – The 27 EU Member States Compared”, November 2009, available at: www.migpolgroup.com/public/docs/180.DevelopingAntiDiscinEurope_Comparativeanalysis_IV_EN_11.09.pdf, accessed 18 December 2010.

956. This information reflects the situation as of November 2010 and has been provided by the European Commission, DG Employment, Social Affairs and Equal Opportunities, Unit G2: “Equality, Action against Discrimination: Legal Questions”. For more background information, see EU Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010, p. 26.

Ireland, Italy, Netherlands, Poland, Portugal and the United Kingdom.⁹⁵⁷ Concerning sexual orientation-related infringement procedures, three “reasoned opinions” have been sent to the following EU member states: Poland,⁹⁵⁸ United Kingdom⁹⁵⁹ and the Netherlands.⁹⁶⁰

The legal basis for EU legislation to combat employment discrimination on the grounds of gender identity is currently – and only for those persons wishing to undergo, undergoing or having undergone gender reassignment treatment – provided through the angle of sex discrimination in employment, the legal basis of which is provided by Article 157 of the TFEU. The secondary legislation is Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereafter: the “Equal Treatment Directive”).⁹⁶¹ The Court of Justice of the European Union has affirmed in *P. v S. and Cornwall County Council* that the prohibition of discrimination on grounds of sex also applies to discrimination resulting from or related to gender reassignment.⁹⁶² Therefore, and in line with the Gender Recast Directive,⁹⁶³ EU member states should prohibit discrimination in the field of employment on grounds of “gender reassignment” of the person.

Cases concerning discrimination in the field of employment on grounds of sexual orientation and gender identity are rarely brought to the Court of Justice of the European Union. This Court has only reviewed a few cases regarding discrimination of LGBT persons in employment. However some of them are landmark judgments. In the first case, *P. v S. and Cornwall County Council*,⁹⁶⁴ the claim of a transsexual woman to have been unlawfully dismissed due to reasons connected to her gender reassignment was judged positively by the Court. The Court affirmed that the Equal Treatment Directive precluded the dismissal of a transsexual person for reasons related to gender reassignment in view of the prohibition of discrimination on the grounds of sex.⁹⁶⁵

An important judgment concerning benefits to partners in the context of employment was given in *Lisa Jacqueline Grant v. South-West Trains Ltd.*⁹⁶⁶ In this case, the alleged discrimination on the grounds of sex was connected to benefits conceded by employers to partners in long-term relationships outside marriage or spouses. The applicant had maintained that the denial of her employer to grant travel concessions to her same-sex partner constituted discrimination, which is prohibited by EU law establishing the right to equal pay for equal work for men and women.⁹⁶⁷ In the judgment, the Court found, however, that such prohibition did not apply to the circumstances of the case, and that discrimination on grounds of sexual orientation was not covered by Community law.⁹⁶⁸

In *K.B. v. NHS Pensions Agency*,⁹⁶⁹ the applicant, who was in a relationship with a transsexual man who had not been able to amend his birth certificate, maintained that the refusal of the NHS Pensions Agency to recognise the right of her partner to a widower’s pension in case of her death amounted to

957. Within the framework of those procedures, reasoned opinions have been sent to the following member states: Ireland, Greece, Italy, Netherlands, Poland, Portugal and the United Kingdom.

958. Reasoned opinion sent on 29 January 2010 concerning the prohibition of discrimination on all grounds set out in the directive (including sexual orientation), which is not provided for in regulations on access to certain professions according to the European Commission.

959. Reasoned opinion sent on 23 November 2009 concerning the possibility of justifying discrimination on grounds of sexual orientation in case of employment by religious institutions, which is considered too wide by the European Commission.

960. Reasoned opinion sent on 1 February 2008 concerning the exceptions provided for legal relations within religious communities and employment by religious institutions which are considered to be too wide, also making it possible to discriminate unduly, for example, on grounds of sexual orientation.

961. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 1976, p. 40.

962. Court of Justice of the European Union, C-13/94, *P. v. S. and Cornwall County Council*, judgment of 30 April 1996.

963. European Union, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26 July 2006, pp. 23-36.

964. *Ibid.*

965. Court of Justice of the European Union, C-13/94, *P. v. S. and Cornwall County Council*, judgment of 30 April 1996.

966. Court of Justice of the European Union, C-249/96, *Grant v. South-West Trains Ltd.*, judgment of 17 February 1998.

967. European Community, Treaty establishing the European Community (consolidated version 1992), Article 119, OJ C 224, 31 August 1992, and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 1975, p. 19.

968. Court of Justice of the European Union, C-249/96, *Grant v. South-West Trains Ltd.*, judgment of 17 February 1998, paragraph 47.

969. Court of Justice of the European Union, C-117/01, *K.B. v NHS Pensions Agency*, judgment of 7 January 2004.

discrimination in contravention of the principle of equal pay for male and female workers.⁹⁷⁰ The agency had responded by affirming that in the absence of a lawful marriage, the partner of the deceased person could not be considered as a “spouse” for pension purposes. In examining the case, the Court maintained that in principle Article 141 precluded legislation preventing a couple like that of K.B. and her partner fulfilling the marriage requirement in order to obtain a part of the pay of the other, but left it to the national court to determine whether in the situation experienced by K.B. and her partner, the applicant could rely on Article 141 in order to nominate her partner as the beneficiary of the survivor’s pension.⁹⁷¹

The already mentioned case *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (Vddb)*⁹⁷² also concerned a surviving partner’s entitlement to a pension. In the case *Jürgen Römer v. Freie und Hansestadt Hamburg*⁹⁷³ the applicant challenged regulations concerning retirement pensions in the Land of Hamburg, according to which the amount of pension payable to married pensioners is greater than for those in life partnerships.⁹⁷⁴

9.2. National legislation

In some EU member states, protection from discrimination on grounds of sexual orientation has been extended beyond the field of employment to encompass some or all of the areas covered by the Race Equality Directive (these are education, social protection including social security and health care, social advantages and access to and supply of goods and services).⁹⁷⁵ In this regard certain groups of member states can be identified.⁹⁷⁶

The first group consists of 11 EU member states (Belgium, Bulgaria, Czech Republic, Germany, Hungary, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom). In these countries the scope of the protection from discrimination on grounds of sexual orientation has been extended to *all* fields covered by the Race Equality Directive. The second group consists of seven EU member states (Austria,⁹⁷⁷ Finland, Ireland, Latvia, Lithuania, Luxembourg and the Netherlands), in which protection against discrimination on grounds of sexual orientation has been partially extended beyond employment and occupation, in order to cover certain, but not all, fields to which the Race Equality Directive applies. The third group consists of nine EU member states (Cyprus, Denmark, Estonia, Greece, France, Italy, Malta, Poland and Portugal), which have implemented the Employment Equality Directive regarding sexual orientation discrimination in the fields designated by the directive, namely in matters related to work and employment only.⁹⁷⁸

For 11 (non-EU) Council of Europe member states, sexual orientation has been included as a prohibited grounds for discrimination in the field of employment (Albania, Andorra, Bosnia and Herzegovina, Croatia, Georgia, Iceland, Montenegro, Norway, Serbia, Switzerland and “the former Yugoslav Republic of Macedonia”). In the other nine member states (Armenia, Azerbaijan, Liechtenstein, Monaco, Moldova, Russian Federation, San Marino, Turkey and Ukraine) sexual orientation is not included in sectoral legislation on non-discrimination in the field of employment (in some of these member states there is no non-discrimination legislation in force).

970. This principle is guaranteed by the European Community, Treaty establishing the European Community (consolidated version 1992), Article 141, OJ C 224, 31 August 1992, and Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 1975, p. 19.

971. Court of Justice of the European Union, C-117/01, *K.B. v NHS Pensions Agency*, judgment of 7 January 2004, paragraph 20.

972. Court of Justice of the European Union, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen (Vddb)*, judgment of 1 April 2008.

973. Court of Justice of the European Union, C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, judgment of 10 May 2011.

974. *Ibid.*, paragraph 27.

975. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22-26.

976. This overview is based on the EU Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”, 2010 (with exception of the classification of Hungary).

977. In Austria, seven of the nine provinces cover all areas, but two fail to do so, EU Agency for Fundamental Rights, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”.

978. FRA national contributions.

In total there are thus 38 member states in which non-discrimination legislation lists sexual orientation among the prohibited grounds (either in sectoral – employment-specific – non-discrimination legislation or in comprehensive non-discrimination legislation).

Regarding gender identity, the picture is more complex. Nine member states (Albania, Croatia, Czech Republic, Germany, Hungary, Montenegro, Serbia, Sweden and the United Kingdom)⁹⁷⁹ have included gender identity explicitly in comprehensive non-discrimination legislation.⁹⁸⁰ At least 11 member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation (Andorra, Austria, Belgium, Denmark, Finland, France, Ireland, Netherlands, Norway, Slovakia and Switzerland), while one member state (Sweden)⁹⁸¹ has chosen multiple formulations to describe the applicable grounds. However, there are significant differences as to the legal scope of these terms and the different laws, even though, as an effect of the transposition of the Gender Recast Directive,⁹⁸² EU member states should recognise discrimination in the field of employment with regard to the gender reassignment of the person.⁹⁸³

9.3. Qualitative and quantitative data on discrimination

9.3.1. The nature of discrimination in the employment sector

Discrimination on grounds of sexual orientation and gender identity in the workplace may take different forms and affect LGBT persons in different aspects of their professional lives. There is direct and indirect discrimination, including in access to employment, but there may also be dismissal or lack of promotion, which in turn may lead to unemployment. Some other forms of discrimination concern unequal treatment in the areas of appraisals, performance pressure, training opportunities, salary or holiday benefits. Persons in a same-sex relationship or partnership may experience denial of benefits to their same-sex partner (parental leave, caring for a sick partner or bereavement, health care insurance for employees and their families or educational facilities for employees and their families). Another field is the survivor's benefit in occupational pension schemes or for the purposes of life insurance.

Other more hidden and less visible discriminatory treatment may range from harassment in the form of demeaning or derogatory statements, name-calling or insults, the use of abusive language by colleagues, mocking, ridicule, gossip or rumours – orally or in writing – aimed against LGBT people, damage to property, blackmail, violence and even death threats, physical violence, et cetera. Transgender persons may be denied time off from work for gender reassignment procedures or their employer may refuse to use the person's new name and gender. As a result, LGBT persons may experience social isolation in the workplace. The fear of being discriminated against on the basis of their sexual orientation or gender identity may lead to self-exclusion when LGBT persons for instance avoid certain jobs, careers or employers.

Discrimination should not only be understood as being caused by employers. On the contrary, depending on the sector of employment, experiences of discrimination may also derive from the attitudes of colleagues, clients, customers or service users. Indeed, LGBT persons may choose certain employment due to their perception of higher degrees of acceptance, or openness in some

979. Under the UK Equality Act 2010, "gender reassignment" protection is offered as in the past (Sex Discrimination Act 1999) but the requirement of being under "medical supervision" is removed and protection extended in several ways. EU Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", Vienna, 2010, p. 23.

980. However, no standard wording is followed to cover gender identity in these member states. In addition to "gender identity" the legislation may refer to "gender expression", "gender identification", "transgender identity", "gender change", "gender reassignment" or "sexual identity". There may be significant differences as to the legal scope of these terms.

981. Legislation passed in Sweden in 2010 introduced the prohibition of discrimination on grounds of "transgender identity and expression" encompassing not only transsexual but also transgender persons who do not wish to undergo gender reassignment. At the same time, Swedish legislation recognises discrimination of transsexual persons under the grounds of "sex". European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", Vienna, 2010, p. 21.

982. European Union, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26 July 2006, pp. 23-36.

983. In Spain, despite the absence of explicit mention in the legislation, courts found gender reassignment also to be covered under current legislation. Agius, S. and Fabeni, S., "Transgender People and the Recast Directive. Implementation Guidelines", ILGA-Europe, Brussels, 2009.

contexts rather than in others. Some employment sectors are found to be more open to LGBT persons than others. Transgressing the traditional boundaries of gender is more difficult in sectors where, for example, traditional notions of masculinity are prevalent, or where a certain traditional gender expression is perceived to be beneficial in relation to, for example, customers or clients. For example, certain perceptions of what it means to be a teacher may make LGBT persons perceived to be unsuitable for positions as teachers or some people may regard LGBT persons as dangerous for children. A 2008 survey among the population in Serbia showed the following:⁹⁸⁴

- 75% would not want/like a homosexual to be the teacher of their children, whilst 14% would accept it. In a survey from 2010 the level of acceptance had gone up to 18%.⁹⁸⁵
- 56% would not want/like a homosexual to be their boss, whilst 30% would accept it. In a 2010 survey, the level of acceptance had increased slightly to 32%.
- 47% would not want a homosexual as their co-worker, whilst 38% would accept it. In 2010 acceptance had increased slightly to 40%.

A government study carried out in Luxembourg found that although gays and lesbians occupy different positions in different sectors in the labour market, they are over-represented in some areas.⁹⁸⁶ According to the study, this is partly explained by the fact that young gays and lesbians, in particular from working-class backgrounds, face problems such as harassment in schools which leads them to prefer a short education in “creative” or service areas. Many other LGBT persons choose to be self-employed, as was shown in a Scottish survey among transgender respondents (20% were self-employed).⁹⁸⁷ In a survey from the United Kingdom, 23% of transgender respondents felt the need to change their job because of their gender identity.⁹⁸⁸

Employment in the armed forces is one of the sectors in which discrimination towards LGBT persons is perceived as being higher in comparison with other sectors. This may be the result of strict military discipline or requirements of access which often include psychological and physical tests in order to assess the aptitude of candidates. In two cases previously referred to brought before the European Court of Human Rights,⁹⁸⁹ the issue at stake was whether interferences in the private lives of the soldiers, in the form of extensive researches by their superiors, had violated Article 8 with regard to the respect for private life. In the two judgments the Court found that the dismissal of the applicants had been despite their excellent work record and that there were no convincing reasons to affirm that homosexual members in the armed forces provoke “damage to morale and fighting power”.⁹⁹⁰

The other issue arising in connection to service in the armed forces is the existence of restrictions for LGBT persons in recruitment processes. The OSCE reports that four Council of Europe member states have an explicit ban on gays and lesbians in the military (Azerbaijan, Greece, Serbia and Turkey).⁹⁹¹ For example, in Turkey, Article 17 of the appendix of the Armed Forces Health Regulation,⁹⁹² states that gay men are “unfit to serve” into the army. The Turkish military uses the DSM II (“Diagnostic and Statistical Manual of Mental Disorders”) dating from 1968 whereas the medical community currently uses DSM IV-2000. According to DSM II, homosexuality is a psychosexual disorder and those who have this “pathology” are considered “unfit to serve” in the

984. Gay Straight Alliance, “Prejudices Exposed – Homophobia in Serbia”, public opinion research report on the LGBT population. Research conducted for the Gay Straight Alliance by the Centre for Free Elections and Democracy (CeSID), February-March 2008, Belgrade, 2008.

985. Gay Straight Alliance, “Homophobia in Serbia 2010. Research and Analysis of Public Opinion. Views of the LGBT Population. Discrimination in the Work Place”, research conducted for the Gay Straight Alliance by the Centre for Free Elections and Democracy (CeSID), Belgrade, 2010.

986. The Government Commission for Foreigners, “Discrimination at Work”, Luxembourg, 2005.

987. Scottish Transgender Alliance, “Transgender Experiences in Scotland – Research Summary”, Equality Network, Edinburgh, 2008.

988. Whittle, S., Turner, L. and Al-Alami, M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, *Equalities Review*, Wetherby, 2007.

989. European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Application Nos. 33985/96 and 33986/96, judgment of 27 September 1999; European Court of Human Rights, *Lustig-Prean and Beckett v. the United Kingdom*, Application Nos. 31417/96 and 32377/96, judgment of 27 September 1999.

990. European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Application Nos. 33985/96 and 33986/96, judgment of 27 September 1999, paragraph 99.

991. “Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel”, www.osce.org/odihr/31393, p. 134.

992. Armed Forces Health Regulation, Paragraph 17, also quoted in national contribution (sociological report) on Turkey, p. 15.

Turkish Armed Forces.⁹⁹³ The EU 2008 Progress Report describes the procedures as follows: “Homosexuals have the right to exemption from military service. If they request such exemption, their sexual orientation is verified by means of degrading medical and psychological tests or by demanding proof of homosexuality.”⁹⁹⁴ Being dismissed as unfit for military service can negatively influence future job prospects and employment in state institutions.⁹⁹⁵

9.3.2. The scale of discrimination of LGBT persons in employment

Official statistical data on complaints and cases of discrimination in employment are not systematically collected in all member states and only available in a few member states. Even if data are collected they are, however, not disaggregated according to the different fields of discrimination, thus making it more difficult to assess the real figures concerning discrimination on grounds of sexual orientation and gender identity in the field of employment. National structures for the implementation of non-discrimination law are sometimes but not always mandated to receive and treat complaints.

Interviews with national human rights structures and LGBT NGOs throughout the member states highlighted the fact that despite the presence and implementation of non-discrimination legislation, the amount of official data on sexual orientation or gender identity related employment discrimination cases is low. Factors explaining this phenomenon may include the fact that LGBT persons are often not open about their sexual orientation or gender identity at work and even when they are and have experienced discrimination they might not want exposure or may perceive complaining as jeopardising current and future job opportunities, and thus they may refrain from reporting.

In relation to the perception of discrimination on grounds of sexual orientation, in the 2009 Special Eurobarometer survey⁹⁹⁶ on discrimination, sexual orientation is seen to constitute a disadvantage for the job applicant for 19% of respondents. This figure is lower in comparison with other grounds of discrimination identified in the survey. The authors of the study suggest that the answers given are likely to be subject to a certain “under claim”, meaning that respondents may give answers that seem more “socially acceptable”.⁹⁹⁷ Furthermore, a lack of knowledge regarding non-discrimination legislation on the issue can be discerned among employees and employers alike. For example, 45% of EU citizens believe that there are no laws prohibiting discrimination on grounds of sexual orientation when hiring a new employee.⁹⁹⁸ This may also partially explain the low number of complaints regarding discrimination on grounds of sexual orientation in the workplace.

In Latvia and Poland several interlocutors explained that the low number of reported sexual orientation or gender identity discrimination cases was due to the fear LGBT persons had that their court case would lead to publicity in the media, which they considered presented a heightened risk that they would lose their jobs. Other interlocutors felt that LGBT persons were not aware of their rights.⁹⁹⁹ Research in Northern Ireland (United Kingdom) concluded that LGB people who might wish to file a complaint faced barriers including fear of victimisation, risk of dismissal and risk of being subject to homophobic or discriminatory actions.¹⁰⁰⁰

The Human Rights Defender in Armenia, who receives a large number of complaints from members of ethnic and religious minorities, reported no registered complaints regarding discrimination against

993. According to the US Department of State Report on Turkey 2009 (p. 49): “Openly gay men were not allowed to perform military service for ‘health reasons’ due to their sexual orientation; those requesting military exemption for reasons of sexual orientation must undergo an invasive burden of proof. LGBT groups complained that gay men were required to show photos of themselves in overt sexual positions and to undergo thorough medical evaluations to prove their homosexuality to military officials” (Turkish Army Forces Health Capability Regulations No. 19291, 24 January 1986).

994. Commission of the European Communities, “Turkey 2008 Progress Report”, 2009, p. 23.

995. See also: Öktem, K., “Another Struggle: Sexual Identity Politics in Unsettled Turkey”, Middle East Report Online, September 2008, available at: www.merip.org/mero/interventions/oktem_interv.html, accessed 25 January 2010.

996. The Special Eurobarometer of 2009 on discrimination covers the 27 EU member states together with three candidate countries (Croatia, “the former Yugoslav Republic of Macedonia” and Turkey).

997. European Commission, Special Eurobarometer 317, “Discrimination in the EU in 2009”, November 2009, available at: www.ec.europa.eu/public_opinion/archives/ebs/ebs_317_en.pdf, accessed 8 December 2010.

998. European Commission, Special Eurobarometer 263, “Discrimination in the European Union”, 2007.

999. FRA “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II The Social Situation”, 2009, pp. 60-62.

1000. Walsh, J., Conlon, C., Fitzpatrick, B. and Hansson, U., “Enabling Gay, Lesbian and Bisexual Individuals to Access their Rights under Equality Law”, Equality Authority and Equality Commission for Northern Ireland, 2007, p. 4.

LGBT persons. This led a representative from the Office of the Human Rights Defender to conclude that the lack of complaints was the best proof that the problem was bigger than assumed.¹⁰⁰¹ The findings in many other member states confirm this analysis.

According to the data collected for this study, during the period between 2005 and 2010 a handful of employment discrimination cases came to court or equality bodies in at least 21 Council of Europe member states (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Hungary, Latvia, Lithuania, Italy, the Netherlands, Norway, Poland, Romania, the Russian Federation, Spain, Sweden, Turkey and the United Kingdom).¹⁰⁰² Some information on these cases and other data are provided below.

In Turkey, several employment-related discrimination cases were pending at the courts. In all the cases the plaintiffs were fired, allegedly on grounds of sexual orientation. The cases involve a civil servant working in a ministry, a policeman, a teacher and a football referee.¹⁰⁰³ In an incident regarding the firing of a bank employee, the court¹⁰⁰⁴ denied the case, which was, at the time of writing, pending at the Court of Appeal.

Transgender persons in some member states face a particular problem when reaching retirement age. In the United Kingdom, for example, up until 2001, the age of retirement for transgender women for the purposes of state pension was the male retirement age of 65 rather than the female retirement age of 60. In 2002, *Christine Goodwin v. the United Kingdom* established that British transgender women were entitled to be treated for all legal purposes in the same way as other women, including pension entitlements. The Gender Recognition Act of 2004 enabled transgender persons married before having undergone gender reassignment to obtain a Gender Recognition Certificate (GRC) on condition they had their marriage dissolved. This would give them pension rights at 60 or as from the date on their GRC whichever came later. But no rights were available for those who had remained married or had reached 60 before the act. This meant that some transgender women who were still married, or had reached 60 before the date the act came into force, were denied a pension for up to five years. A very recent Court of Appeal case has now established that all transgender women reaching the age of 60 after 1984, whether married or not, are entitled to receive their state pension. It is not yet clear whether the Pension Service will follow the Court of Appeal judgment.¹⁰⁰⁵

In the Russian Federation, two cases have been identified where a lesbian and a gay man had their labour rights restored through the court despite the fact that Russian labour legislation does not contain any specific provisions explicitly prohibiting discrimination on grounds of sexual orientation or gender identity. The first case was reviewed in 2004 by Dzerzhinsky district court of the City of Yaroslavl.¹⁰⁰⁶ On 28 December 2004, the court heard the case of a lesbian woman who had been dismissed from her position as educator in a kindergarten with the official reason being "health reasons". In court, the director of the kindergarten explained that he had dismissed the employee because she was a lesbian. The court invalidated the dismissal and restored the plaintiff's rights.

Another case was examined by Frunzensky district court of St Petersburg.¹⁰⁰⁷ By decision of 20 September 2005, the court invalidated the discriminatory decision of JSC Russian Railways concerning a candidate who was refused registration for training, because his military service record card contained a note on a "mental deviation" made solely on the basis of his homosexuality. In 2003, he was taken off the books at the psycho-neurological dispensary. However, the military enlistment office refused to remove the note from the military service record card, still considering him unfit for military service because of homosexuality, which they classified as "other gender identity disorders" at that time. In 2003, the plaintiff addressed the polyclinic of Oktyabrsky Railway for a medical opinion to be able to register for courses for train attendants. They found him unfit on the grounds of his military service record card and the fact that he had been registered with the psycho-neurological dispensary.

1001. Meeting with the Human Rights Defender, 5 March 2010.

1002. (FRA) national contributions (legal reports) contain annexes with descriptions on such cases identified in the member states. See also European Union Agency for Fundamental Human Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 2009, p. 64.

1003. National contribution (sociological report) on Turkey, p. 31-36.

1004. Istanbul Labour Court No. 4, Case No. 2009/195.

1005. Court of Justice of the EU, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, Case C-423/04; *Christine Timbrell v. Secretary of State for Work and Pensions*, Court of Appeal, London, Case CP/1261/2007; *Secretary of State for Work and Pensions v. Christine Timbrell*, Case UKSC 2010/0141 (permission to appeal refused).

1006. See national contribution (legal report) on the Russian Federation.

1007. Ibid.

Having found the decision invalid, Frunzensky district court made two conclusions: the court found the practice of using military records to limit human rights illegal. It further indicated that the “perverse psychopathy” diagnosis was based on his homosexual orientation only and confirmed that homosexuality was not a mental disorder.

Other examples of claims of discrimination and harassment cases identified for this report include a Croatian civil servant who was given an office in the basement and told that a “faggot should die in the basement with rats”. Supervisors did reportedly not respond to his memo, and he was reluctant to bring a charge against the ministry.¹⁰⁰⁸ A transgender woman in Moldova claimed to have been dismissed from her post as a high-school teacher during her hormone therapy, despite requests from her students’ parents to let her stay.¹⁰⁰⁹

In addition to these data, surveys reveal that significant numbers of LGBT persons claim to have faced harassment or have been discriminated against at work; however, those incidents are not formally reported. These surveys include 52% of LGBT workers in the United Kingdom surveyed by a trade union; 39% of lesbian and gay workers surveyed in Denmark;¹⁰¹⁰ over a third of respondents in Hungary;¹⁰¹¹ 56% of transgender employees surveyed in Spain.¹⁰¹² In a survey from Bosnia and Herzegovina, 9% of the LGBT respondents stated that they had experienced discrimination and violations of human rights at work or through an employment agency.¹⁰¹³ Some 23% of the respondents had witnessed discrimination of LGBT persons in employment. According to the National Institute for Working Life¹⁰¹⁴ some 30% of lesbian and bisexual women in Sweden say that demeaning comments at work are the norm. In a study in Belgium, 16% of the transgender respondents were unemployed and of those working, 62% had unstable working conditions – temporary work contracts or interim work only.¹⁰¹⁵

In a Finnish survey, about 80% of the transgender respondents witnessed inappropriate jokes at work.¹⁰¹⁶ Some 13% experienced discrimination upon recruitment, 12% in the area of pay, 13% with regard to opportunities for career advancement, 12% in access to information and 16% in the attitudes of co-workers and supervisors. In a British survey on discrimination faced by transgender persons, 10% of respondents experienced verbal abuse and 6% experienced physical assaults. Only 30% felt they were treated with dignity by their co-workers.¹⁰¹⁷ In a survey in Scotland (United Kingdom) “40% of transgender respondents rated the services of their human resources departments as “extremely poor” and 15% felt that their employer failed to protect their privacy.”¹⁰¹⁸

There are several reasons why such transphobic and homophobic attitudes and practices prevail at the workplace. As an ILGA-Europe report summarises: “hesitation to approach what is often considered a ‘touchy subject’, lack of resources, different priorities and, in most cases, ignorance. Many people are simply not aware that their colleagues may experience their daily work lives in a

1008. National contribution (legal report) on Croatia, p. 30.

1009. National contribution (sociological report) on Moldova, p. 16.

1010. European Union Agency for Fundamental Human Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 2 – The Social Situation”, 2009, p. 68.

1011. Takács J., Mocsonaki L. and Tóth T. P., *A leszbikus, meleg, biszexuális és transznem (LMBT) emberek társadalmi kirekesztettségé Magyarországon* (Social Exclusion of LGBT People in Hungary), MTA SZKI, Budapest, 2007.

1012. Esteva, I. et al. “Social Inequalities: Demographic Characteristics of Patients Treated at the First Gender Identity Disorder Unit in Spain”, 2001.

1013. Organization Q, “The Invisible Q? Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina”, Sarajevo, 2008.

1014. National Institute for Working Life. Arbetsvillkor och utsatthet, Sweden, 2003, p. 73, also quoted in European Union Agency for Fundamental Human Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 2 – The Social Situation”, 2009, p. 68.

1015. Motmans, J. et al., “Being Transgender in Belgium – Mapping the Social and Legal Situation of Transgender People”, Instituut voor de gelijkheid van vrouwen en mannen, Brussels, 2009. The population of the study was 244.

1016. Lehtonen, J. and Mustola, K. (eds), “Straight People Don’t Tell, Do They?’ Negotiating the Boundaries of Sexuality and Gender at Work”, Ministry of Labour, Helsinki, 2004.

1017. Whittle, S., Turner, L. and Al-Alami M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, *Equalities Review*, Wetherby, 2007.

1018. Scottish Transgender Alliance, “Transgender Experiences in Scotland – Research Summary”, Equality Network, Edinburgh, 2008, pp. 14-15, also quoted in European Union Agency for Fundamental Human Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation”, 2009, p. 117.

fundamentally different manner. ... Some argue that sexual orientation is a private matter, best confined to the bedroom and has no relevance to the workplace.”¹⁰¹⁹

9.4. Impact of discrimination

Discrimination on grounds of sexual orientation and gender identity in the workplace – or the mere fear of discrimination – has a negative impact on the everyday work-life experiences of many LGBT persons. In member states where homosexuality is taboo or politically contested, and where attitudes towards LGBT persons are negative, LGBT persons, to a high degree, may choose not to disclose their sexual orientation or gender identity at work. The perceived risk of discrimination or harassment is thus important when LGBT persons decide whether or not to disclose their sexual orientation or gender identity.

Concealment of one’s sexual orientation or gender identity in the workplace is used as a possible strategy to avoid discrimination.¹⁰²⁰ This may engender negative effects on the worker’s productivity and well-being and it may impoverish the quality of social interaction of LGBT persons with colleagues and co-workers. In general, distress and fear of dismissal and discrimination are found to be important factors in keeping LGBT persons closeted in the workplace. In member states, LGBT NGOs pointed at the finding that many LGB persons are not “out” in the workplace. This was supported by evidence heard at interviews with national human rights structures and public authorities dealing with employment issues throughout the member states.¹⁰²¹ At the same time, transgender persons living in their preferred gender may encounter more difficulties in adopting concealment strategies and may therefore face additional obstacles in accessing the labour market.

Discrimination in employment may in certain cases marginalise LGBT persons and push them out of the labour market, resulting in chronic unemployment and poverty. Such situations might lead people to apply strategies of survival involving dangerous or illegal activities. Transgender persons may experience significant obstacles in access to the labour market and for this reason they may be subject to higher levels of discrimination and marginalisation. This situation of socio-economic vulnerability is reflected in the presence of transgender women working as sex workers in some member states of the Council of Europe. Their reason for entering sex work is often linked to systematic direct discrimination by employers, which in turn affects the possibility of gaining access to stable employment. However, in some cases transgender women may be pushed to enter sex work in order to pay for treatments they wish to undertake in order to have their preferred gender recognised, particularly in situations where health schemes do not reimburse such expenses.

Problems of discrimination in employment are substantiated by empirical research, studies and surveys in Albania,¹⁰²² Croatia,¹⁰²³ Finland,¹⁰²⁴ Germany,¹⁰²⁵ Norway,¹⁰²⁶ Poland,¹⁰²⁷ the Russian Federation,¹⁰²⁸ Slovakia,¹⁰²⁹ Sweden¹⁰³⁰ and the United Kingdom.¹⁰³¹ In addition, a report from ILGA-

1019. Quinn, S. and Paradis, E., “Going Beyond the Law: Promoting Equality in Employment”, ILGA-Europe, Brussels, 2007, pp. 10-11.

1020. See for example Lehtonen, J. and Mustola, K. (eds), “Straight People Don’t Tell, Do They? Negotiating the Boundaries of Sexuality and Gender at Work”, Research Reports 2b/04, Ministry of Labour, Helsinki, 2004; The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), “Open Up Your Workplace: Challenging Homophobia and Heteronormativity”, Stockholm, 2007.

1021. See (FRA) national contributions.

1022. GISH, “Survey Research with the LGBT Community in Albania”, Tirana, 2006.

1023. Lesbian Group Kontra, “Violence against Lesbians, Gays and Bisexuals in Croatia: Research Report”, Zagreb, 2006.

1024. Lehtonen, J. and Mustola, K. (eds), “Straight People Don’t Tell, Do They? Negotiating the Boundaries of Sexuality and Gender at Work”, Research Reports 2b/04, Ministry of Labour, Helsinki, 2004.

1025. Frohn, D. (ed.), “Out im Office?! Sexuelle Identität, (Anti-)Diskriminierung und Diversity am Arbeitsplatz”, Schwules Netzwerk NRW e.V., Cologne, funded by Ministry of Intergenerational Affairs, Family, Women and Integration of North Rhine-Westphalia, 2007.

1026. Moseng, B. U., “Lesbiske og homofile arbeidstakere – en pilotundersøkelse”, NOVA, Oslo, 2005.

1027. Abramovicz, M. (ed.), “Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report”, Campaign Against Homophobia and Lambda Warsaw Association, Warsaw, 2007.

1028. Survey by the Internet portal Qguys, quoted in: Moscow Helsinki Group, “Discrimination Based on Sexual Orientation and Gender Identity in the Russian Federation”, Moscow, 2007.

1029. Jójárt, P., Šipošová, M. and Daučíková, A., “Report on Discrimination of Lesbians, Gay Men and Bisexuals in Slovakia”, Archive, Bratislava, 2002.

1030. Arbetslivsinstitutet, “Arbetsvillkor och utsatthet”, Stockholm, 2003.

1031. Whittle, S., Turner, L. and Al-Alami, M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, Equalities Review, Wetherby, 2007.

Europe¹⁰³² notes that a large proportion of LGBT persons are not open about their sexual orientation or gender identity at work. These surveys and studies point at a high degree of invisibility of LGBT persons in the workplace and consequently a low level of perceived discrimination. Discrimination in the workplace is only apparently absent and the very high number of persons concealing their sexual orientation or gender identity at work is in itself the result of fear of discrimination. This makes it particularly difficult to assess the real extent of workplace discrimination on grounds of sexual orientation and gender identity.

According to an ILGA-Europe report, 42% of LGBT respondents are not “out” in their workplace. Some 66% name fear of reprisals as a factor in their choice to remain hidden.¹⁰³³

In an Albanian survey, 93% of the respondents in the survey mentioned above hide their sexual orientation in the workplace. Some 5% of the respondents answered that they know of concrete cases of non-acceptance and discrimination on grounds of sexual orientation in the workplace, but the fact that so many hide their sexual orientation shows that the general level of acceptance towards LGBT persons in the workplace is perceived to be low. At the same time, the relatively low level of detected discrimination is influenced by the high level of invisibility.¹⁰³⁴

In Norway, a study presented in 2005 by the Norwegian Confederation of Trade Unions¹⁰³⁵ showed that 35% of lesbians and bisexual women and 39% of gay and bisexual men did not disclose their sexual orientation at work, primarily due to fear of being met with prejudice and lack of acceptance. A Swedish investigation conducted by the National Institute for Working Life, which included answers from 14 000 respondents, demonstrated that half of LGBT respondents were not “out” at work.¹⁰³⁶ Some 40% of these avoided socialising due to fear of being “revealed”.¹⁰³⁷ In a Polish study, 86% of LGBT respondents had felt the need to conceal their sexual orientation at work.¹⁰³⁸ A German study found similar figures.¹⁰³⁹

In a Croatian survey, when talking about peers and co-workers, the LGBT respondents were significantly less open as LGBT in the workplace than in their circle of friends. More than one third of the persons were sure that all their friends certainly knew of their sexual orientation, which may point at disclosure to a relatively large circle of people. Only 14% of them were sure that everybody at their place of work was familiar with their homosexuality or bisexuality. About 31% of the respondents were convinced, or assumed, that none of their colleagues knew of their sexual orientation.

Lack of openness about sexual orientation or gender identity in the workplace can render the problem of discrimination on those grounds invisible. However, discrimination is not only faced by openly LGBT persons, but may also be experienced if an employee is assumed to be LGBT, or if an employee is somehow connected with LGBT persons or organisations. LGBT persons not open about their sexual orientation, or gender identity, also experience discrimination. As an example, research conducted in Slovakia showed that although many LGBT persons (try to) conceal their sexual orientation at work, more than 25% still experienced harassment.¹⁰⁴⁰

Research from Austria,¹⁰⁴¹ Finland¹⁰⁴² and the United Kingdom¹⁰⁴³ shows that high percentages of transgender persons do not dare to live in their preferred gender at work out of fear of losing their job.

1032. Quinn, S. and Paradis, E., “Going Beyond the Law: Promoting Equality in Employment”, ILGA-Europe, Brussels, 2007.

1033. Ibid.

1034. GISH, “Survey Research with the LGBT Community in Albania”, Tirana, 2006.

1035. Figures based on: Moseng, B. U., “Lesbiske og homofile arbeidstakere – en pilotundersøkelse”, NOVA, Oslo, 2005.

1036. Arbetslivsinstitutet, “Arbetsvillkor och utsatthet”, Stockholm, 2003.

1037. Ibid.

1038. Abramowicz, M. (ed.), “Situation of Bisexual and Homosexual Persons in Poland – 2005 and 2006 Report”, Campaign Against Homophobia and Lambda Warsaw Association, Warsaw, 2007.

1039. Frohn, D., “Out im Office?! Sexuelle Identität, (Anti-)Diskriminierung und Diversity am Arbeitsplatz”, Schwules Netzwerk NRW e.V. (ed.), Cologne, funded by the Ministry of Intergenerational Affairs, Family, Women and Integration of North Rhine-Westphalia, 2007.

1040. Jójárt, P., Šípošová, M. and Daučíková, A, “Report on Discrimination of Lesbians, Gay Men and Bisexuals in Slovakia”, Archive, Bratislava, 2002.

1041. Frketić, V. and Baumgartinger, P., “Transpersonen am Österreichischen Arbeitsmarkt”, Diskursiv, Vienna, 2008.

1042. Lehtonen, J. and Mustola, K., “Straight People Don’t Tell, Do They? Negotiating the Boundaries of Sexuality and Gender at Work”, Research Reports 2b/04, Ministry of Labour, Helsinki, 2004.

1043. Whittle, S., Turner, L. and Al-Alami, M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, *Equalities Review*, Wetherby, 2007.

The risk of harassment or losing a job if openly LGB may be well founded in some cases, as pointed out in a report from the Moscow Helsinki Group, in the Russian Federation: “Disclosure of the sexual orientation of a person most frequently leads to their dismissal in Russian towns, after which it is practically impossible for the affected people to find a new job in the same town.”¹⁰⁴⁴

9.5. Combating discrimination in the workplace

Combating discrimination and harassment of LGBT persons in the workplace requires a consistent approach and involvement of multiple actors: non-discrimination legislation in the employment sector gives the framework, but even more important is its implementation. The Special Eurobarometer survey of 2009 on discrimination highlights the fact that 63% of respondents supported the implementation of specific measures aimed at providing equal opportunities in the field of employment as for discrimination on grounds of sexual orientation.¹⁰⁴⁵ At the same time, however, the implementation of measures to combat discrimination on grounds of sexual orientation in the field of employment has the lowest level of support in comparison with other grounds of discrimination.¹⁰⁴⁶ Moreover, when asked if they believed that sufficient measures had been adopted in order to increase diversity in the workplace in relation to discrimination on grounds of sexual orientation, less than half of the total number of respondents in Europe gave a positive evaluation, with the United Kingdom (65%), Belgium (60%), Sweden (58%) and Slovenia (58%) having the highest level of positive answers, and Romania (26%), Lithuania (25%), Turkey (15%) and Bulgaria (12%) having the lowest percentage of positive answers.

A study in the United Kingdom addressing the impact of employment equality legislation¹⁰⁴⁷ found that 34% of LGB respondents said employment equality legislation had had a positive impact and that 65% said they would be more likely to file a complaint if a problem arose after the introduction of the regulations.

A good practice in the United Kingdom is the Public Sector Gender Equality Duty, which requires all public authorities (including contractors) to eliminate unlawful discrimination and harassment on eight grounds (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and to promote equality of opportunity between women and men, including transsexual men and women.¹⁰⁴⁸ Transgender experts in the United Kingdom have pointed out that this is the first time that any organisation in the UK has been required by law to be proactive in the fight against discrimination of transgender persons.

Secondly, the creation in the workplace of an environment where all workers feel safe, welcome and respected is crucial. Here, the role of management and employers in countering discrimination is equally important. In the EU, the Employment Equality Directive obliges employers to protect employees from discrimination and to ensure equal treatment on grounds of sexual orientation.¹⁰⁴⁹ However, a Croatian study on the attitudes of employers towards LGBT persons shows that two thirds of the persons in charge of making business decisions in 2002 gave a negative answer to the question: “Would you hire a homosexual person who is ‘out’?”¹⁰⁵⁰ A qualitative study carried out in Serbia in 2010 concludes that there is a general lack of knowledge and focus on discrimination by employers.¹⁰⁵¹

1044. Moscow Helsinki Group and the Russian LGBT Network, “Situation of Lesbians, Gays, Bisexuals and Transgender People in the Russian Federation – 2008”, 2009.

1045. European Commission, Special Eurobarometer 317, “Discrimination in the EU in 2009”, November 2009, available at: www.ec.europa.eu/public_opinion/archives/ebs/ebs_317_en.pdf, accessed 8 December 2010.

1046. Implementation of measures to combat discrimination on grounds of disability in the field of employment having 81% support, *ibid.*

1047. Colgan, F., Creegan, C., McKerney, A. and Wright, T., “Lesbian, Gay and Bisexual Workers: Equality, Diversity and Inclusion in the Workplace: A Qualitative Research Study”, COERC/London Metropolitan University, undated.

1048. The Equal Opportunities Commission, “Overview of the Gender Equality Duty – Guidance for Public Bodies Working in England, Wales and Scotland”, 2007.

1049. The Employment Equality Directive, 2000/78/EC.

1050. Result presented in: Lesbian Group Kontra, “Violence Against Lesbians, Gays and Bisexuals in Croatia: Research Report”, Zagreb, 2006.

1051. Gay Straight Alliance, “Homophobia in Serbia 2010. Research and Analysis of Public Opinion, Views of LGBT Population, Discrimination in the Work Place”, research conducted for the Gay Straight Alliance by the Centre for Free Elections and Democracy (CeSID), 2010.

FRA refers to a German study which argues that diversity management may have an influence on the wellbeing of LGB employees though not necessarily prevent discrimination.¹⁰⁵² According to an ILGA-Europe report, action by employers responding to pressure for legal compliance is yielding to a growing argument about the “business case” for diversity.¹⁰⁵³ ILGA-Europe has formulated the following recommendations to employers on how to promote equality in employment:¹⁰⁵⁴

- build a culture of respect (including representation at all organisational levels, issuing public statements, inclusion in social events);
- support the establishment of LGBT employee networks;
- publicise, implement and monitor adopted equality policies;
- provide training and awareness-raising;
- review terms and conditions of employment;
- recruit, select and promote fairly.

Regarding LGBT employee networks, a number of multinational companies support the creation of LGB networks within their companies and include partner benefits for both LGB and heterosexual workers.¹⁰⁵⁵

Trade unions are important actors in combating discrimination on grounds of sexual orientation and gender identity in the workplace. In 2007 the European Trade Union Confederation (ETUC) adopted the “Seville Manifesto”¹⁰⁵⁶ setting as goals the necessity of promoting awareness on these issues, taking action against prejudices present in trade unions and developing the exchange of good practices targeting discrimination on grounds of sexual orientation and gender identity carried out by trade unions. Furthermore, the ETUC has established collaboration with ILGA-Europe, beginning in 2008 with the organisation of the first Europe-wide trade union conference on LGBT rights.¹⁰⁵⁷ Another conference of trade unions was organised by the Polish trade union OPZZ¹⁰⁵⁸ during the EuroPride held in Warsaw in 2010. The 2008 conference highlighted the low level of awareness inside trade unions of the existence of issues of discrimination on grounds of sexual orientation and even lower for discrimination on grounds of gender identity, but it also showed that in cases in which trade unions have started addressing these issues, they have been likely to build alliances with LGBT NGOs carrying out joint activities and partnerships.¹⁰⁵⁹

In 2010, the European Commission carried out research on trade union practices on non-discrimination and diversity in EU member states, EFTA/EEA states and (potential) EU candidate countries.¹⁰⁶⁰ Results of this study highlighted the existence of various good practices by trade unions raising awareness of discrimination on grounds of sexual orientation. In particular, 19 good practices were identified as targeting specifically discrimination on grounds of sexual orientation. Three of them were Europe-wide projects while the remaining 16 were found in 10 countries (Ireland: one; Italy: two; Netherlands: two; Norway: one; Poland: two; Portugal: one; Slovenia: two; Spain: two; Sweden: one; and the United Kingdom: two).¹⁰⁶¹ The highest proportion, as regards geographical location, of initiatives targeting discrimination on grounds of sexual orientation were found in central and eastern Europe (one in four).¹⁰⁶²

1052. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, p. 66.

1053. Quinn, S. and Paradis, E., “Going Beyond the Law: Promoting Equality in Employment”, ILGA-Europe, Brussels, 2007,

1054. ILGA-Europe, “Good Business Practices: What Can You Do to Promote Equality?”, available at: www.ilga-europe.org/home/issues/employment, accessed 12 August 2010.

1055. Ibid.

1056. European Trade Union Confederation, “The Seville Manifesto”, adopted by the XIth ETUC Congress, Seville, 21-24 May 2007, available at: www.etuc.org/IMG/pdf_CES-Depliant_Manifeste-EN.pdf, accessed 8 December 2010.

1057. European Trade Union Confederation, “Extending Equality – Trade Union in Action! Organising and Promoting Equal Rights, Respect and Dignity for LGTB workers”, available at: www.etuc.org/IMG/pdf_ETUC_inside-2.pdf, accessed 8 December 2010.

1058. Ogólnopolskie Porozumienie Związków Zawodowych (The All Poland Alliance of Trade Unions), http://opzz.org.pl/english/about_us.html, accessed 8 December 2010.

1059. European Trade Union Confederation, “Extending Equality – Trade Union in Action! Organising and Promoting Equal Rights, Respect and Dignity for LGTB Workers”, available at: www.etuc.org/IMG/pdf_ETUC_inside-2.pdf, accessed 8 December 2010.

1060. European Commission, “Trade Union Practices on Anti-Discrimination and Diversity”, available at: www.ec.europa.eu/social/BlobServlet?docId=6163&langId=en, accessed 8 December 2010.

1061. Ibid., pp. 47-56.

1062. Ibid., p. 13.

Participation by trade unions in LGBT Pride parades can be seen as further positive action, showing their commitment to the human rights of LGBT persons, and has been suggested by the ETUC. In 2001, the Confederation of Professional Employees (TCO) was the first trade union in Sweden to participate in the Stockholm Pride as a part of their strategy to show commitment to their LGBT members and it also published an article on LGB members in the Stockholm Pride magazine. ETUC participated in the 2008 EuroPride in Stockholm,¹⁰⁶³ while to date, in at least nine member states (France, Germany, Ireland, Italy, Netherlands, Portugal, Spain, Sweden and the United Kingdom)¹⁰⁶⁴ trade unions have participated in national Pride parades.¹⁰⁶⁵

Other examples of national initiatives by trade unions concern different activities. The Confederation of Professional Employees (TCO) in Sweden included the issue of attitudes towards gays and lesbians in their national survey, and organised a training seminar on trade unions' responsibilities. Subsequently, together with other organisations, the TCO initiated a three-year project to promote equality in employment, with a focus on the church, the armed forces and the police.¹⁰⁶⁶ Education sector trade unions in the United Kingdom have supported LGBT initiatives by introducing in schools the "LGBT History Month" following the success of the "Black History Month".¹⁰⁶⁷

In Italy the trade union CGIL has created a special section dealing with issues concerning sexual orientation and gender identity, together with the establishment of co-operation with the LGB NGO Arcigay in training and awareness-raising programmes in the workplace.¹⁰⁶⁸ In Poland, the trade union ZNP has supported gay and lesbian teachers after homophobic remarks by the government in 2006, and in 2009 the trade union OPZZ has appointed an officer dealing with LGBT issues.¹⁰⁶⁹

In the United Kingdom, the NGO Stonewall has developed the Workplace Equality Index.¹⁰⁷⁰ It is an annual, 25-question survey designed to measure equality in the workplace for LGB people. Participating organisations demonstrate their work with supplementary evidence. Any employer can complete the survey for free on the Stonewall website, to benchmark their performance and compete for a place in the Top 100 Employers. In 2010 Stonewall received 352 submissions covering 24 different employment sectors. Based on similar principles, the International Gay and Lesbian Chamber of Commerce (IGLCC) has developed the International Business Equality Index survey, which measures how companies are performing internationally in issues related to the LGBT community. The index is a tool allowing corporations to draw external comparisons, which illustrate how their competitors are doing as well as internal comparisons that provide a better understanding of their own performance.¹⁰⁷¹

Practical initiative – in the Norwegian Government's action plan 2009-10, "Improving Quality of Life Among lesbians, Gays, Bisexuals and Trans Persons", the initiatives concerning employment include dialogue meetings between responsible ministries and labour market partners as well as a review of central government employment policy. This includes co-ordination of all elements of the central government employment policy which concern, or have a bearing upon, sexual orientation, and the development of a uniform approach to the policy.¹⁰⁷²

1063. European Trade Union Confederation, "Extending Equality – Trade Union in Action! Organising and Promoting Equal Rights, Respect and Dignity for LGTB Workers", available at: www.etuc.org/IMG/pdf_ETUC_inside-2.pdf, accessed 8 December 2010.

1064. "When UNISON in the UK first sponsored the London Pride March a few years ago there was significant union opposition from within the union to spending money on what appeared to some to be an irrelevant activity. However, the presence of the union at the march and the visible commitment to LGBT paid dividends in terms of the number of new union members that were recruited", *ibid.*

1065. *Ibid.*

1066. Quinn, S. and Paradis, E., "Going Beyond the Law: Promoting Equality in Employment", ILGA-Europe, Brussels, 2007. Qvarford, E., "The Union Goes Gay", in Lehtonen, J. (ed.), *Sexual and Gender Minorities at Work*, 2002.

1067. European Commission, "Trade Union Practices on Anti-Discrimination and Diversity", available at: www.ec.europa.eu/social/BlobServlet?docId=6163&langId=en, accessed 8 December 2010, p. 28.

1068. *Ibid.*, p. 36.

1069. *Ibid.*, p. 34.

1070. Stonewall, "Stonewall Top 100 Employers 2010: The Workplace Equality Index", 2010. See: www.business-humanrights.org/Categories/Miscellaneous/Ratingsindexes/WorkplaceEqualityIndexUK, accessed 1 September 2010.

1071. International Gay and Lesbian Chamber of Commerce, www.iglcc.org/en, accessed 18 December 2010.

1072. Norwegian Ministry of Children and Equality, "The Norwegian Government's Action Plan – Improving Quality of Life Among Lesbians, Gays, Bisexuals, and Trans Persons, 2009-2012", Oslo, 2008.

9.6. Conclusions

Sexual orientation has been included as an explicitly prohibited ground for discrimination in the legislation (either in sectoral non-discrimination laws or in comprehensive non-discrimination legislation) of 38 member states. Whilst non-discrimination legislation has been adopted in member states, effective implementation of such laws remains a challenge.

Regarding gender identity, nine member states have included gender identity explicitly in comprehensive non-discrimination legislation. At least 11 member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation. However, there are significant differences as to the scope of these terms and the different laws.

Official data on employment discrimination and complaints on the grounds of gender identity and sexual orientation exist in some member states but remain scarce in others or are not collected in a systematic way. In a few member states equality bodies collected these data. Regarding court cases related to discrimination on grounds of sexual orientation or gender identity in employment, information has been identified in 21 member states. For the European Union member states the European Commission collects data on transposition of relevant EU directives.

This study found a lack of awareness of existing non-discrimination legislation among LGBT persons (including LGBT employees) and employers. Even when LGBT persons know about the legislation, they are often hesitant to file complaints or start proceedings as they are afraid to “come out” to the employer. Effective protection against discrimination is further hampered by the lack of visibility of LGBT persons in the labour market due to the negative societal attitudes towards them in many member states. The situation is particularly problematic for transgender persons. In some member states they resort to sex work due to the significant obstacles and forms of discrimination they face in accessing the labour market. Some studies show that unemployment rates among the transgender community are high.

LGBT persons are subject to homophobia, transphobia and discrimination in the labour market in a number of ways: direct discrimination, harassment, bullying, ridicule and social isolation in the context of the workplace. In order to avoid discrimination many LGBT persons choose not to “come out” at work. Although data vary according to national context, studies demonstrate that the majority of LGBT persons are generally reluctant, or somewhat reluctant, to being out and open in the workplace. Past experiences or fear of homophobia, transphobia and discrimination, the risk of dismissal and the workplace environment all play a role in determining LGBT persons’ decisions about openness in the workplace. Perception about levels of homophobia and transphobia in some sectors may also contribute in influencing decisions on career development and employment perspectives for LGBT persons. Furthermore, concealment of one’s sexual orientation or gender identity affects the health and well-being of LGBT staff and may result in less satisfactory work results.

Invisibility and reluctance to be open at work, together with a relatively low level of recorded complaints, make it difficult to assess the actual extent and permeation of homophobia, transphobia and discrimination in the workplace.

There has been a positive trend in certain Council of Europe member states by involving different actors in countering discrimination in the workplace. Of particular importance has been the role of management and trade unions. Some member states have taken initiatives to combat the particular discrimination against LGBT persons on the labour market. However, these are often pilot projects which may lack sustainability. A more strategic and systemic focus is needed in order to evolve from a project-based approach to a more durable and comprehensive approach.

10. Housing and access to goods and services

Although the right to housing is protected by international human rights instruments, many people remain homeless, poorly housed or lacking effective access to housing for several reasons, including discrimination. Access to goods and services such as hotels, transport, public buildings, financial services and services provided by industries, including insurance companies, is also a problematic area for LGBT persons. This chapter addresses a number of issues related to access to housing and access to goods and services in view of the problems encountered by LGBT persons. The chapter starts with a short overview of the international and European legal framework on access to goods and services. Data on discrimination cases are presented in the following part. It then continues with a section on the international and European legal framework regarding housing, followed by cases of discrimination in this field. Conclusions can be found at the end of the chapter.

10.1. *The international and European legal framework on access to goods and services*

LGBT persons face discrimination in access to goods and services. This may result in receiving poorer quality goods and services, services and goods being obtained on less favourable terms or in a worse manner, or being refused goods or services. As such, access to goods and services is not enshrined as a human right in any human rights convention.

However, Article 21 of the UN Universal Declaration of Human Rights enshrines the right to equal access to public services¹⁰⁷³ and both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contain provisions imposing an obligation on states to ensure the right to access public services¹⁰⁷⁴ and housing, health and education, and to take part in cultural life.¹⁰⁷⁵ In all areas, the non-discrimination principle applies. These rights should thus be applied in a non-discriminatory manner.

Moreover, the UN Convention on the Elimination of All Forms of Racial Discrimination¹⁰⁷⁶ contains, in Article 5(f), a specific provision on the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks, without discrimination. However, the UN convention only applies to “race”.

Access to goods and services is not explicitly covered by the European Convention on Human Rights, although Article 8 of the Convention may be applied to cover some issues in relation to the equal access to goods and services in a non-discriminatory way. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 does not list access to goods and services as a particular area of concern.¹⁰⁷⁷ Instead, it stresses the need for protection against discrimination in relation to education, health, housing and sports.

In the EU context, protection from discrimination in access to goods and services is covered by the Race Equality Directive¹⁰⁷⁸ on the grounds of race and ethnic origin. The scope of this directive includes employment, social security, social protection, health care, social advantages, education, access to goods and services and housing.

EU gender equality legislation also covers access to goods and services (the Gender Goods and Services Directive).¹⁰⁷⁹ In line with the jurisprudence of the Court of Justice of the European Union, gender equality legislation (the Gender Goods and Services Directive) also applies to discrimination

1073. Universal Declaration of Human Rights, GA Resolution 217A (III), UN Doc A/810 at 71 (1948).

1074. Cf. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, Article 25(c).

1075. Cf. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, Articles 11, 12, 13 and 15.

1076. International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

1077. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010.

1078. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive), OJ L 180/22, 19 July 2000.

1079. Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37, 21 December 2004.

resulting from or related to gender reassignment.¹⁰⁸⁰ However, sexual orientation (as well as the grounds of religion or belief, disability and age) is only covered by the prohibition of discrimination in the labour market (the Employment Equality Directive).¹⁰⁸¹ In other words, EU member states are not obliged to legislate against discrimination of LGB persons in accessing goods and services despite the fact that 18 EU member states in fact have extended the Employment Equality Directive to include also access to goods and services. Finally, as discussed before, the question of extending the material scope of the principle of equal treatment between persons irrespective of sexual orientation is being examined by the Council of the European Union with reference to a Commission proposal for a so-called “horizontal” equal treatment directive.¹⁰⁸²

10.2. Discrimination in access to goods and services

Some 27 member states (Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Finland, Germany, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom) explicitly prohibit discrimination on the grounds of sexual orientation in the area of goods and services (either in specific sectoral laws focusing on, among others, goods and services, or in comprehensive non-discrimination legislation).

Regarding gender identity, nine member states have included gender identity explicitly in comprehensive non-discrimination legislation and at least 11 member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation.

Collecting data on discrimination against LGBT persons in access to goods and services is particularly challenging. Many incidents are assumed to remain largely under-reported. However, during the elaboration of this report, information on court cases related to discrimination on sexual orientation and gender identity when accessing goods and services has been detected in six member states of the Council of Europe during the period from 2005 to 2010. Courts or national structures promoting equality have decided on cases in Austria, Denmark, Latvia, Romania, Netherlands and Sweden.¹⁰⁸³

The case in Denmark (2006) involved a transvestite being refused service and told to leave a hi-fi store in the city of Viborg. The incident received significant attention and the company’s headquarters apologised for the incident. The organisation Trans-Denmark pressed charges against the store manager, and the transvestite was awarded compensation.¹⁰⁸⁴ In the case in the Netherlands, the court ruled that it was discrimination on the grounds of sex when a hotel in 2007 cancelled the reservation of a room after it found out that the room would have been used for a party for transvestites.¹⁰⁸⁵ In Latvia a legal services firm published an advertisement in Daugavpils’ local newspaper offering a 50% discount to Russian speakers and refusing legal services to sexual minorities. The Centre for Protection of Consumer Rights found the advertisement discriminatory and fined the firm.¹⁰⁸⁶ In Sweden three cases concerning discrimination on grounds of sexual orientation in access to goods and services were brought to court. The first involved a lesbian patient exposed to a demeaning statement during emergency treatment. The second case concerned the refusal of a dog kennel owner to sell a dog to a lesbian woman. The last case concerned a lesbian couple being turned away from a restaurant for kissing and hugging on its premises. In all three cases the courts found discrimination on grounds of sexual orientation.¹⁰⁸⁷

A recent European research project looked, *inter alia*, at sexual orientation as grounds of discrimination in access to goods and services. The “Study on the use of age, disability, sex, religion or belief, racial or ethnic origin and sexual orientation in financial services, in particular in the

1080. Court of Justice of the European Union, C-13/94, *P. v. S. and Cornwall County Council*, judgment of 30 April 1996.

1081. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), OJ L 303/16, 2 December 2000.

1082. European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final – 2008/0140 (CNS), 2 July 2008.

1083. See (FRA) national contributions.

1084. FRA national contribution on Denmark.

1085. Dutch Equal Treatment Commission, Decision No. 2007-201.

1086. FRA national contribution (legal report) on Latvia.

1087. FRA national contribution (legal report) on Sweden.

insurance and banking sectors”¹⁰⁸⁸ shows that, although to a lesser extent in comparison with other grounds of discrimination, sexual orientation is among the factors of discrimination in access to goods and services, in particular in relation to financial services.¹⁰⁸⁹ The first factor of discrimination in access to financial services is reported to be age, followed by disability, racial/ethnic origin, sex, and then “other” grounds. Sexual orientation comes right after “other grounds” and just before religious belief, which is the last in the list.¹⁰⁹⁰

Apart from official data, LGBT NGOs report incidents throughout member states, in particular in relation to denial of services at cafes, bars or restaurants, discrimination against LGBT persons in the field of sports, discrimination against transgender persons when purchasing insurance policies and discrimination of LGBT NGOs in purchasing services. This issue may affect openly LGBT persons or persons whose sexual orientation or gender identity is perceived to be non-heterosexual.

In a NGO survey carried out in 2005 in Ukraine, 23% of the lesbian and gay respondents stated that they had experienced discrimination in access to goods and services.¹⁰⁹¹ Some evidence was also presented by LGBT NGOs in Georgia,¹⁰⁹² Moldova¹⁰⁹³ and Turkey.¹⁰⁹⁴ Such incidents are seldom reported, and, as underlined in Georgia, LGBT persons also apply strategies to avoid discrimination, either by not being open and visible as LGBT or by avoiding going to places where the risk of harassment is known or assessed to be high. In Moldova, the LGBT NGO GenderDoc-M had experience with LGBT persons being harassed or denied service in taxis, and LGBT NGOs in Turkey reported harassment of transgender women whilst using public transport by bus drivers as well as other passengers.¹⁰⁹⁵ Similarly, the NGO PINK in Armenia reported that in order to avoid harassment, transgender persons, to the extent they can afford it, use the services of taxi drivers they know when they leave their home.¹⁰⁹⁶ The Norwegian Lesbian, Gay, Bisexual and Transgender Organisation (LLH) reported an incident of a gay couple being refused entry onto a bus after having kissed each other at the bus stop.¹⁰⁹⁷

Incidents of discrimination have also been reported from within the LGBT community towards, for example, transgender persons not being allowed entrance to some gay clubs in Istanbul (Turkey) and Roma persons having experienced discrimination when trying to access an LGBT party in Skopje (“the former Yugoslav Republic of Macedonia”).¹⁰⁹⁸

Another important area where discrimination occurs is in the field of insurance. Some interlocutors reported that insurance companies have refused applications from transgender persons. In the Netherlands, several cases are known of insurance companies refusing life insurance to transgender applicants, resulting in difficulties in being able to finance a mortgage and eventually leading to housing problems. Refusing insurance would be discrimination according to Dutch law, since gender identity is regarded as a form of sex discrimination.¹⁰⁹⁹ Another case was detected in Belgium, where a transsexual person wishing to take out life insurance was asked to pay a surcharge.¹¹⁰⁰ One case from Ireland suggests that a transgender person’s premium for life insurance was raised by 75% before gender reassignment surgery.¹¹⁰¹ In Switzerland, transgender persons may reportedly be excluded from accessing additional private health insurance.¹¹⁰²

1088. European Commission DG Employment, Social Affairs and Equal Opportunities, study available at: <http://ec.europa.eu/social/BlobServlet?docId=5599&langId=en>, accessed 17 November 2010.

1089. *Ibid.*, p. 16.

1090. *Ibid.*

1091. Nash Mir, “Ukrainian Homosexuals and Society”, Ukraine, 2007.

1092. Meeting with the Inclusive Foundation, 9 March 2010.

1093. Meeting with GenderDoc-M, 20 May 2010.

1094. Meeting with Lambdaistanbul, Black Pink Triangle, and Pink Life, 22 February-3 March 2010.

1095. Meetings with GenderDoc-M in Moldova, 21 May 2010, and with Lambdaistanbul, Istanbul LGBTTT, Black Pink Triangle and Pink Life in Turkey, 22 February-2 March 2010.

1096. Meeting with PINK, 4 March 2010.

1097. Meeting with the Norwegian Lesbian, Gay, Bisexual and Transgender Organisation (LLH), 26 April 2010.

1098. Meetings with Lambdaistanbul, Istanbul LGBTTT and Black Pink Triangle in Turkey, 22-24 February 2010, and EGAL in Sutka, “the former Yugoslav Republic of Macedonia”, 28 April 2010.

1099. FRA national contribution on the Netherlands.

1100. European Commission DG Employment, Social Affairs and Equal Opportunities, “Study on the use of age, disability, sex, religion or belief, racial or ethnic origin and sexual orientation in financial services, in particular in the insurance and banking sectors”, available at: <http://ec.europa.eu/social/BlobServlet?docId=5599&langId=en>, accessed 17 November 2010, p. 116.

1101. McIlroy, C., “Transphobia in Ireland – Research Report”, Ireland Transgender Equality Network Ireland (TENI), 2009.

1102. National contribution (legal report) on Switzerland.

There are also accounts of several incidents of discrimination when LGBT NGOs attempt to purchase certain services for their work. In Moldova, there are accounts of GenderDoc-M being refused printing services for their material.¹¹⁰³

In May 2007, the Lithuanian Gay League (LGL), while implementing the project “Open and Safe at Work” (supported by EU funding), planned to launch an advertising campaign. Statements like “A lesbian can work at school” and “A gay man can work as a police officer” were to be placed on trolleybuses in the cities of Vilnius and Kaunas.¹¹⁰⁴ The campaign failed, because it was not possible to get the planned advertisement space. The municipalities of both cities, as well as drivers and the company running the buses opposed it, due to the theme of the campaign material. No legal arguments were made in order to justify this opposition. The banning of the campaign was not challenged in court.

A similar incident happened in Austria in 2004, when HOSI-Wien – for its 25th anniversary – wanted to purchase the name of two trains running in Austria. The Austrian State Railways (ÖBB) offers such patronage for a year.¹¹⁰⁵ The name of the train would be announced in printed timetables, over loudspeakers in train stations and on platform displays. It was the intention to name the two trains “Homosexuelle Initiative”. Although the advertising company had already signed the contract with HOSI-Wien, the management of ÖBB eventually refused to approve the sale. Other NGOs, alongside private companies, have had no problems in buying such patronage.

Regarding the area of discrimination in sports, the Council of Europe Committee of Ministers has addressed sports as one of the areas where protection against discrimination is needed. There is little research on discrimination against LGBT persons in sports, but the limited data available suggest that homophobia and transphobia are found in various sports contexts and that there are significant challenges related to being an openly LGBT person in sports.¹¹⁰⁶ There are many forms of problematic issues in this regard. Direct discrimination by team managers, team members, fans or opponents may affect lesbian, transgender, bisexual or gay athletes or players, causing some individuals to abandon their sport. The European Gay and Lesbian Sport Federation (EGLSF) affirms¹¹⁰⁷ that LGBT persons often decide to join gay and lesbian sport groups due to negative experiences in the past in a predominantly heterosexual environment, in which macho culture prevails.¹¹⁰⁸

Discrimination against transgender persons (and intersex persons) may in some cases be related to allegations of unfair competition in sports on grounds of their presumed “physical advantage” deriving from current or previous hormonal treatment. While research in this field is close to non-existent, some cases have recently received coverage in the international press, particularly the repeal of the all-out ban on transgender athletes in the Olympic Games in May 2004. Experts have argued that while the change of regulations in 2004 appeared to be aimed at including transgender athletes in the Olympic Games, it was designed more to protect non-transgender athletes from “false competition”.¹¹⁰⁹ On the positive side, they argue, the change of rules has given more publicity to the problems of transgender athletes, but it has also left them open to the scrutiny of the public as a result of this invasion of their privacy.¹¹¹⁰ As a result of the new rules, which are followed by many other governing sports bodies, transsexual athletes fear being banned from competition sports for several years during the transition process.¹¹¹¹

In 2006 the International Association of Athletics Federations (IAAF) issued a “policy on gender verification”,¹¹¹² which tries to establish threshold criteria to evaluate under which circumstances

1103. Meeting with GenderDoc-M, 20 May 2010.

1104. FRA national contribution on Lithuania.

1105. FRA national contribution on Austria.

1106. FRA national contribution in the 27 EU member states.

1107. European Gay and Lesbian Sport Federation, “Offside, European Document on Discrimination of Gays and Lesbians in Sport”, 1999, available at: www.eglsf.info/EGLSF_Public_Documents/EGLSF_Off%20Side_1999.pdf, accessed 1 December 2010.

1108. Ibid.

1109. Cavanagh, S. and Sykes, H., “Transsexual Bodies at the Olympics: The International Olympic Committee’s Policy on Transsexual Athletes at the 2004 Athens Summer Games”, *Body & Society*, Vol. 12(3), 2006, pp. 75-102, at p. 78.

1110. Green, J. and Worley, K., “The Impacts of Gender Policy in Athletics”, unpublished paper presented at the 20th Biennial Symposium of WPATH in Chicago, 6 September 2007.

1111. Transgender Europe, unpublished policy paper, submitted in the context of PACE Recommendation 1915 (2010), May 2009.

1112. International Association of Athletics Federations, “IAAF Policy on Gender Verification”, available at: www.iaaf.org/mm/document/imported/36983.pdf, accessed 1 December 2010.

transgender and intersex athletes could be allowed to participate in competitions according to their chosen gender. This issue remains highly problematic and the IAAF policy does not thoroughly address discrimination of transgender and intersex persons in sports.

Comprehensive and recent figures concerning cases of discrimination against lesbian, bisexual and gay persons in sports are not available: the latest tentative overview furnished by the EGLSF dates back to 1999. The EGLSF identified cases of discrimination in the field of sports in at least six countries (Belgium: one case; France: one case; Germany: six cases; Italy: two cases; Netherlands: 22 cases; and the United Kingdom: one case).¹¹¹³

Existing research and data mostly focus on professional football, where lack of visibility of gay and bisexual men especially, as well as homophobic expressions being part of the vocabulary used by both fan groups and players against opponents, are highlighted. Recent research (2009) by Stonewall has shown that nearly 70% of respondents have heard anti-gay language at football matches in the previous five years,¹¹¹⁴ and that while 61% of respondents thought that racist abuse had gone down, only 33% held a similar view of anti-gay abuse.¹¹¹⁵

The case of a gay football referee dismissed by the Turkish Football Federation – allegedly because of his sexual orientation – has generated significant media attention and debate in Turkey.¹¹¹⁶ The referee has appealed in the case, which is pending before the courts. The plaintiff has received considerable public and media support in Turkey, and also support from other referees, after the media first disclosed his sexual orientation, and he then decided to come out publicly himself.

Incidents like the above, experienced in the everyday lives of LGBT persons, are rarely reported to the official equality bodies. As noted in other parts of this report, many LGBT persons apply strategies in their everyday lives to avoid such incidents, either by avoiding certain places or by attempting to pass as non-LGBT when out in public. Scarcity of data does not imply, however, that incidents like those described above do not take place in the member states.

10.3. The international and European legal framework on housing

The right to housing is included in several international legally binding instruments, and the United Nations have affirmed its derivation from the right to an adequate standard of living and its centrality to the enjoyment of other economic, social and cultural rights.¹¹¹⁷ Article 25 of the Universal Declaration of Human Rights¹¹¹⁸ and the International Covenant on Economic, Social and Cultural Rights¹¹¹⁹ are among the most important international instruments containing the right to housing. Article 11(1) of the covenant protects the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”.¹¹²⁰

In 1991, the Committee on Economic, Social and Cultural Rights issued its General Comment No. 4 clarifying the meaning and the scope of Article 11.¹¹²¹ The right to adequate housing applies to everyone. The phrase “himself and his family” does not refer to any limitation in the right to housing and does not exclude individuals, households headed by women, or other specific groups. Individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status, and the enjoyment of the right must not be subject to any form of discrimination. The concept of “adequacy” has been defined by the Committee on Economic, Social

1113. European Gay and Lesbian Sport Federation, “Offside, European Document on Discrimination of Gays and Lesbians in Sport”, 1999, available at: www.eglsf.info/EGLSF_Public_Documents/EGLSF_Off%20Side_1999.pdf, accessed 1 December 2010.

1114. Stonewall, “Leagues Behind – Football’s Failure to Tackle Anti-Gay Abuse”, 2009, available at: www.kickitout.org/files/1eb24eb6-/Leagues%20Behind.pdf, accessed 1 December 2010.

1115. *Ibid.*

1116. See, for example: Birch, N., “Gay Referee Gets Red Card in Turkey”, *Independent*, 25 June 2009, www.independent.co.uk/news/world/europe/gay-referee-gets-red-card-in-turkey-1718056.html, accessed 27 August 2010.

1117. Committee on Economic, Social and Cultural Rights, General Comment No 4, Document E/1992/23, paragraph 1.

1118. Universal Declaration of Human Rights, GA Resolution 217A (III), UN Doc A/810 at 71 (1948).

1119. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

1120. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3.

1121. Committee on Economic, Social and Cultural Rights, General Comment No. 4, Document E/1992/23, paragraph 6.

and Cultural Rights as encompassing a series of standard conditions including legal security of tenure, availability of services, materials and infrastructure, affordable housing, habitable housing, accessible housing, housing in a suitable location, and housing constructed and sited in a way that is culturally adequate.¹¹²² Moreover, the enjoyment of the right to housing is closely related to the enjoyment of other human rights such as the principle of non-discrimination and the right not to be subjected to arbitrary or unlawful interference with one's private and family life.

In a 2004 report, Miloon Kothari, the then UN Special Rapporteur on Adequate Housing, as a Component of the Right to an Adequate Standard of Living, classed sexual minorities among groups who require special attention by the government in the area of forced evictions, given their already socio-economically vulnerable position in society. He argued that they would suffer disproportionately from the effects of forced eviction.¹¹²³

The European Social Charter (1961) and the revised European Social Charter (1996) both explicitly protect the right to housing. The latter includes a specific provision on the right to housing in Article 31, which requires states to undertake measures designed to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; and to make the price of housing accessible to those without adequate resources. Housing is also referred to in Article 30 of the revised European Social Charter in the context of the right to protection from poverty and social exclusion, as well as in Article 16 with reference to the promotion of family housing. The right to housing should be implemented without discrimination in accordance with the Charter's open-ended non-discrimination clause, Article E.

The European Convention on Human Rights does not contain an explicit right to housing. Notwithstanding this, indirect reference to the protection of the right to housing can be found in the jurisprudence of the European Court of Human Rights, particularly in relation to violation of Articles 2, 3, 6, 8, 13 and 14 of the Convention.¹¹²⁴ In *Karner v. Austria*¹¹²⁵ and later in *Kozak v. Poland*,¹¹²⁶ both concerning succession to tenancy upon death of the partner in a same-sex relationship, the Court found that exclusion from the succession to a tenancy of a person living in a same-sex relationship was in breach of Article 8 of the European Convention on Human Rights taken in conjunction with Article 14¹¹²⁷ with regard to respect for private life.

The Council of Europe Committee of Ministers has addressed the right to protection against discrimination on the grounds of sexual orientation and gender identity in relation to housing in its Recommendation CM/Rec(2010)5,¹¹²⁸ indicating that the protection also extends to discriminatory evictions and should guarantee equal rights to acquire and retain ownership of land and other property.¹¹²⁹

In an Issue Paper on housing rights published by the Commissioner for Human Rights the non-discrimination principle in access to housing is also highlighted. Lesbian women and gay men are referred to as a group who face not only discrimination in access to housing and inheritance, but also homelessness as a consequence thereof.¹¹³⁰

For the European Union member states the right to housing assistance is protected by Article 34 of the European Union Charter of Fundamental Rights. According to Article 34(3) of the Charter of Fundamental Rights, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices. This right is also mentioned in

1122. Ibid., paragraph 8.

1123. UN, Economic and Social Council, "Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari", E/CN.4/2004/48, 8 March 2004, paragraph 49.

1124. The Commissioner for Human Rights, Recommendation on implementation of the right to housing, CommDH(2009)5, p. 5.

1125. European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003.

1126. European Court of Human Rights, *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010.

1127. European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003, paragraph 43, and European Court of Human Rights, *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010, paragraph 99.

1128. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted 31 March 2010.

1129. Ibid.

1130. The Commissioner for Human Rights, "Housing Rights: The Duty to Ensure Housing for All", Issue Paper, CommDH/Issue Paper(2008)1, p. 10.

other instruments, in particular in the directives prohibiting discrimination on the grounds of racial and ethnic origin¹¹³¹ and gender.¹¹³² Moreover the European Commission has put forward a proposal for a horizontal equal treatment directive,¹¹³³ which would extend protection against discrimination on grounds of sexual orientation (and other grounds) beyond employment to include access to goods and services as well as housing.

The Yogyakarta Principles address the right to housing by stating that everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity. According to Principle 13, this encompasses, amongst other things, security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or marital or family status.¹¹³⁴

Non-discrimination legislation at national level can often be applicable in the field of housing as well. The prohibition of discrimination on grounds of sexual orientation and gender identity in relation to housing rights can also be the subject of specific housing legislation. For example, Norway has several specific acts: the Tenancy Act, the Housing Association Act and the Residential Building Association Act all prohibit discrimination on the basis of sexual orientation and gender when renting out or selling residences. These articles are enforced by the Norwegian Equality and Non-discrimination Ombudsperson.¹¹³⁵

10.4. Discrimination in housing

LGBT persons may experience discrimination in the enjoyment of the right to housing in a number of ways. LGBT persons can face discrimination from family members, landlords, neighbours and flat-mates because of their sexual orientation or gender identity. Discrimination may take the form of refusal to rent or sell a property, as well as unlawful evictions on discovery of the tenant(s)' sexual orientation or gender identity. This in turn seriously impairs the possibility of attaining adequate standards of living as highlighted by international human rights standards and could lead the more vulnerable LGBT persons, in particular young people, to homelessness and marginalisation.

LGBT NGOs have suggested that general attitudes towards LGBT persons have implications for access to housing. Indeed, a Eurobarometer survey¹¹³⁶ has shown that in the European Union on average 11% of respondents said that they would be uncomfortable having a homosexual person as a neighbour while 67% stated that they would be comfortable. Differences, however, exist among different member states: the results of various research projects¹¹³⁷ have identified a group of member states in which attitudes towards homosexual neighbours are more positive (Belgium, Denmark, France, Netherlands and Sweden), and another in which trends tend to be negative (Armenia,¹¹³⁸ Bulgaria, Latvia, Lithuania, Hungary, Romania, the Russian Federation, "the former Yugoslav Republic of Macedonia",¹¹³⁹ Ukraine and Turkey).¹¹⁴⁰

The legal recognition of same-sex partnerships and cohabitation rights in member states could have an impact on issues such as joint ownership of property, inheritance and rights in relation to eviction and resettlement. In countries with no cohabitation rights, same-sex partners lack rights in relation to

1131. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22-26.

1132. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004, pp. 37-43.

1133. European Union, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, COM(2008)426 final – 2008/0140 (CNS).

1134. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006.

1135. National contribution (legal report) on Norway.

1136. European Commission, Special Eurobarometer 296, "Discrimination in the European Union: Perceptions, Experiences and Attitudes", Chapter 9, 2008.

1137. Ibid., and European Values Survey, 1999/2000 data set, analysed in: Stulhofer, A. and Rimac, I., "Determinants of Homonegativity in Europe", *Journal of Sex Research*, Vol. 46/1, 2009, pp. 24-32. Also, Atlas of European Values, www.atlasofeuropeanvalues.eu/homepage.php?lang=en, accessed 20 September 2010.

1138. ILGA-Europe and COC Netherlands, "Forced Out – LGBT people in Armenia", 2007.

1139. "Annual Report on Sexual and Health Rights of Marginalised Communities", Coalition for the Protection and Promotion of the Sexual and Health Rights of Marginalised Communities, 2009.

1140. Esmer, Y., "Radicalism and Extremism", Bahcesehir University, 2009.

housing, for example, in the case of the death of a partner. Indeed, legal notions of a couple (as perceived as “consisting of a man and a woman”) may limit access to housing programmes for LGBT persons. An example is a housing programme in the Russian Federation (the priority national project “Affordable and Comfortable Housing – To Citizens of Russia”).¹¹⁴¹ This housing programme provides state support for young families in need of improved housing conditions as well as preferential loans for the purchase of housing. The programme gives detailed conditions on eligibility for the programme (the age of the spouses should not exceed 35 years of age, and single parents should not be older than 35 with one or more children). Same-sex families are left out of the scope of social support, since two cohabiting partners would not be considered as a family (and therefore cannot participate in the sub-programme).

LGBT persons may hide their sexual orientation or gender identity in order to avoid discrimination in the exercise of their right to housing. As a result of this, many same-sex couples living together may fear that disclosure of their relationship to the landlord or to neighbours may result in discriminatory treatment or evictions. The Serbian lesbian organisation Labris often sees this situation, in particular in those contexts characterised by the invisibility of LGBT persons. On the basis of experience and interviews with lesbian couples, Labris reports that same-sex couples are usually very “discreet”, and that a frequently used strategy is to live together whilst giving the impression to neighbours, landlords and others that they are friends. As a representative from Labris put it: “You can be friends forever here.”¹¹⁴² NGOs in other countries, describing the situation in similar ways, add that living together as friends becomes suspicious, and thus complicated, once people reach a certain age. For instance, the NGO PINK in Armenia affirmed that it is regarded as unusual if two people of the same sex share an apartment if they have reached their thirties.¹¹⁴³ If one is open about one’s sexual orientation (for example, in a LGBT organisation), one could face situations like a case in Armenia from September 2004. In this case an Armenian man found an apartment, agreed all the price details and the date when he would move in. The landlady checked the man’s “record” to make sure that the apartment would be in safe hands. One week after the check she said to the man that the apartment was no longer available as someone else had rented it. She also asked if the man was the one who gave an interview to the newspaper *Aravot* about sexual minorities, which led the man to believe that he was refused housing on the basis of his sexual orientation.¹¹⁴⁴

In Turkey, the NGO Lambdaistanbul links complications in the access to housing for LGBT persons to gender expectations and the normative requirement to marry. Also in Turkey, it is seen as unusual to live alone after a certain age, and many landlords prefer to rent out to married couples – in particular single men are unwanted as tenants. Turkish LGBT NGOs reported several incidents where two persons of the same sex sharing an apartment were forced to move due to allegations that they were having a same-sex relationship (regardless of whether it was true or not).¹¹⁴⁵ Such cases tend not be brought to court because many do not want the exposure that could come with such a case.

Transgender persons may encounter specific discrimination in trying to exercise their right to housing, such as refusal to rent accommodation or marginalisation to specific areas of the cities, as well as hostility from neighbours. In relation to this in Turkey, as real estate prices are thought to be negatively affected by the presence of a local transgender community, many real estate agents or landlords will not sell/rent housing to transgender persons, and occasional “campaigns” to get transgender persons out of certain areas have created several conflicts in Istanbul.¹¹⁴⁶ The “campaigns” mentioned have also had a violent character: in 1996, transgender persons living in Ulker Street in Istanbul were attacked by other persons living in the street because they did not want them in the neighbourhood.¹¹⁴⁷ No case was filed against the perpetrators. In 2006, similar attacks happened in the neighbourhood of Eryaman in Ankara.¹¹⁴⁸

1141. The Federal Targeted Programme Housing for 2002-10: approved by decision of the Government of the Russian Federation of 17 September 2001, *Collected Legislation of the Russian Federation*, No. 39, Article 3770, 2001. Information about the programme in Russian is available at: www.rost.ru/projects/habitation/habitation_main.shtml, accessed 21 January 2010.

1142. Meeting with Labris in Serbia, 6 April 2010.

1143. Meeting with PINK in Armenia, 4 March 2010.

1144. Carroll, A. and Quinn, S., “Forced Out – LGBT People in Armenia”, report of a ILGA-Europe/COC fact-finding mission, ILGA-Europe and COC Netherlands, 2009.

1145. Meetings with Lambdaistanbul in Istanbul, 22 and 25 February 2010, and Kaos GL in Ankara, 1 and 3 March 2010.

1146. Meetings with Lambdaistanbul, 22 February 2010, and Istanbul LGBTTT, 23 February 2010, in Istanbul.

1147. The case is described in Selek, P., *Masks, Cavaliers, Transgender Women*, İstiklal Publications, 2007.

1148. Meeting with Pink Life in Ankara, 1 March 2010, and Öz, Y., “The Situation Concerning Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in Turkey”, national contribution (legal report), 2010.

Findings from the United Kingdom suggest that transgender persons find themselves in the least protected forms of housing. Research shows that fewer transgender persons own a house with a mortgage and thus live in social housing, or find themselves in a type of informal homelessness, such as living with parents or lodging with someone.¹¹⁴⁹

Young LGBT persons are particularly vulnerable in relation to the enjoyment of the right to housing. Following their “coming out” or disclosure to the family of their gender identity, some young people may face hostility, marginalisation and rejection in the family environment, and are forced or pressured into leaving the family home. This in turn renders LGBT youth particularly vulnerable to homelessness and to difficulties in finding alternative accommodation. A 2004 study from the United Kingdom showed that 29% of lesbian respondents and 25% of gay male respondents were made homeless when they “came out” to their parents.¹¹⁵⁰ In a 2002 Slovakian study, 20% of the LGB respondents were expelled from home.¹¹⁵¹ Data from Scotland in 2008 suggests that housing can become very difficult for transgender persons, when families, flat-mates or neighbours turn out to be transphobic. Some 25% of the respondents in Scotland had to move out of their homes due to their transgender identities; whilst 4% of the respondents (3 out of 71 respondents) were homeless at the time of the survey.¹¹⁵² This is a particular problem for LGBT persons in member states where the level of income is relatively low and/or where young people traditionally live with their families, making it difficult to find (shared) housing, as emphasised by, for example, several NGO representatives in Albania¹¹⁵³ and Moldova.¹¹⁵⁴

While good practices concerning the right to housing are not consistently applied or developed throughout Europe, an initiative in Belgium points in the right direction in order to combat the problem of discrimination in access to housing. It has developed a strategy in order to raise awareness of the existence of non-discrimination legislation in the housing market,¹¹⁵⁵ which includes, *inter alia*, prohibition of discrimination on grounds of sexual orientation. The project targets applicants but it is also aimed at landlords and people working in real estate who are given training on issues concerning discrimination in access to housing.

10.5. Conclusions

27 member states explicitly prohibit discrimination on grounds of sexual orientation in access to goods and services. Regarding gender identity nine member states have included gender identity explicitly in comprehensive non-discrimination legislation¹¹⁵⁶ and at least 11 member states treat discrimination on grounds of gender identity or gender reassignment as a form of sex or gender discrimination in comprehensive non-discrimination legislation.

Incidents of discrimination in access to goods and services are generally not reported and LGBT persons may turn to concealment of their sexual orientation or gender identity, as well as refraining from going to certain places, in order to avoid discrimination. However, cases have been reported by NGOs in relation to discrimination in restaurants, bars and cafes refusing to serve LGBT persons. In other sectors, such as public transport, sports and insurance, episodes of discrimination against LGBT persons have occurred in several member states. Official information on court cases related to

1149. Whittle, S., Turner, L. and Al-Alami, M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, Equalities Review, Wetherby, 2007, p. 59.

1150. Averill, S., “How Can Young People Be Empowered to Achieve Justice When They Experience Homophobic Crime?”, thesis, Middlesex University, 2004, www.schools-out.org.uk/research/docs/Partners%20An%20update%20to%20tackling%20homophobia.pdf, accessed 30 July 2008.

1151. Daucikova, A., Jójárt, P. and Siposova, M., “Report on Discrimination of Lesbians, Gay Men and Bisexuals in Slovakia”, Documentation and Information Centre, Bratislava, 2002.

1152. Scottish Transgender Alliance, “Transgender Experiences in Scotland – Research Summary”, Equality Network, Edinburgh, 2008, p. 11.

1153. Meetings in Tirana, 30 April-4 May 2010.

1154. Meeting with HomoDiversus in Chişinău, 21 May 2010.

1155. Centre for Equal Opportunities and Opposition to Racism, “Housing”, available at: www.diversiteit.be/?action=onderdeel&onderdeel=79&titel=Housing&setLanguage=3, accessed 17 November 2010.

1156. However, no standard wording is followed to cover gender identity in these member states. Instead of “gender identity”, the legislation in these seven member states may refer to “gender expression”, “gender identification”, “transgender identity”, “gender change”, “gender reassignment” or “sexual identity”. There may be significant differences as to the legal scope of these terms.

discrimination on sexual orientation and gender identity when accessing goods and services has been detected in only six member states of the Council of Europe during the period from 2005 to 2010.

LGBT NGOs have also themselves experienced discrimination when attempting to purchase services such as printing or advertising space. It seems reasonable to assume that lack of significant data concerning discrimination of LGBT persons in access to goods and services may be connected to severe under-reporting of incidents, and this may in turn affect the assessment of the extent to which this kind of discrimination is widespread and to what degree it may affect the life of lesbian, gay, bisexual and transgender persons.

Research on discrimination of LGBT persons in access to adequate housing remains scarce but there is evidence of LGBT persons being refused permission to purchase or rent properties or being unlawfully evicted from their rented accommodation. Discrimination may also range from single incidents of discrimination as the exclusion of same-sex couples from public housing programmes, to general social norms expecting two people of the opposite sex to settle and found a family. Therefore, same-sex couples often pretend to be living together as friends and avoid disclosure of their relationship to landlords as well as to neighbours for fear of hostile reactions.

Access to housing is particularly problematic for LGBT youth who may not be able to live with their family, because of lack of acceptance. Particular problems may also be faced by transgender people whose access to adequate housing can be jeopardised by marginalisation in some neighbourhoods or through explicit attempts by local residents to force them to leave some areas. Homophobia, transphobia and discrimination in access to housing may thus have wider economic consequences in the form of homelessness.

11. Health

This chapter gauges the extent to which LGBT persons enjoy their right to the highest attainable standard of health. The first section focuses on the international and European legal framework on the right to enjoyment of the highest attainable standard of health. The second section discusses the enduring influence of medical classifications on definitions of homosexuality and gender identity. The third section provides an overview of research on the health situation of LGBT people. The chapter also looks into transgender-specific health care and the stigmatisation of LGBT persons related to HIV/Aids. The last section outlines data and research on homophobia, transphobia and discrimination in access to health services, including the attitudes of health professionals.

11.1. *International and European legal framework*

The right to enjoyment of the highest attainable standard of health is a fundamental right indispensable for the exercise of other human rights and is recognised in numerous international instruments. Article 25 of the Universal Declaration of Human Rights affirms that everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.¹¹⁵⁷

The obligation to respect and fulfil the right to health is laid down in Article 12(1) of the UN International Covenant on Economic, Social and Cultural Rights. It imposes an obligation on the States Parties to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, while Article 12(2) enumerates a number of “steps to be taken by the states parties ... to achieve the full realisation of this right”.¹¹⁵⁸

The Committee on Economic, Social and Cultural Rights has highlighted that the right to the highest attainable standard of health contains both freedoms and entitlements.¹¹⁵⁹ The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. Health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and in reality, without discrimination on any of the prohibited grounds,¹¹⁶⁰ including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/Aids), sexual orientation and civil, political, social or other status.¹¹⁶¹ The committee has also recognised gender identity as a prohibited ground of discrimination in its 2009 general comment.¹¹⁶²

In Europe, Article 11 of the revised European Social Charter guarantees the right to protection of health¹¹⁶³ and stipulates that states should take appropriate measures designed to, *inter alia*, provide advisory and educational facilities for the promotion of health. Moreover, Article 13 stipulates the right to medical assistance. This should be put in place with a view to ensure the effective exercise of the right to protection of health, by the state directly or in co-operation with public or private organisations. The enjoyment of the right to protection of health shall be secured without discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.¹¹⁶⁴ Discrimination due to sexual orientation or gender identity is not explicitly addressed by the Charter but the Charter includes an open-ended non-discrimination provision in Article E with reference to the enjoyment of all rights set out in the charter.

1157. United Nations, Universal Declaration of Human Rights, Article 25, 1948.

1158. United Nations, International Covenant on Economic, Social and Cultural Rights, Article 12(1), adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force on 3 January 1976 in accordance with Article 27. Andorra is the only Council of Europe member state not signatory to the ICESCR.

1159. Committee on Economic, Social and Cultural Rights, General Comment No. 14 on the right to the highest attainable standard of health, paragraph 8, 2002.

1160. *Ibid.*, paragraph 12(b).

1161. *Ibid.*, paragraph 18.

1162. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009), paragraph 32.

1163. The European Social Charter was adopted in 1961 (ETS No. 35) and in a revised version in 1996 (ETS No. 163).

1164. The European Social Charter (revised), Part V, Article E.

Access to the highest attainable standard of health is a crucial issue for transgender persons who choose to undergo gender reassignment treatment. The European Court of Human Rights has established a positive duty for states to provide for the possibility of undergoing surgery leading to full gender reassignment as well as having this covered by insurance plans as “medically necessary” treatment. In *van Kück v. Germany*¹¹⁶⁵ the Court affirmed that “the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in one of the most intimate areas of private life, appears disproportionate”.¹¹⁶⁶ In *L. v. Lithuania*,¹¹⁶⁷ the Court indicated that a legislative gap concerning full gender reassignment surgery left the applicant “in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity”.¹¹⁶⁸

In three different recommendations of the Council of Europe Committee of Ministers references are made to the highest attainable standard of health applicable to LGBT persons. Firstly, the Committee of Ministers has stressed that “both women and men must have a non-negotiable right to decide over their own body, including sexual and reproductive matters”.¹¹⁶⁹ Secondly, the Committee of Ministers has urged states to “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”.¹¹⁷⁰ The Committee of Ministers has also stressed that while developing coherent and comprehensive policies and strategies addressing health care needs in multicultural societies, the individual’s gender and sexual orientation must be taken into consideration.¹¹⁷¹

Within the EU, Article 35 of the Charter of Fundamental Rights of the European Union provides that “everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”. Furthermore, Article 35 states that “a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”. Read in conjunction with the non-discrimination provision in Article 21 of the Charter, it provides a clear prohibition of discrimination on grounds of sexual orientation in the access to health.

The standards outlined above have been referred to by different UN Special Rapporteurs. In 2004, the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health stated that “the right to health, including sexual and reproductive health, encompasses both freedoms, such as freedom from discrimination, and entitlements”.¹¹⁷² In 2009 the UN Special Rapporteur pointed to the stigmatisation which vulnerable communities, including LGBT persons, face and which “prevents legislative and policymaking institutions from adequately addressing health-related matters”. He further pointed out that “attempts to “cure” those who engage in same-sex conduct are not only inappropriate, but have the potential to cause significant psychological distress and increase stigmatisation of these vulnerable groups”.¹¹⁷³ The UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment referred in 2001 to “information according to which members of sexual minorities have

1165. European Court of Human Rights, *van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003.

1166. *Ibid.*, paragraph 82.

1167. European Court of Human Rights, *L. v. Lithuania*, Application No. 27527/03, judgment of 11 September 2007.

1168. *Ibid.*, paragraph 59.

1169. Council of Europe Committee of Ministers Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, paragraph 44 .

1170. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies, section VII, “Health”, paragraph 33.

1171. Sexual orientation is mentioned under the heading “General considerations” in the appendix to Committee of Ministers Recommendation Rec(2006)18 on health services in a multicultural society, adopted by the Committee of Ministers on 8 November 2006 at the 979th meeting of the Ministers’ Deputies.

1172. United Nations, “The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health – Report of the Special Rapporteur, Paul Hunt”, E/CN.4/2004/49, paragraph 24.

1173. United Nations, Human Rights Council, “Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover”, 27 April 2010, A/HRC/14/20, paragraph 23, available at: www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf, accessed 11 December 2010.

received inadequate medical treatment in public hospitals – even after having been victims of assault – on grounds of their gender identity”.¹¹⁷⁴

The Yogyakarta Principles stress the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity, in Principle 17, which includes sexual and reproductive health as fundamental aspects of this right. Apart from mentioning access to health care facilities, Principle 17 also refers to access to goods and services, including in relation to sexual and reproductive health, and to medical records, without discrimination on the basis of sexual orientation or gender identity. Protection against medical abuse is stressed in Principle 18 of the Yogyakarta Principles: “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”¹¹⁷⁵

11.2. Medical classifications

11.2.1. Homosexuality perceived as an illness

The World Health Organization removed homosexuality from the International Classification of Diseases in 1990.¹¹⁷⁶ In 1973 the American Psychiatric Association had already removed homosexuality (which was defined as a disorder) from the *Diagnostic and Statistical Manual of Mental Disorders*.¹¹⁷⁷ However, in some member states health institutions and medical practitioners still apply definitions of homosexuality that perceive it as a disease. Examples hereof have been identified in many member states, including in Croatia, Montenegro, Russian Federation, Serbia and Turkey.

In Montenegro, a psychiatrist stated in the daily newspaper *Pobjeda* in 2007 that homosexuality is a “disorder”. The statement remained allegedly unchallenged by other Montenegrin psychiatrists or medical professionals.¹¹⁷⁸ Also, the Director of the Neuropsychiatric Clinic in Podgorica publicly stated that homosexuality is an illness. The Chamber of Medical Physicians opposed this statement.¹¹⁷⁹

In Turkey, LGBT organisations reported that LGB persons have been diagnosed as sick because of their sexual orientation, and psychological therapy was prescribed for them. NGO reports suggest that several young people were advised to seek “treatment” once their parents learned of their sexual orientation. The reaction from health professionals included prescribing anti-depressants to “cure” lesbianism.¹¹⁸⁰ There are also cases of psychiatrists and psychologists expressing in the Turkish media that homosexuality and transsexuality are illnesses that have to be treated.¹¹⁸¹

The Serbian Health Society applied until 2008 the definition of homosexuality as a disease. However, even after 2008 publicly known psychologists and psychiatrists have openly declared that homosexuality is “a type of deformity, because such couples cannot have children”.¹¹⁸² Similar characteristics are also found in some medical textbooks in Serbia, for example, in a biology textbook for third grade students of medical high schools, where it is stated that “there are also such characteristics which in a lesser form deviate from normal behaviour and are considered as deviant forms of behaviour. Such characteristics include, for example, the tendency towards criminal

1174. “Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, UN Doc. A/56/156, 3 July 2001, paragraph 22.

1175. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, Principles 17 and 18.

1176. World Health Organization, International Classification of Diseases, 1990, www.who.int/classifications/icd/en, accessed 20 August 2010.

1177. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 1994 (fourth and latest edition).

1178. Lazarevic, N., “Montenegro’s Gay Community Stays Hidden to Survive”, *BalkanInsight.com*, 19 October 2009, www.balkaninsight.com/en/main/analysis/22983, accessed 28 December 2009.

1179. Meeting with the Ministry of Health, 7 May 2010. National contribution on Montenegro (sociological report), page 9.

1180. Human Rights Watch, “We Need a Law for Liberation”, 2008, www.hrw.org/en/node/62197/section/8, accessed 26 May 2010.

1181. Meetings with LGBT NGOs in Turkey, 20 February-3 March 2010. National contribution on Turkey (sociological report), page 16.

1182. “BGD Novine Jovan Marić supports Đilas”, 11 August 2009, [http://www.pressonline.rs/sr/vesti/vesti_dana/story/136303/\(VIDEO\)+%C4%90ilas%3A+%C5%A0teta+od+nemira+ve%C4%87a+od+milion+evra.html](http://www.pressonline.rs/sr/vesti/vesti_dana/story/136303/(VIDEO)+%C4%90ilas%3A+%C5%A0teta+od+nemira+ve%C4%87a+od+milion+evra.html), accessed 15 March 2011.

behaviour, the use of alcohol and drugs, homosexuality, as well as many other characteristics which deviate from the standard of usual behaviour.”¹¹⁸³

In the Russian Federation, an internal order of the Ministry of Health refers to bisexuality and homosexuality as deviations of sexual attraction. In the section “Disorders of sexual preferences”, the “criteria of sexual norm” are formulated as: “twosome, heterosexuality”. Any deviation from these criteria is considered as a sexual preference disorder.¹¹⁸⁴

In 2009 in Croatia, a professor stated in an interview that homosexuality is the way for society to enter decadence. The Lesbian Group Kontra, Iskorak and the Women’s Network of Croatia submitted a proposal for the withdrawal of the scientific title of the university professor and doctor of medicine to the Medical School of the University of Zagreb. Earlier, in 2003, the Croatian Medical Chamber had reprimanded the same professor for publicly stating that homosexuality is a disease that can be treated. However, following the statements in 2009 no disciplinary sanction was taken and the NGOs did not receive an answer to their proposal.¹¹⁸⁵

11.2.2. Gender Identity Disorder as a mental disease

Two widely used systems for classifying mental illnesses have a direct impact on the way member states of the Council of Europe approach transgender persons when they access health services. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM) of the American Psychiatric Association¹¹⁸⁶ includes the term “gender identity disorder” as a mental health disorder and uses it to describe persons who experience significant gender dysphoria, that is, discontent with the gender assigned at birth.¹¹⁸⁷ Secondly, the WHO “International Statistical Classification of Diseases and Related Health Problems” (ICD) lists gender identity disorders including transsexualism among mental and behavioural disorders.¹¹⁸⁸ Transgender persons are labelled as having a mental disorder.

This study has identified problems and obstacles for many transgender persons in accessing health services due to these classification systems. There is growing support for the approach that no mental disorder diagnosis is necessary in order to give access to medical treatment for a condition in need of medical care.¹¹⁸⁹ The World Professional Association for Transgender Health called for the depathologisation of transgender people’s identities¹¹⁹⁰ and transgender activists from 44 countries worldwide have joined forces in the Stop Trans Pathologization 2012 campaign.¹¹⁹¹ Activists have pointed out that the effects of depathologisation should not have a negative impact on the already frail reimbursement possibilities for trans-specific health care and access to legal gender recognition procedures where such a diagnosis is a precondition.

In at least two member states governments have started to reconsider their internal classification systems. France announced in a decree of February 2010¹¹⁹² that it would no longer classify transsexuality as a psychiatric ailment.¹¹⁹³ It does not eliminate psychiatric control, but removes certain

1183. Authors D. M., M. A., A. S., V. D., *Biology* 3, ninth edition, Beograd: Zavod za udžbenike i nastavna sredstva, chapter on “Genetic conditioning of mental disorders”, p. 92.

1184. On Approval of Clinical Guidelines “Models of Diagnosing and Treating Mental and Behavioural Disorders”: Order of the Ministry of Health of the Russian Federation of 6 August 1999.

1185. Lesbian Group Kontra, “Violence Against Lesbians, Gays and Bisexuals in Croatia: Research Report”, Zagreb, 2009.

1186. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition, Washington DC, 2000.

1187. Currently under review in the DSM-V revision planned for publication in 2013; the current proposal is for the expression “Gender incongruence” to be used, which represents a less rigid understanding of gender binary and is less pathological than definitions in DSM-IV. See: www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482#, accessed 1 December 2010.

1188. World Health Organization, “International Statistical Classification of Diseases and Related Health Problems”, 10th Revision, version: <http://apps.who.int/classifications/apps/icd/icd10online>, accessed 27 September 2010.

1189. See in this regard also the Commissioner for Human Rights, “Human Rights and Gender Identity”, Issue Paper, Strasbourg, 2009.

1190. World Professional Association for Transgender Health statement urging the de-psychopathologisation of gender variance worldwide, 2010, www.wpath.org/publications_public_policy.cfm, accessed 27 September 2010.

1191. Stop Trans Pathologization 2012: Supports, www.stp2012.info/old/en/supports, accessed 27 September 2010.

1192. Decree No. 2010-125 of 8 February 2010 “portant modification de l’annexe figurant à l’article D. 322-1 du code de la sécurité sociale relative aux critères médicaux utilisés pour la définition de l’affection de longue durée ‘affections psychiatriques de longue durée’”, www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021801916, accessed 27 September 2010.

1193. FRA national contribution (legal report) on France, p. 40.

health aspects from the list of “long-term psychiatric conditions” and inserts them in the category of “long-term affections”, relating to “severe” or “invalidating pathologies”.¹¹⁹⁴ The impact of this change cannot yet be assessed and clarifications are still needed. The issue of the necessity of sterilisation as a legal requirement is the subject of fierce debate between the French authorities and French transgender groups.¹¹⁹⁵

As of 1 January 2009, Sweden defines three transgender identities as psychiatric disorders,¹¹⁹⁶ whilst the others are no longer classified as such.¹¹⁹⁷ The decision was taken by the National Board of Health and Welfare.

11.3. The health situation of LGBT persons

11.3.1. General health situation

This section presents findings from studies which focus on the health situation of LGBT persons in Council of Europe member states. A general observation is that many studies report a higher risk of poor health for LGBT persons than for their heterosexual peers. For example, findings from the Swedish National Institute for Public Health¹¹⁹⁸ indicate that a significant proportion of LGBT persons are in poorer health than the population at large. Particularly, homosexual and bisexual women aged 45-64 and homosexual and bisexual men aged 16-29 had a worse general health condition than the rest of the population, with common symptoms of anxiety, worry and anguish. Transgender persons of all age-groups reported worse health conditions than homosexual or bisexual persons. In Ireland, the Equality Authority report “Access to Health Services for Transsexual People” showed similar results.¹¹⁹⁹ A Belgian study found that LGB persons run a higher risk of getting a chronic disease.¹²⁰⁰

Studies in member states found an alarmingly high percentage of LGBT persons who had attempted or considered committing suicide. In a Danish study, it was found that the percentage of LGBT persons who have considered (16%) or attempted (11%) suicide is about twice as high as the population average.¹²⁰¹ It was further found that bisexuals had more thoughts of suicide than lesbians, gay men and transgender persons. Some 61% of the suicide attempts were carried out by persons below the age of 20, and even 6% below the age of 12.

Figures from Sweden also show that it is much more common among LGBT persons to have considered suicide.¹²⁰² In Sweden¹²⁰³ 40% of 298 transgender respondents reported a lower level of mental health compared with LGB respondents. Furthermore, 21% of the respondents had attempted suicide. Similar figures were found in the Transgender EuroStudy where 29.9% reported having attempted to end their lives.¹²⁰⁴ In a French survey conducted by two NGOs, 34% of young transgender persons aged 16-26 had attempted to commit suicide.¹²⁰⁵

1194. See Article R. 322-6 of the Social Security Code.

1195. See the response of the French Minister of Justice to parliamentary questions: www.senat.fr/basile/visio.do?id=qSEQ100714524.

1196. F64.0 Transsexualism, F64.8 Other gender identity disorders, and F64.9 Gender Identity Disorder, unspecified.

1197. F64.1 Dual-role transvestism, F64.2 Gender identity disorder of childhood and F65.1 Fetishist transvestism in the Swedish version of ICD-10, called KSH-97. KSH97 (in Swedish): www.socialstyrelsen.se/publikationer1996/1996-4-1.

1198. Swedish National Institute for Public, “Health on Equal Terms”, 2006: www.fhi.se/PageFiles/4351/A2008_1_health%20on%20equal%20terms.pdf.

1199. Collins, E. and Sheehan, B., “Access to Health Services for Transsexual People”, The Equality Authority, 2004.

1200. Heeringen, K. and Vincke, J., “Suicidal Acts and Ideation in Homosexual and Bisexual Young People: A Study of Prevalence and Risk Factors”, *Social Psychiatry and Psychiatric Epidemiology*, 35 (11), pp. 494-499.

1201. Gransell, L. and Hansen, H., *Lige og ulige? Homoseksuelle, biseksuelle og transkønnedes levevilkår*, CASA and Landsfoeningen for bøsser og lesbiske, Copenhagen, 2009, p. 121.

1202. Swedish National Institute for Public Health, “Health on Equal Terms”, 2006.

1203. Swedish National Institute for Public Health, “Vem får man vara i vårt samhälle?”, available at: www.fhi.se/PageFiles/3412/R200825_Vem_far_man_vara0810.pdf, accessed 29 November 2010.

1204. Whittle, S., Turner, L., Combs, R. and Rhodes, S., “Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care”, April 2008, p. 49.

1205. Homosexualités & Socialisme (HES), Mouvement d’Affirmation des jeunes Gais, Lesbiennes, Bi et Trans (le MAG-Jeunes LGBT), “Enquête sur le vécu des jeunes populations trans en France”, 2009, p. 1, available at: www.hes-france.org/IMG/pdf/Rapport_Prelim_Enquete_JeunesTrans_Avril2009_Vfinal.pdf, accessed 29 November 2010.

A Norwegian report from 2007 shows that young lesbian and gay people often experience loneliness or depression, and are over-represented among the youth who use illegal drugs.¹²⁰⁶ Another Norwegian report from 2007 shows that the relatively high level of bullying, harassment and violence to which LGB youth are exposed is “associated with high levels of health risk behaviours and contact with the child welfare system. LGB teenagers who have been exposed to severe physical maltreatment reported higher levels of sexual-risk behaviours, substance abuse, suicide ideation, and loitering about in the city”.¹²⁰⁷

In the United Kingdom research showed that 20% of lesbian and bisexual women have deliberately harmed themselves, compared to 0.4% of the general population; 16% of respondents under the age of 20 have attempted suicide compared to 0.12% of the total population under 18.¹²⁰⁸

Experiences of homophobia, harassment and marginalisation in society at large have a negative impact on the health of LGBT persons.¹²⁰⁹ Homophobia, transphobia and discrimination in the health sector further exacerbate this by keeping LGBT persons from seeking health services, advice and treatment, sometimes leading to suicide or thoughts about it as reported in a study on Ireland.¹²¹⁰ Negative impacts on the health of transgender persons can also be seen in statistics: 12% of the transgender respondents in a Swedish study reported bad health (as opposed to 6% of the general population). Transgender persons were also reported as having worse mental health than gay men or lesbian respondents. Transgender persons were also more likely to have sleeping problems.¹²¹¹

Practical initiative: In Ireland two NGOs commissioned researchers to conduct the first comprehensive study on LGBT mental health and well-being in the country. The study was funded by the National Office for Suicide Prevention.¹²¹²

11.3.2. Lesbian and bisexual women’s health

No systematic analysis has been carried out on whether lesbian and bisexual women face specific problems in comparison to both heterosexual women and gay men. The invisibility of lesbian and bisexual women in campaigns against HIV/Aids or against sexually transmitted infections (STIs), as well as lack of specific knowledge on the part of health care personnel on the specific risks lesbian and bisexual women face, have over the years contributed to false perceptions regarding the necessity to undergo screenings and to engage in safe sex. Therefore, lesbian and bisexual women’s reluctance to have regular health checks may stem from the perception, reproduced at the level of prophylactic measures, that same-sex activity between women does not entail significant risks of contracting sexually transmitted infections.¹²¹³ This has also been pointed out as a problematic issue worldwide: “Even today there is little research on transmission of HIV virus and other sexually transmitted infections (STI) between two women, as compared to the research made for gay men. This leads to perceptions among lesbian and bisexual women themselves that they are immune to contracting sexually transmitted infections when having sex with another woman”.¹²¹⁴

1206. Hegna, K., “Homo? Betydningen av seksuell erfaring, tiltrekning og identitet for selvmordsforsøk og rusmiddelbruk blant ungdom. En sosiologisk studie”, Norsk institutt for forskning om oppvekst, velferd og aldring (NOVA), Rapport 1/07, Oslo, 2007, p. 87.

1207. Moseng, B. U., “Vold mot lesbiske og hoomfile tenåringer. En representative undersøgelse av omfang, risiko og forbrydelse – Ung i Oslo 2006”, Norsk institutt for forskning om oppvekst, velferd og aldring (NOVA), Rapport 19/07, Oslo, 2007, p. 53.

1208. Hunt R. and Fish J., “Prescription for Change: Lesbian and bisexual women’s health check”, Stonewall: London, 2008, p. 4, also quoted in European Union Agency for Fundamental Human Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 2 – The Social Situation”, 2009, p. 84.

1209. For example: National Institute for Working Life, “Arbetsvillkor och utsatthet”, Sweden, 2003; Jenett, M., “Stand Up For Us – Challenging Homophobia in Schools”, Crown Copyright, 2004.

1210. The Equality Authority and the Health Service Executive, “Recognising LGB Sexual Identities in Health Services, The Experiences of Lesbian, Gay and Bisexual People with Health Services in North West Ireland”, 2007, p. 66.

1211. Statens Folkhälsoinstitut, “Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer”, FHI, Östersund, 2005.

1212. Mayock, P., Bryan, A., Carr, N., Kitching, K., “Supporting Lesbian, Gay, Bisexual and Transgender Lives: A Study of the Mental Health and Well-Being of Lesbian, Gay, Bisexual and Transgender People”, 2009, also quoted in European Union Agency for Fundamental Human Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 2 – The Social Situation”, 2009, p. 81.

1213. Hunt, R. and Fish, J., “Prescription for Change. Lesbian and Bisexual Women’s Health Check”, Stonewall, 2008, p. 20.

1214. ILGA, “Lesbian and Bisexual Women’s Health: Common Concerns, Local Issues, Sexually Transmitted Infection and HIV/Aids, report 2006”, 2006, p. 20.

In addition to little awareness of the risks of contracting STIs, lesbian and bisexual women are also less aware in comparison to heterosexual women of the necessity for screening against cancer risks, such as for cervical cancer and breast cancer. Research does not show clear results on any increased risk level for bisexual or lesbian women, but some have suggested that the lower level of screening for cervical cancer renders it more difficult to discover it at an earlier stage and the lower number of pregnancies among lesbian and bisexual women increases the risk of having breast cancer¹²¹⁵ and other cancers such as ovarian cancer.¹²¹⁶ Research from the United Kingdom has highlighted the fact that when it comes to screening related to cancer risks, lesbian and bisexual women tend to underestimate the necessity of having a smear test or that they are refused one by health practitioners when they request one.¹²¹⁷ Lack of trust of health practitioners and their questionable sensitivity to LGBT issues further complicates the possibility of lesbian and bisexual women regularly seeing a gynaecologist. Research undertaken in Bosnia and Herzegovina, Hungary, Moldova, Romania and “the former Yugoslav Republic of Macedonia” has shown that the attendance rate in the five countries was low.¹²¹⁸

Positive measures in relation to specific health issues of lesbian and bisexual women relate mainly to the inclusion of lesbian health-related issues in prevention programmes and in training for health care personnel. One positive example in this direction may be the adoption of a health plan which explicitly includes lesbian health among its fields of action. Such was, for instance, the strategy adopted by the Department of Health in Ireland in 1997, which included in its Plan for Women’s Health a section devoted to the specific health care needs of lesbian women. According to the document, health professionals should have or develop specific knowledge of lesbian health issues. It also states that “staff respect the sexual orientation of lesbian women”.¹²¹⁹ Furthermore, in conceiving campaigns against HIV/Aids, STIs and cancer, lesbian and bisexual women should be included as target groups, made aware of their specific risk factors and encouraged to seek expertise and to undergo regular health checks.

11.3.3. Transgender-specific health care

Introduction

Transgender-specific health care refers to health care needs that are directly linked to a person’s gender identity. These include hormone treatment, various forms of surgery, epilation of hair or other physical surgery, as well as psychological counselling for those who need and consent to such services and treatments. Gender reassignment treatment can consist of hormone treatment (puberty-delaying treatment, cross-sex hormone treatment), epilation (facial hair removal, body hair removal), speech therapy (voice pitch, male/female speech pattern), psychological support, surgery (such as facial feminisation surgery, breast/chest surgery, genital reconstruction, liposuction) and/or other adaptations of the body and mannerisms of a person. It is important to stress that each person has their own individual needs – not all transgender persons need or wish to undergo all or any of the available treatment options.

This research has demonstrated significant gaps in the accessibility of these treatments for transgender people. Waiting times for transgender-specific health care services can for example be long.¹²²⁰

The first significant hurdle for transgender persons is to find an informed health care professional. European countries may lack a team of medical professionals with sufficient knowledge about the health care needs of transgender people to be able to offer health care at the minimum level as recommended by the World Professional Association for Transgender Health International Standards

1215. Dibble, S. L., Roberts, S. A. and Nussey, B., “Comparing Breast Cancer Risk Between Lesbians and their Heterosexual Sisters”, *Women’s Health Issues*, 14 (2), March-April 2004, pp. 60-68.

1216. Vo, C. and Carney, M., “Ovarian Cancer Hormonal and Environmental Risk Effect”, *Obstetrics and Gynaecology Clinics of North America*, 34 (4), December 2007, pp. 687–700.

1217. Ibid.

1218. Quinn, S., “Accessing Health: The Context and the Challenges for LGBT People in Central and Eastern Europe”, ILGA-Europe, 2006, p. 15, available at: www.ilga-europe.org/content/download/4638/28034/version/3/file/HEALTHreportWWW.pdf, accessed 11 December 2010.

1219. Ibid., p. 76.

1220. Whittle, S., Turner, L. and Al-Alami, M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, *Equalities Review*, Wetherby, 2007, p. 47.

of Care.¹²²¹ A study in the United Kingdom (Scotland) among health professionals found that treatment by health professionals could be problematic.¹²²² Research among transgender people on experiences in Scotland (United Kingdom) shows that a “lack of understanding and knowledge by general psychiatrists often results in transgender people being given inappropriate treatment which fails to assist them with their gender dysphoria and causes many months or even years of delay in getting access to assessment by an experienced gender specialist”.¹²²³

Health care professionals who have sufficient knowledge of transgender issues are thus not always easy to identify. In Hungary, for example, finding a skilled and co-operative health care provider is reportedly difficult according to Hungarian NGOs. Transgender persons in Hungary also reported dissatisfaction with (hetero)sexist attitudes of health practitioners.¹²²⁴ Finding an endocrinologist to administer hormone treatment in Ukraine is also difficult, according to a NGO report.¹²²⁵ In certain member states few professionals, or none, can be found who are willing and/or able to treat transgender persons.

If a health care provider is found, the experiences are not always satisfactory. Some 14% of the respondents in a Scottish study on transgender experiences rated the NHS General Practice (i.e. family doctors) as “very poor” or “extremely poor”. Only 46% rated the service as “very good” or “extremely good”. Lack of knowledge on the part of doctors and often insurmountable technical problems in changing the gender markers on records (resulting in a lack of privacy) were the biggest points of concern.¹²²⁶ Health care practitioners can also be biased against transgender persons and this is encountered by transgender persons both in transgender-specific health care as well as general health care.

Reportedly, there have been instances where transgender persons are refused treatment. About a third of respondents in the EuroStudy said they were refused treatment because a health care professional did not approve of gender reassignment. A quarter of the respondents were met with refusal when they first approached a doctor or psychiatrist in order to start gender reassignment treatment.¹²²⁷ In NGO study, 6% of the transgender respondents’ stated that the general practitioners refused their requests for help in finding treatment for gender identity issues, and a further 13% did not appear to want to help. While 80% did want to help, only 20% actually could help, because they had the relevant knowledge. Some 60% wanted to help but lacked information.¹²²⁸

Transgender persons may have great difficulty in being accepted for gender reassignment treatment. A statistical comparison between Denmark and Sweden for example shows that from 1996 to 2005 permission for gender reassignment was granted to 91% of applicants in Sweden while it was granted to 37% in Denmark.¹²²⁹

Access to gender reassignment treatment and transgender-specific health facilities

The standard established by the European Court of Human Rights includes a positive duty by states to provide for the possibility of undergoing surgery leading to full gender reassignment.¹²³⁰ Depending on

1221. WPATH, “The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, Sixth Version”, 2001, www.wpath.org/documents2/socv6.pdf, accessed 30 August 2010.

1222. Scottish Needs Assessment programme, “Transsexualism and Gender Dysphoria in Scotland”, Scottish Executive, 2001.

1223. Scottish Transgender Alliance, “Transgender Experiences in Scotland – Research Summary”, Equality Network, Edinburgh, 2008, p. 18.

1224. Solymár, B., “The Situation of Transgender People in the Hungarian Social and Health Care System”, in Takács, J. (ed.), *Surgery of the Soul*, Új Mandátum Kiadó, Budapest, 2005; and Solymár, B. and Takács, J., “Wrong Bodies and Real Selves: Transsexual People in the Hungarian Social and Health Care System”, in Kuhar, R. and Takács, J. (eds), *Beyond the Pink Curtain; Everyday Life of LGBT People in Eastern Europe*, Mirovni Institut, Ljubljana, 2007.

1225. NGO Insight, “The Situation of Transgender Persons in Ukraine – A Research Report”, NGO Insight, Kiev, 2010.

1226. Scottish Transgender Alliance, “Transgender Experiences in Scotland – Research Summary”, Equality Network, Edinburgh, 2008, p. 15.

1227. Whittle, S., Turner, L., Combs, R. and Rhodes, S., “Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care”, ILGA-Europe, Brussels, 2008, p. 55 ff.

1228. Whittle, S., Turner, L. and Al-Alami, M., “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination”, *Equalities Review*, Wetherby, 2007, p. 44.

1229. Raun, T., “Denmark – A Transgender Paradise?”, 2009, <http://trikster.net/4/raun/1.html>, accessed 4 January 2011.

1230. European Court of Human Rights, *van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003, paragraph 82.

an individual transgender person's wishes and needs, the person should thus have access to hormone treatment, gender reassignment surgery or other medical interventions.

In 28 member states, full or partial gender reassignment treatment is offered to transgender persons (Austria, Belgium, Czech Republic, Germany, Denmark, Estonia, Finland, France, Hungary, Greece, Georgia, Iceland, Ireland, Italy, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Russian Federation, Serbia, Spain, Sweden, Switzerland, Turkey, United Kingdom and Ukraine). The differences between these 28 member states are significant, ranging from member states where quality expertise centres are available and those where some but not all necessary treatment is available. In Malta and Ireland, for example, hormonal treatment is available, but no surgery. In yet other member states, services are only available in one city of the country.

In 13 member states (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Montenegro and San Marino) no facilities needed for gender reassignment treatments were identified. Transgender persons from these 13 countries wishing to undergo gender reassignment would have to go abroad (they are explicitly advised to do so in some member states). For the remaining six member states information on availability of health facilities is unclear.

Access to gender reassignment treatment usually depends on a number of requirements that the person must meet. Systematic collection of information on such requirements has proved difficult. Notwithstanding this, the research has highlighted the existence of a set of common requirements currently in force in member states. The most common are a medical opinion (Czech Republic, Denmark, Estonia, Germany, Finland, Georgia, Iceland, Ireland, Luxembourg,¹²³¹ Latvia, Netherlands, Romania, Russian Federation, Serbia and Ukraine) and the diagnosis of gender dysphoria (Denmark, Estonia, Georgia, Ireland, Norway, Russian Federation, "the former Yugoslav Republic of Macedonia" and Ukraine) in some cases accompanied by a statement indicating lack of mental disease (Estonia and the Russian Federation). At least six member states require that the person has undergone a real-life experience (RLE), that is to say has lived in the preferred gender for a defined lapse of time (Denmark: two years; Estonia: two years; Finland and Georgia: one year; and Serbia and "the former Yugoslav Republic of Macedonia": two years). For many other countries there is uncertainty concerning requirements to access gender reassignment treatment.

Transgender organisations report that access to gender reassignment treatment is further complicated in member states of the Council of Europe due to the fact that sometimes there is only one specialised clinic in the whole country to provide treatment, which does not offer transgender persons a reasonable choice of available treatment centres. On the other hand, some member states offer high quality medical care in specialised centres, including in Germany, Netherlands and the United Kingdom. Some of them have support groups for transgender children, teenagers and their parents.

Complaints are reported by transgender persons regarding medical professionals who are allegedly uninformed, biased and sometimes overtly rude with their clients, for example referring to the client in the not-preferred gender. A study in the United Kingdom found that only 30% of respondents, when seeking help or a referral for gender reassignment procedures, experienced what the survey defined as the minimum acceptable level of assistance – a practitioner wanting to help, but lacking information about transgender health care. One third reported that they were refused treatment because a medical practitioner did not approve of gender reassignment.¹²³² In addition, transgender organisations point out that access to gender reassignment surgery does not put the client at the centre of their treatment, as a great deal of decision-making power is assigned to the authorities or medical professionals, such as experts on a gender reassignment panel or individual doctors.

The existence of certain "protocols", whereby transgender individuals have to prove certain conditions regarding their childhood, sexual orientation or tastes in clothing, are highly questionable. As already pointed out in the Issue Paper published by the Commissioner for Human Rights, "there are accounts of transgender people having to undergo genital examinations by psychiatrists, having to tell a set story of their childhood which is the only acceptable one; sometimes their claims are only considered

1231. A psychiatric assessment is needed for reimbursement of gender reassignment performed abroad.

1232. Transgender EuroStudy, op. cit., pp. 55 and 58. See also the report of Solymár, B., "The Situation of Transgender People in the Hungarian Social and Health Care System", in Takács, J. (ed.), *A lélek műtétei* [Surgery of the Soul], Új Mandátum Kiadó, Budapest.

genuine if they have at least one proven suicide attempt. Other transgender persons are being forced to stereotype themselves to the extreme in their preferred gender to fit eligibility criteria, leading to ridicule in daily life. The examples are too numerous to list, but it is safe to state that the majority of tests and processes conducted in most countries will usually include aspects that can at best be called incomprehensible.”¹²³³

In this regard, in Ukraine problems have been reported by NGOs, especially regarding the particularly high number of requirements a transgender person has to meet. These requirements include the risk of suicide of the client, absence of “homosexual inclinations” and no “serious flaws in the ability for social adaptation” (namely, unemployment and homelessness).¹²³⁴ In Norway, transgender organisations reported that transgender persons did not always receive the required medical treatment. One young transgender woman reportedly practised auto-castration out of frustration over the Gender Identity Disorder Clinic’s refusal to treat her.¹²³⁵

Children’s access to gender reassignment treatment is a topic which is under-researched.¹²³⁶ Explicit mention of the age at which it is possible to start gender reassignment treatment was identified in some countries, including Denmark and Iceland (21 and 21/22) and in Finland, Portugal, Sweden and Turkey (the person must be at least 18 years old). In Belgium,¹²³⁷ Germany and the Netherlands, transgender youth may begin treatment to offset puberty and receive counselling, so as to allow them to make informed decisions about their future gender identity. Then at the age of 18 they can proceed with gender reassignment treatments, if they wish to. In Switzerland persons under 25 years of age may have gender reassignment denied by court.¹²³⁸

Insurance coverage

The European Court of Human Rights has required states to cover gender reassignment surgery as part of “medically necessary” treatment in insurance policies.¹²³⁹ However, research for this report shows that access to health care insurance is highly problematic in at least 16 countries (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, Moldova, Montenegro, Poland, Romania, the Russian Federation, Serbia, Slovakia and Turkey). In these countries transgender persons claim that they must bear the financial burden of medically necessary health care themselves.

In the remaining 31 member states, research for this report shows that there is partial or full reimbursement.¹²⁴⁰ In Germany, Portugal, Sweden and Italy public health insurance covers most if not all expenses related to a person’s gender reassignment treatment. In Greece, Iceland and Ireland, payment by public health insurance for treatment abroad has been reported, though not confirmed as a general rule. In San Marino, since gender reassignment facilities are not available in the country, transgender persons may have the costs of surgeries performed abroad reimbursed by the national health fund. Hungary’s health insurance cover for gender reassignment treatment is 10% of the total costs. In the Netherlands, not all surgery is covered, and some surgery is covered only partially. Malta covers only hormone treatment. Norway covers costs for some but not all transgender persons, depending on the particular diagnosis of the person. In Switzerland private health insurance companies have in the past refused transgender people. In the judgment *Schlumpf v. Switzerland* the European Court of Human Rights found that the refusal of the insurance company to cover the costs of the applicant’s gender reassignment surgery due to non-compliance with the requirement to complete two years of observation in order to ascertain the existence of “true transsexualism” was in violation of Article 8.¹²⁴¹ In the UK around 86% of transgender respondents claimed that they were

1233. Commissioner for Human Rights, Issue Paper, “Gender Identity and Human Rights”, 2009.

1234. Ponomaryov, S., “Legal Study on the Situation Regarding Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation in the Council of Europe Member States. Report on Ukraine, 2010”.

1235. National contribution (sociological report) on Norway.

1236. Gender exploring treatment is typically puberty-delaying hormonal treatment, often combined with psychological support, which gives children time to explore their gender identity without developing, for example, breasts or a deep voice. This kind of hormonal treatment is reversible.

1237. See FRA national contribution on Belgium. Under-age individuals must be assisted by a parent or a legal representative.

1238. See national contribution (legal report) on Switzerland.

1239. European Court of Human Rights, *van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003, paragraphs 47, 73 and 82; *L. v. Lithuania*, Application No. 27527/03, judgment of 11 September 2007, paragraphs 59 and 74.

1240. For a full overview, see the (FRA) national contributions (sociological and legal reports) on the mentioned countries.

1241. European Court of Human Rights, *Schlumpf v. Switzerland*, Application No. 29002/06, judgment of 8 January 2009, paragraphs 115-16.

refused state funding for surgery and more than 80% claimed they were refused funding for hormone treatment. Over half of transgender respondents said they had funded their own treatment.¹²⁴² Coverage of public health insurance is unclear in the countries not mentioned above.

11.4. Homophobia, transphobia and discrimination in access to health services

11.4.1. General studies

Studies in some Council of Europe member states show that LGBT persons have experienced discrimination and homophobia in accessing health services. In the following, studies and concrete examples will be described.

In a survey from Bosnia and Herzegovina, 5% of the respondents in a survey stated that they had experienced discrimination and violation of human rights in a hospital or other health institution, and 24% of the respondents had witnessed discrimination against LGBT persons.¹²⁴³

In Hungary, 28% of LGBT respondents had experienced discrimination or prejudice in the health care system.¹²⁴⁴ In Moldova, 19% of LGB respondents felt they were treated worse by their health care provider because of their sexual orientation.¹²⁴⁵ In other countries LGB persons have been advised to undergo psychiatric treatment because of their homosexuality.¹²⁴⁶

A quarter of the transgender respondents in a UK study reported adverse treatment by health care professionals. A fifth reported that being transgender affected the way they accessed non-transgender-related health care. As a result, many transgender persons reported avoiding doctors' visits as much as possible for fear of inappropriate behaviour.¹²⁴⁷ In a study in Belgium on the living conditions of transgender people, 3% did not go to a doctor at all and 20% only if absolutely necessary. Some 88% of transgender respondents in a UK study disguised their gender identity and/or sexual orientation from their general practitioners. In the same study, 38% of respondents had never had a sexual health check-up.¹²⁴⁸

The attitudes of health professionals are considered as one of the main problems faced by LGBT persons when accessing health services. The Equality Authority in Ireland documented the health care experiences of lesbian, gay and bisexual persons in the country.¹²⁴⁹ While many respondents received good care, some faced signs of discomfort from their doctors, such as lack of eye contact, rushing the remainder of the consultation, a lack of friendliness and an increased focus on sexuality issues.

In Albania, an NGO reported incidents where LGBT persons did not receive proper treatment from health professionals.¹²⁵⁰ An example is the case of two transgender women who, after having been subjected to a hate crime, faced reportedly degrading and offensive treatment by health care staff,

1242. Whittle S., Turner L., Combs R., Rhodes S., "Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care", Brussels, 2008, p. 57.

1243. Organization Q, "The Invisible Q? Human Rights Issues and Concerns of LGBTIQ Persons in Bosnia and Herzegovina", Sarajevo, 2008.

1244. Takács, J., Mocsonaki, L. and Tóth, T. P., "Social Exclusion of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Hungary – Research Report 2008", Institute of Sociology, Hungarian Academy of Sciences, Budapest, in co-operation with the Háttér Support Society for LGBT People in Hungary and the Labrisz Lesbian Association, 2008.

1245. Quinn, S., "Accessing Health: the Context and the Challenges for LGBT People in Central and Eastern Europe", ILGA-Europe, 2006, p. 12.

1246. Greif, T. and Velikonja, N., "Anketa o diskriminaciji na osnovi spolne usmerjenosti", *Lesbo*, 11/12, 2001, www.ljudmila.org/lesbo/raziskave_porocilo1.htm, accessed 29 March 2008.

1247. Whittle, S., Turner, L., Combs, R. and Rhodes, S., "Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care", ILGA-Europe, Brussels, 2008, p. 59 ff.

1248. Browne, K., "Count Me in Too – LGBT Lives in Brighton & Hove", 2008,

www.spectrum-lgbt.org/cmiToo/downloads/CMIT_Trans_Report_Dec08.pdf, accessed 4 January 2011, p. 5.

1249. Gibbons, M., Manandhar, M., Gleeson, C. and Mullan, J., "Recognising LGB Sexual Identities in Health Services", Equality Authority and Health Service Executive, Dublin, 2008, p. 46. Additional research on accessing health services by transgender persons has also been conducted by the Equality Authority: Collins, E. and Sheehan, B., "Access to Health Services for Transsexual People", Equality Authority, Dublin, 2004.

1250. Meeting with Alleanza LGBT, 30 April 2010.

after they refused to treat them.¹²⁵¹ However, the Ministry of Health reported no known cases of lack of proper treatment.¹²⁵²

According to NGO reports there have been incidents where transgender persons did not receive proper treatment in health care institutions in Azerbaijan,¹²⁵³ for example in 2008, when two transgender women apparently died from injuries after a car accident because physicians at a Baku Hospital reportedly refused to treat them.¹²⁵⁴ Representatives of the Ministry of Health, however, objected to this information, arguing that there have been no incidents of mistreatment or discrimination in access to health care in Azerbaijan.¹²⁵⁵

A Turkish report published by the Istanbul Provincial Human Rights Board identifies cases where police authorities have put pressure on medical staff regarding the procedural examination in cases where transgender sex workers are brought to the hospital when they have been arrested. Apart from a certain level of "intolerance" found by some staff members, the main problem identified in the report relates to shortcomings regarding working conditions and infrastructure: no separate rooms for examination and questioning without the presence of the police, and a lack of knowledge about the specific issues at stake. There are also cases of the police trying to interfere in medical examinations or trying to prevent victims of police harassment from seeking medical care and examinations.¹²⁵⁶

In Croatia a newspaper published information about the case of a woman who had been accommodated since the age of 16 in the Lopača psychiatric hospital and from the age of 18 to 21 had been forcibly accommodated in the same hospital without a decision by the responsible county court, exclusively because of her homosexual orientation.¹²⁵⁷ In the newspaper report, it was stated that the hospitalisation in this case had been carried out by the then director of the hospital in question at the request of the parents. The victim herself described how she was treated in such a way that progress in her medication was seen only when she lied and said that she had heterosexual tendencies. During the treatment, it was claimed, various psycho pharmaceuticals were administered to her and she was accommodated in a hospital ward with serious psychiatric patients. It was further stated that after five years in this hospital she was released from it only after the director was replaced, which was done after the Inspectorate of the Ministry of Health and Welfare confirmed irregularities in the work of that psychiatric institution. It was also reported in the media that the Rijeka Municipal State Attorney's Office had commenced an investigation of this case.

In the Russian Federation a friend of an HIV-positive gay man tried to visit him in a hospital in St Petersburg and was reportedly prevented by a nurse from going into the ward, claiming that "this is no place for the meeting of faggots" and "there is nothing for you here to arrange your hang-outs".¹²⁵⁸

The underlying negative attitudes within health care towards LGBT persons expressed in the cases and studies above mirror society at large. As an example, a representative from the Ministry of Health in Montenegro stated, talking about the Montenegrin context, that LGBT persons, practices and identities were not sufficiently recognised, understood and respected by health care professionals. The representative of the ministry called the situation in health care a copy of everyday life, with the result that LGBT persons were reluctant to seek adequate health care.¹²⁵⁹ It should be noted that the ministry representative added that there are also health professionals in Montenegro who accept LGBT persons and treat them properly.

1251. Press release by Alleanza LGBT, <http://birdofparadox.wordpress.com/2010/06/03/albania-two-women-knifed-and-beaten-by-a-gang-of-cis-men-then-denied-hospital-treatment>, accessed 10 June 2010.

1252. Meeting with the Ministry of Health in Albania, 4 May 2010.

1253. Meeting with Gender & Development in Azerbaijan, 11 March 2010. Also see: "The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in Azerbaijan – A Shadow Report", presented to the UN Human Rights Committee in respect of the ICCPR and for the 44th Session of the Committee on the Elimination of Discrimination against Women (CEDAW) (20 July-7 August 2009).

1254. Bureau of Democracy, Human Rights, and Labor, US Department of State, "2009 Human Rights Report: Azerbaijan".

1255. Meeting with the Ministry of Health in Azerbaijan, 12 April 2010.

1256. Report of TC Istanbul Valiligi, B054VLK4340300/521; meeting with the Chair of the Chamber of Medicine and Member of the Istanbul Provincial Human Rights Board in Istanbul, 22 February 2010.

1257. Meeting with the Ombudsman Office, the Ombudsman for Gender Equality and with Kontra. Also, see in detail in: Lesbian Group Kontra, "Violence Against Lesbians, Gays and Bisexuals in Croatia: Research Report", Zagreb, 2009, p. 45. The article was printed on 4 January 2009.

1258. Kirichenko, K., "The Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation in Russia", 2010, p. 34.

1259. Meeting with the Ministry of Health in Montenegro, 7 May 2010.

On a positive note, several medical associations have professional internal regulations or a code of ethics in place relating to non-discrimination including sexual orientation. An example is the Russian Federation, where the Code of Ethics of the Society of Psychoanalytic Therapy contains relevant provisions in relation to issues of relevance to LGBT persons' access to health: "Respect for the individual and the absence of discrimination – The therapist must be aware of his/her own values and beliefs, and not impose these on patients. Therapists should provide psychological assistance to patients, as well as promote the professional development of students and colleagues with respect and care. Discrimination on the grounds of age, disability, nationality or religious affiliation, gender, sexual orientation or socio-economic status, as well as on other grounds, is contrary to the ethics of psychotherapy. The therapist should not allow discrimination of patients by sex, age, health status, ethnic or religious affiliation, sexual orientation and socio-economic status."¹²⁶⁰

11.4.2. Fear of disclosing one's sexual orientation and gender identity

Studies show that many LGBT persons tend to choose not to disclose their sexual orientation or gender identity. In an ILGA-Europe report on accessing health care for LGBT people in central and eastern Europe, a high level of mistrust is reported between LGBT persons and their health care providers.¹²⁶¹ Mistrust and concealment in themselves may lead to health risks for LGBT people because they may refrain from seeking health services, or they may not get proper treatment or advice when seeking medical services. In a survey in Moldova, 45% of LGB respondents would not feel comfortable revealing their sexual orientation to their health care provider.¹²⁶²

Transgender people often feel that they cannot "hide" their gender identity when it comes to medical history or physical appearance. Thus, in a study in the United Kingdom, it was found that 88% of transgender respondents had disclosed their gender identity to their GPs, which is a significantly greater proportion than LGB persons disclosing their sexual orientation (58%).¹²⁶³

Another problem reported is that same-sex partners are not recognised as next of kin in countries that do not grant some form of legal recognition to same-sex partners. In practice it means that patients in life-threatening conditions, or suffering from chronic illness, may find their life partners excluded from decision-making processes about their treatment. Sometimes the partners are not allowed at their bedside. In Estonia, the female partner of a woman who gave birth was not allowed to be present at the birth of the couple's child.¹²⁶⁴ Other examples from the United Kingdom and Italy show that access to a partner's hospital ward can vary according to the discretion of ward staff.¹²⁶⁵ In contrast, other NGOs reported no significant problems with visiting partners in intensive care, hospitals or being present when a partner is giving birth.¹²⁶⁶ However, many administrative procedures use forms and language that presume heteronormativity, a practice regarded as a barrier to LGBT persons.

11.4.3 Stigmatisation and HIV/Aids

NGOs reported that gay and bisexual men face situations where they are assumed to be HIV-positive when accessing health services. HIV/Aids had, and still has, a profound influence on the LGBT community. After being discovered in the 1980s, HIV/Aids sparked a significant debate and media interest, often using a sensationalist approach. Despite the fact that the introduction of new medication in the mid 1990s has brought some improvements in living conditions, stigmatisation of persons living with HIV/Aids is still widespread. In some member states gay and bisexual men have been automatically barred from donating blood. Whereas blood donor centres in some member states have changed their policies and focus on risk behaviours rather than the sexual orientation of the donor, other member states continue to bar gay and bisexual men categorically. The European Court of Human Rights set an important standard when it ruled that an HIV-positive person cannot be refused a residence permit on the basis of his health status.¹²⁶⁷

1260. The Medico-Social Charter for nurses in the Russian Federation contains similar provisions.

1261. Quinn, S., "Accessing Health: the Context and the Challenges for LGBT People in Central and Eastern Europe", ILGA-Europe, 2006, p. 12.

1262. Ibid.

1263. Browne, K., "Count Me in Too – LGBT Lives in Brighton & Hove", Trans People Additional Findings Report December 2008, p. 6, www.spectrum-lgbt.org/cmiToo/downloads/CMIT_Trans_Report_Dec08.pdf, accessed 4 January 2011.

1264. FRA national contribution (sociological report) on Estonia, p. 8.

1265. Stonewall, "Prescription for Change. Lesbian and Women's Health Check", 2008, p. 14.

1266. FRA national contribution on Denmark.

1267. European Court of Human Rights, *Kiyutin v. Russia*, Application No. 2700/10, judgment of 10 March 2011, paragraph 74.

Practical initiative – in Serbia, according to the law on the prohibition of discrimination, it is forbidden to discriminate against an individual or a group of persons on the grounds of his/her or their health, or to discriminate against their family members (Article 27), and this provision protects persons with HIV. Also, in 2006, the Serbian Institute for Blood Transfusion altered its questionnaire for potential blood donors after Labris – the lesbian human rights organisation – launched protests against what it said was discrimination against homosexual women. Labris protested against the institute’s practice of rejecting donors who affirmatively answered the following question: “Have you ever had sexual relations with a person of the same gender?” As a result of the protest, a new questionnaire was drafted, without the contested question.¹²⁶⁸

11.5. Conclusions

LGBT persons in the Council of Europe member states report obstacles in accessing their right to the enjoyment of the highest attainable standard of health. Due to fear of discrimination, LGBT persons sometimes refrain from seeking medical advice and care, which in itself leads to health risks. Existing research links transphobia, homophobia, harassment or marginalisation with the generally poorer mental and physical health situation of LGBT persons.

Contrary to international medical classifications, homosexuality is in some member states still considered as an illness by some medical professionals and authorities. In some member states there are textbooks for medical students and professionals which categorise homosexuality as an illness and some health professionals perceive homosexuality as a disease. The classification of gender identity disorder as an illness in international classification systems is omnipresent in the member states of the Council of Europe.

Transgender persons face serious problems in accessing the health care they need. In some member states there are no or not sufficient medical facilities; in many other member states transgender persons face biased attitudes by health care practitioners. In many countries transgender persons face problems in insurance coverage for transgender-specific treatments.

Access to gender reassignment in the member states depends on a number of requirements that the person must meet. Systematic collection of such requirements has proved difficult. The most common requirements are a medical opinion and the diagnosis of gender dysphoria, in some cases accompanied by a statement indicating lack of mental disease. Furthermore, some member states require that the person has undergone a real-life experience for a defined lapse of time.

Public health care insurance coverage of trans-specific health care is problematic in at least 16 countries. In these countries transgender persons claim that they must bear the financial burden of medically necessary health care themselves. In the remaining 31 member states, there is partial or full reimbursement.

The health care conditions and needs of lesbian and bisexual women have been the object of little analysis and research. There has been a general invisibility of lesbian and bisexual women in campaigns against HIV/Aids or sexually transmitted infections, and little knowledge on the part of health care personnel on the specific risks and needs of this group. Additionally, this has led to reluctance on the part of lesbian and bisexual women to approach health care services, as well as a lack of understanding of their health care risks.

Positive initiatives have been taken in some Council of Europe member states to improve training and understanding of LGBT health needs, amongst them the establishment of professional internal regulations and codes of ethics with respect to non-discrimination, including sexual orientation. This is vital in light of the existence of mistrust among LGBT persons and their health care providers. However, there continues to exist a stigma in many Council of Europe member states attached to LGBT persons, in particular gay men who are living with HIV/Aids, due mainly to the negative attitudes of health care personnel.

¹²⁶⁸. It should be noted that the Serbian Institute for Blood Transfusion operates with a list of categories termed “highly risk groups”, which includes persons who practise gay sex. In practice this prevents gay men from donating blood.

12. Methodology, data collection and data gap analysis

12.1. Introduction

This chapter describes the different stages in the research process for the report "Discrimination on grounds of sexual orientation and gender identity in Europe". It will give an account of the methodology followed, the data collected and the quality assurances put in place. The chapter will also present a concise data gap analysis.

The report is based on research and data collection on the human rights situation of LGBT persons in all Council of Europe member states. The focus has been on data from the period between 2004 and 2010.¹²⁶⁹ Given the large geographical and material scope of the project, a call for tenders was launched on 27 May 2009 in line with the internal regulations of the Council of Europe. The deadline for submitting bids was set at 24 June 2009. On 30 September 2009, the Council of Europe Tenders Board endorsed the selection of the international consultancy firm Consultancy within Engineering, Environmental Science and Economics (COWI) to carry out the study. On 1 October 2009, the one-year consultancy contract commenced.

Regarding the 27 member states of the European Union the report draws primarily from research conducted by the European Union Agency for Fundamental Rights (FRA) in relevant FRA publications from 2008, 2009 and 2010¹²⁷⁰ as well as data from research as published in the FRA's social and updated legal country contributions. In line with the Co-operation Agreement between the Council of Europe and the European Union Agency for Fundamental Rights,¹²⁷¹ these reports were kindly shared by the FRA with the Commissioner's Office, which has also relied on the technical expertise of the FRA throughout the research process.

The European umbrella NGOs representing LGBT persons – ILGA-Europe and TGEU (Transgender Europe) – were consulted in key phases of the project including project design, implementation, and review of country and comparative reports. Two project meetings during the research period were organised in Copenhagen and Strasbourg respectively, during which representatives of ILGA-Europe, Transgender Europe and the FRA gave valuable input.

Voluntary contributions for this project were received from the following Council of Europe member states: Belgium (Flemish Government), Finland, Germany, Netherlands, Norway, Sweden (through the Swedish International Development Agency), Switzerland and the United Kingdom.

12.2. Approach

Research for this project was conducted into areas which face challenges regarding data gaps. Moreover, there is a great variety to be found in national legal and policy frameworks in the 47 member states, as well as in social and cultural settings. The study relies on existing data and new data collected through semi-structured interviews with key stakeholders and experts in the 47 member states. The method of data triangulation enabled the collection of data that takes into account the specific legal traditions and social/cultural circumstances identified in the different member states. Several types of data and data collection methods have been used to check and validate data and conclusions. Broadly speaking, there were two phases in the data collection:

- the collection and comparative analysis of legal data (via desk research);

1269. Changes in policy and legislation in Council of Europe member states which took place after 31 December 2010 have not been systematically taken into account. However, some important data from before 2004 and some developments after December 2010 have been included on a case-by-case basis.

1270. See European Union Agency for Fundamental Rights, "Homophobia and Discrimination on the grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 1 – Legal Analysis", 2008; "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 2009; "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010.

1271. Agreement between the European Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe, paragraph 7, accessible at: www.coe.int/t/der/docs/EUFRACoEAgreement_en.pdf.

- the collection (via field trips) and comparative analysis of data of a sociological nature (also referred to as “social data”).

Based on these data for each country, a legal and a sociological report were drafted for each Council of Europe member state. These national contributions formed the foundation for this comparative report covering 47 countries. Additional information provided by the OSCE/ODIHR, OHCHR, UNHCR and other actors was also used for the drafting of the report.

The data collection for the national legal reports was carried out by independent national experts whose task was to draft country reports with reference to detailed guidelines.¹²⁷² The collection of sociological data was carried out by consultants who started with a desk study of available data and the drafting of preliminary country reports. On the basis of these materials, field trips were carried out to Council of Europe member states in order to collect additional data and verify the data already collected during the desk studies. Based on the aforementioned data, the country reports were finalised.

12.2.1. Building on previous research

The report is the result of two separate, but interlinked, data collection processes. In 2008 and 2009, the FRA published two comprehensive comparative reports on “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States” (Part I – Legal Analysis and Part II – The Social Situation) covering the 27 EU member states. The primary materials for the first publication (Part I – Legal Analysis) were collected by FRA’s network of legal experts, FRALEX. These experts collected data of a legal nature in each of the 27 EU member states, which led to 27 national reports on the subject matter, which formed the basis of the comparative legal report. In 2010 the FRA updated all of its national legal country reports and published the 2010 update on its comparative legal analysis.¹²⁷³

For the FRA report describing the social situation (Part II – the Social Situation), the FRA contracted the Danish Institute of Human Rights (and in a sub-contractual arrangement the consultancy firm COWI). They collected data in each EU member state describing the social situation of LGBT persons. This resulted in 27 national reports on the subject matter which formed the basis of the comparative social report.

The data collection for the remaining 20 member states of the Council of Europe took place in 2009 and 2010 (see 12.2.2. for more information on that process). In order to create an accurate overview and comparative analysis of the situation in all member states of the Council of Europe, the data collection methodology for this report has been consistent to the extent possible, namely:¹²⁷⁴

- the same thematic areas of interest were defined and researched for all member states;
- in all member states, the same types of interlocutors were identified and approached (NGOs, the authorities, national human rights structures);
- interview guidelines were designed and used consistently for all meetings;
- legal and sociological country reports for each country were based on similar guidelines.

As much as possible, primary sources, which can be found in the national legal and national sociological country reports, are referenced in the comparative report. This facilitates the tracing of original sources. When this report references the legal or social situation in one or more EU member state(s), it should be understood as a reference to the 2010 update of these national legal country reports.

Primary sources for the 27 member states are referenced in this report as “FRA national contribution on [country]”. For the other 20 member states of the Council of Europe references are made to

1272. For the 27 EU member states, these legal experts were contracted by the European Union Agency for Fundamental Rights through the FRALEX network. For the other 20 Council of Europe member states the consultancy firm COWI contracted national legal experts. All experts’ names can be found in Appendix 1.

1273. FRA, “Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis”.

1274. For example, it should be noted that the FRA did not (in line with its mandate) collect any data in the area of family law. Data for the 27 EU member states in this field were collected by the Office of the Commissioner for Human Rights.

“national contribution on [country]”. Since there are both legal and sociological reports for each member state this is specified in the respective references.

12.2.2. Legal data collection

National legal experts

As stated before, legal experts were identified and contracted in each of the 47 member states: for the EU member states, experts of FRA’s network, FRALEX were contracted; for the remaining Council of Europe member states the Office of the Commissioner for Human Rights identified and COWI contracted national legal experts. A list of all experts can be found in Appendix 1. Detailed data collection guidelines were provided to these experts. These guidelines aimed at facilitating the experts’ work in describing the legal position of LGBT persons in the respective countries.

Legal guidelines

The guidelines were developed and adjusted in order to comply with the topics to be covered by the report. The basic premise for the development of these guidelines derived from the human rights obligations of all Council of Europe member states. Within the framework of the Council of Europe, these are particularly the European Convention on Human Rights and case law deriving from the European Court of Human Rights as well as other conventions, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Furthermore, the legal guideline was developed on the basis of relevant UN instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are legally binding for the member states of the Council of Europe. Standards and principles embedded in relevant EU directives are referenced when applicable for the EU’s member states. References are also made to relevant OSCE commitments and other standards.

On the basis of the guidelines, the national legal experts collected relevant information regarding the legislative frameworks affecting LGBT persons in the given country. The reports focus on:

- legal instruments;
- case law;
- application of the law;
- statistics on complaints;
- any other relevant information;
- “good practices” (which are indicated as “practical initiatives” in this report).

The FRA draft national legal reports were quality-assured through the FRA’s internal procedures. The draft national legal country reports for the other 20 Council of Europe member states were quality-assured by independent experts, identified by the Office of the Commissioner for Human Rights. COWI also submitted the national reports for non-EU member states for review to the contracted expert on transgender rights. These independent experts are listed in Appendix 2. Feedback to the draft national reports by the independent experts was provided to the authors of the legal country reports (via COWI) and an adjusted final version of each national report was submitted to the Office of the Commissioner for Human Rights.

12.2.3. Sociological data collection

The sociological data collection ran parallel to the legal data collection process. The aim of the sociological part of the study was to collect data on the everyday lives of lesbian, gay, bisexual and transgender persons in the 47 Council of Europe member states.

The methodology included the collection of publicly available data (surveys, research and studies) on homophobia, transphobia and discrimination on the grounds of sexual orientation and gender identity with in-depth qualitative interviews in each country during field trips. Moreover, relevant national policies, action plans and public as well as non-governmental initiatives which might qualify as good practice were identified and analysed.

LGBT communities are diverse, and considering that there is a tendency in academic and political discourse to focus on gay men when discussing LGBT human rights, specific attention has been given in this research to data on lesbian, bisexual and transgender persons. Particular efforts were made to collect data on the situation of transgender persons and discrimination on grounds of gender identity. There are similarities, links and overlaps between the social conditions and types of discrimination experienced by lesbian, gay, bisexual and transgender persons, but certain issues are of specific relevance for transgender persons alone. These issues are mainstreamed in the report to the extent possible. An expert on gender identity, who provided input to ensure a comprehensive mainstreaming of transgender issues in the report, was contracted by COWI.

Sociological guidelines

Detailed data collection guidelines were drafted and used by the authors of the national sociological studies. These guidelines aimed at facilitating the experts' work in describing the social position of LGBT persons in the respective countries. Thematically, the issues included in data collection for the national sociological reports covered the same areas as for the national legal reports (with the exception of "attitudes and public opinion", which was only part of the sociological guideline). Quantitative data included:

- statistical data such as information from official, semi-official or NGO sources on homophobic and transphobic incidents, complaints of discrimination on the grounds of sexual orientation and gender identity;
- surveys and opinion polls on perceived or experienced discrimination and attitudes towards LGBT people conducted by authorities, research institutions, survey agencies or NGOs.

Qualitative data included:

- reports from national state authorities;
- reports from Council of Europe monitoring bodies, as well as data and information from reports of UN treaty bodies, OSCE, EU agencies (including FRA thematic reports) and NGOs (for example, Amnesty International, Human Rights Watch and ILGA-Europe);
- information from national human rights structures;
- cases of official or administrative discrimination, such as cases where "Gay Pride" marches have been banned;
- cases of homophobic and transphobic incidents and homophobic and transphobic public discourse – including media reports;
- national policies, action plans and positive initiatives combating homophobia and transphobia and discrimination on the grounds of sexual orientation and gender identity;
- incidents or cases where authorities have denied transgender persons the right to change their first names and/or gender on official and semi-official documents;
- other relevant information, such as press material.

On the basis of these data (through a desk study), an initial analysis of the collected data was carried out by COWI in order to prepare preliminary draft sociological country reports. In order to gain access to as much data as possible, interlocutors in all member states were subsequently contacted for additional data (see 12.2.4). These country reports formed the basis for the field trips and served as important background documents for the interviews conducted when visiting the member states.

12.2.4. Field visits

In order to verify and qualify the data collected and presented in the draft country reports as well as to collect supplementary information, field visits were carried out to all member states during which semi-structured qualitative interviews were conducted.¹²⁷⁵ The field visits took place in the period between February and July 2010 (for the 20 non-EU member states) and in the period between February and May 2008 (for the 27 EU member states).

¹²⁷⁵ With the exception of Andorra where no field trip took place – telephone interviews were conducted instead. The project team did not succeed in meeting with the public authorities in the Russian Federation during their mission to the country.

The interviews were guided by the previously collected data in the preliminary sociological and legal country reports and a thematic interview guide drafted on the basis of the sociological and legal guidelines. Both single and group interviews were conducted.

It is important to note that conducting qualitative interviews in different contexts and collecting data from different research projects enable a collection of data that takes into account specific circumstances and types of knowledge found at a local level across the member states. However, this approach does not necessarily provide directly comparable data across Europe, since the local set-ups, types of knowledge, data and categorisations in some respects differ significantly. Instead, it provided the project team with a detailed perception of the situation in each member state and, hence, the comparability has primarily been at the level of identifying types and patterns of discrimination across the Council of Europe.

The field visits allowed for a participatory process involving key stakeholders in the collection, assessment and analysis of data. To the extent possible, meetings were held in each member state with the following stakeholders:¹²⁷⁶

Meetings

Representatives of the authorities of Council of Europe member states – Ministry of Justice, Ministry of the Interior, Ministry of Foreign Affairs and/or Ministry of Health

LGBT organisations or groups – semi-structured interviews

LGBT community members – focus group interviews

Representatives of national human rights structures – national equality bodies, ombudsmen or national human rights institutions.

Public authorities

Representatives of national authorities were contacted, often with the kind support of the Permanent Representations to the Council of Europe in Strasbourg, which provided useful assistance in this process. Also, Council of Europe offices in member states provided helpful assistance. In most instances, civil servants working in the Ministry of Justice, Ministry of the Interior or Ministry of Health were met with a view to accessing all publicly available official and other data and information regarding discrimination on grounds of sexual orientation and gender identity, and incidents of homophobia and transphobia, as well as information on the relevant national policies, action plans, measures, and positive initiatives regarding combating discrimination and in promoting equal treatment and/or human rights.

Interviews with representatives of ministries were important in order to collect data on the work by public authorities to combat homophobia/transphobia, but also to gauge their awareness of the national situation with regard to homophobia, transphobia and discrimination based on sexual orientation and gender identity. Many interlocutors emphasised the usefulness of this report and engaged constructively in the data collection process, though often they had no statistics or data to share. Public authorities were overwhelmingly co-operative and constructive in their contribution to the study.

LGBT and human rights NGOs

In order to fully understand the national situations of homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, organisations representing LGBT persons were met. Some of them were informal groups, others were officially registered LGBT organisations as well as general human rights NGOs.

1276. The (FRA) national contributions (sociological studies) give a precise overview of which interlocutors were consulted for each country.

Representatives of LGBT organisations provided their perspectives on the collected information and gave references for further materials. LGBT organisations, having hands-on experience and knowledge of various aspects of the situation for LGBT persons, have been valuable sources of data. This is particularly the case when academic research and/or official data have been scarce.

National human rights structures

Representatives of national human rights structures (namely, national equality bodies, ombudsmen or national human rights institutions) were met during the field trips. They are key actors in protecting and promoting human rights and the rule of law. They play an important role at the national level in implementing international and European human rights standards and promoting such standards vis-à-vis the public authorities and society at large.

The materials collected via desk research and field visits led to national sociological country reports for each member state of the Council of Europe. The FRA national social reports were quality-assured through the agency's internal procedures. The draft sociological national reports for the 20 non-EU member states were quality-assured by independent experts, identified by the Office of the Commissioner for Human Rights. They are listed in Appendix 2. Feedback was provided to the authors of the country reports (via COWI) and an adjusted final version of each national report was submitted to the Office of the Commissioner for Human Rights.

12.2.5. Comparative report

The two sets of 47 national legal country reports and 47 national sociological country reports formed the basis for the preparation of the comparative report. In the course of the study important observations were made as to the topic of data availability. Since the paucity of relevant data was a particular challenge for this study, the next paragraph will elaborate on some of the main findings in this respect.

12.3. Data availability

Paucity of relevant data and research

The collection of data for this report included publicly available official data and other data and information regarding homophobia, transphobia and discrimination on the grounds of sexual orientation and gender identity. Apart from research, interviews and media accounts, it also entailed information on the relevant national policies, action plans, measures and good practices by both public authorities and civil society actors combating discrimination, particularly NGOs and national equality bodies promoting equal treatment.

The collection of systematic data on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity throughout member states has been a challenge, as in some cases and for some member states such data remain scarce or simply non-existent. Most data available were collected by NGOs. Only a few Council of Europe member states, including the Netherlands, Sweden and the United Kingdom, have systematic data collection mechanisms on some aspects in place. A few member states have integrated questions on sexual orientation and/or gender identity in periodic national monitoring research regarding health, social attitudes or discrimination. Others have expressed the intention of starting such research. Furthermore, for some areas of research, collection of data appears to be more consistent and systematic, while in other cases information is largely obtained and built on the back of evidence reported by NGOs and associations. To the extent possible, the present report has tried to integrate both official and other data in every chapter in order to provide consolidated evidence of types and patterns of discrimination of LGBT persons in different spheres of their lives.

Official data may include different instruments to assess the existence and impact of various kinds of discrimination: they can take the form of national surveys carried out both by national authorities or by other international (intergovernmental) organisations as well as national studies on the subject of discrimination of LGBT persons. Official statistical data on discrimination on grounds of sexual orientation and gender identity appear to be collected only in a small number of member states and

usually only within a few specific areas. Other types of official data used for the purpose of this report are the case law concerning discrimination on grounds of sexual orientation and gender identity, retrieved in the different national systems, and official complaints received by member states' equality bodies or national human rights structures.

Other data are provided and collected by LGBT NGOs and mainstream NGOs working on LGBT issues. Many studies and surveys are thus initiated by NGOs. These surveys are sometimes carried out in co-operation with survey agencies or research institutions, and are often groundbreaking in the sense that they shed light on issues not previously researched and thus generate not only valuable knowledge, but also awareness. This also goes for research conducted by ILGA-Europe and Transgender Europe. NGO information cannot always be systematised as it is sometimes fragmented or incomplete but, together with official data, it helps in addressing topical issues concerning discrimination on grounds of sexual orientation and gender identity. Types of other data referred to in this report are surveys carried out by NGOs or Internet surveys, statistics, assessments and studies undertaken and collected by NGOs, or by independent researchers. NGOs also receive and record complaints and have information on cases of discrimination on grounds of sexual orientation and gender identity in different member states.

Each thematic field of this study report presents specific challenges and patterns in terms of quality and quantity of data. Since data gaps are significant, the following paragraphs elaborate on each chapter of this report more specifically.

The chapter on "Attitudes and public opinion towards LGBT persons" presents a variety of data sources, in particular European and national public opinion surveys. The three main European studies are Eurobarometer surveys,¹²⁷⁷ the European Values Study¹²⁷⁸ and the European Social Survey. It is positive that some member states conduct research in this area, including some equality bodies. It should be noted, however, that the surveys carried out in different countries are not uniform in terms of questions posed and the institutions which carried them out. This has resulted in difficulties for the comparability of the results. In addition to the problem of comparability, another issue arises with regard to sampling. In the case of internet surveys in particular, samples may be small or not always fully reliable. Problems also concern the fact that pan-European surveys on general attitudes towards LGBT persons are not developed (the Eurobarometer surveys used for this study mainly cover EU member states) and that surveys on specific attitudes towards bisexual and transgender persons are significantly absent from almost all surveys and studies.

As regards the chapter on overall legal framework, sufficient information was available to describe the relevant legal instruments. However, it remains a challenge to identify precise information on the scope of non-discrimination legislation regarding its (explicit) inclusion of gender identity. Problems concerning data gaps are further related to the fact that data on complaints of discrimination are typically not disaggregated regarding the different fields of discrimination. This renders it more difficult to assess the exact scope of discrimination on grounds of sexual orientation or gender identity in the member states. Gaps in the collection of data have also been identified on the implementation of non-discrimination legislation in member states. Finally, given the broad diversity of national structures for promoting equality across the member states, it remains a challenge to identify the extent to which LGBT-related discrimination issues are covered by these structures.

Although incidents in relation to the enjoyment of the right to freedom of assembly and freedom of association may not always be registered and reported to the police or brought to court, the chapter concerning these issues does not present major challenges in terms of data gaps. Indeed, the relevant information on restrictions or violations of the right to freedom of assembly and of the right to freedom of association in some of the member states are usually well documented by domestic and international (non-governmental) actors. Information on certain court cases is also well documented.

To a similar extent, the same picture can be drawn from the chapter concerning freedom of expression in which the most important incidents and cases concerning restrictions on the right to freedom of expression are referred to. It goes without saying that for this chapter as well the possibility of

1277. European Commission, Special Eurobarometer 296, "Discrimination in the European Union: Perceptions, Experiences and Attitudes", 2008; European Commission, Special Eurobarometer 317, "Discrimination in the EU 2009", 2009.

1278. European Values Study, "How do Europeans think about life, family, work, religion, sex, politics, and society?", available at www.europeanvaluesstudy.eu, accessed 14 October 2010.

collecting single cases or incidents of restrictions to the right to freedom of expression is limited by the fact that not all cases or incidents are reported or reach court. Still, this chapter does not present any major challenges in terms of data collection.

Data on hate speech and hate crime against LGBT persons are collected at the level of (some) member states and by the ODIHR. In addition, 15 Council of Europe member states have reported to the ODIHR that they collect data on crimes committed against LGBT persons. These data may include data from police reports or court decisions concerning incidents or crimes committed against LGBT persons. The data collected by the OSCE/ODIHR and published in their annual hate crime reports constitute one of the most comprehensive data sets available, but also, by the same token, demonstrate the limitations of official data currently available since many member states of the Council of Europe do not collect such data. In addition, information on incidents and complaints concerning hate crime and hate speech against LGBT persons are collected by LGBT NGOs, including European initiatives such as the Transgender Hate Crime Survey. Despite the availability of data, this area of research appears to be partly problematic as it is characterised, in the first place, by serious under-reporting of incidents by victims of hate speech and hate crimes, which hampers the assessment of the extent of the problem. Another problem impairing the possibility of creating complete data sets on homophobic/transphobic hate speech and hate crime is the lack of proper tools for authorities to register complaints and incidents. While data collected by NGOs help in counterbalancing the under-reporting of incidents, gaps in the collection of data remain problematic, especially in relation to gender identity.

Data on the legislative frameworks regarding family life in Council of Europe member states (marriage and partnership laws) are available and relatively easy to identify. Data gaps on issues concerning family life exist at the level of empirical sociological research measuring attitudes towards same-sex partnerships, adoption or assisted reproduction by same-sex couples, and discrimination of LGBT persons by their families and society at large. Existing surveys and studies carried out in national contexts are not always directly comparable because of their structure, sample sizes and questions asked. Moreover, studies such as the Eurobarometer surveys, the findings of which are referred to in this chapter, provide data on opinions on the above-mentioned issues normally for the EU member states only. Furthermore, research undertaken regarding family questions tends to focus on the conditions for LGBT persons within the family of origin (for example, harassment or acceptance by family members), whereas the debates on partnerships and parenting often seem to lack a solid knowledge base. No comprehensive data exist, for instance, on the number of same-sex couples in member states or of LGBT families (with or without children). The actual existence of LGBT families and their children may thus be largely ignored and consequently often left out of the political debate and of discourses concerning family policies. Furthermore, there is some research on the living conditions for LGBT families and their children though this is still a largely under-researched area.

As for official data on asylum, statistics on the number of LGBT persons benefiting from asylum and subsidiary protection due to persecution on the grounds of sexual orientation or gender identity are only provided in Belgium and Norway. The UNHCR has also been able to share some information in this regard. Information concerning this topic is often scarce and tentative figures are given both by NGOs dealing with requests from LGBT asylum seekers or by scanning national databases on asylum claims, which are often not disaggregated in terms of factors on which the claim is based (such as persecution or fear of persecution on grounds of sexual orientation or gender identity). In some member states there are no known cases of LGBT asylum seekers having made claims, which hampers the possibility of completing an overview for all countries. Positive developments in this field, however, include increased efforts by the UNHCR to address the situation of LGBT asylum seekers as well as some projects to improve data collection.

The chapter on education presents reports and information on discrimination and coverage of LGBT issues in educational programmes (curricula), mainly provided by NGO sources and a handful of national structures for promoting equality. Official information in this area is scarce. This is particularly so with regard to two issues: assessment of bullying in schools and figures on the impact of bullying and harassment of LGBT persons in schools. However, some good practices and initiatives were identified in certain member states. Case law on sexual orientation or gender identity discrimination in education is also scarce but was identified in only few member states of the Council of Europe.

In relation to discrimination of LGBT persons in employment some data have been identified. In some member states equality bodies collected these data. Regarding court cases related to discrimination on sexual orientation or gender identity in employment, information was identified in 21 member states. For the European Union member states the European Commission collects data on transposition of relevant EU directives. However, incidents of discrimination in the workplace are thought to be under-reported, often because many are reluctant to disclose their sexual orientation or gender identity for fear of dismissal or harassment. Therefore, it remains a challenge to continue to improve data collection in this field, not only to get a better picture of the extent of discrimination in the field of employment on grounds of sexual orientation and gender identity, but also of the negative impact that harassment has on the working life of the persons concerned.

Discrimination of LGBT persons in access to housing and to goods and services presents challenges in terms of data gaps. In the first place, substantial information on these issues is mainly provided by NGOs which collect complaints of cases of discrimination in access to housing or access to goods and services. Secondly, case law related to discrimination on sexual orientation and gender identity when accessing goods and services has only been detected in few member states of the Council of Europe.

In the field of health of LGBT persons, data are not collected in a systematic fashion either at national level or at European level. The NGO reports available, however, point to serious problems regarding the particular problems experienced by LGBT persons when accessing health services. Aspects relating to the health of transgender persons are even more under-researched. Moreover, no systematic studies are available on the general health situation of LGBT persons. These important data gaps, especially evident in the context of lack of official data, should be addressed as a matter of urgency.

12.4. Conclusions

Significant improvements in data collection are needed in order to acquire more comprehensive data sets on the socio-legal position of LGBT persons in all areas of life. This study report has shown that there are many areas where data collection remains a challenge. Throughout member states, the lack of data requires serious scrutiny – a conclusion backed by the fact that many public authorities consulted in the member states during field visits expressed the need to improve the collection and handling of data.

The invisibility of the human rights situation of LGBT persons' is a cross-cutting issue emerging from this report. This may be related to the sensitivity of the issues (fear of harassment, bullying, mistrust of health care personnel) as well as the strong social stigma attached to LGBT persons in some areas. A general lack of visibility of LGBT persons in a society is reflected in the lack of scientific research as well as official statistics. Regional differences also appear within countries: data are particularly limited, or entirely absent, about the conditions in rural areas.

Studies cover gay men, lesbian, bisexual and transgender persons – LGBT. However, in practice it can be difficult to assess how comprehensively the different groups are actually covered in each research project or report. None of the categories under the LGBT umbrella term – lesbian, gay, bisexual and transgender persons – avoid data gaps. However, some groups receive more attention than others. In particular, data regarding transphobia and discrimination on grounds of gender identity are scarce. Inquiries into issues related to discrimination on grounds of sexual orientation and gender identity tend to render bisexual persons invisible. Explicit references to conditions for bisexual men and women are scarce, and bisexual persons are, in many contexts, invisible in the LGBT communities. Specific problems facing lesbian and bisexual women due to their gender lack research – this includes issues of multiple discrimination, for example, in employment, social control exercised by families, violence and sexual abuse. It should also be noted that more research is needed in relation to multiple discrimination. The situation of LGBT persons with reference to disability, age, race and ethnicity would deserve more attention.

Appendix 1: National experts for legal reports

Legal experts were contracted by the consultancy firm COWI for the drafting of national legal country reports focusing on the human rights of LGBT persons. Their names can be found in the following overview.¹²⁷⁹ Information regarding the national sociological country reports can be found in the respective national reports.¹²⁸⁰

Country	Name
Expert on human rights of transgender persons in Europe	<i>Justus Eisfeld</i>
Albania	<i>Krenar Loloçi</i>
Andorra	<i>Carlos Villagrasa Alcaide</i>
Armenia	<i>Edmon Marukyan</i>
Austria	<i>Barbara Liegl Julia Kozma</i>
Azerbaijan	<i>Elhan Bagirov Ruslan Valiyev</i>
Belgium	<i>Paul Lemmens Jogchum Vrielink</i>
Bosnia and Herzegovina	<i>Svetlana Durkovic</i>
Bulgaria	<i>Slavka Kukova</i>
Croatia	<i>Sanja Juras</i>
Cyprus	<i>Nicos Trimikliniotis Corina Demetriou</i>
Czech Republic	<i>Vera Honuskova Pavel Sturma</i>
Denmark	<i>Christoffer Badse Martin Futtrup</i>
Estonia	<i>Merle Haruoja Marianne Meior Kari Käsper</i>
Finland	<i>Timo Makkonen Tuomas Ojanen Martin Scheinin</i>

1279. It should be noted that the names mentioned in this overview for European Union member states refer to the author(s) of the updated 2010 national contributions (legal reports).

1280. In addition, specific information on the authors of the sociological reports for the EU member states can be found on page 133 of European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 2009.

Country	Name
France	<i>Elisabeth Lambert Abalgawad</i>
Georgia	<i>Ana Natsvlishvili</i>
Germany	<i>Jerzy Szczesny Daniel Scherr Petra Follmar-Otto</i>
Greece	<i>Vassilis Hatzopoulos</i>
Hungary	<i>Márton Udvari</i>
Iceland	<i>Dóra Guðmundsdóttir</i>
Ireland	<i>Donncha O'Connell</i>
Italy	<i>Marta Cartabia Elisabetta Crivelli Elisabetta Lamarque Diletta Tega</i>
Latvia	<i>Ilvija Pūce</i>
Liechtenstein	<i>Sigrid Launois-Mayer</i>
Lithuania	<i>Gediminas Andriukaitis</i>
Luxembourg	<i>Roby Antony</i>
Malta	<i>Therese Comodini Cachia</i>
Moldova	<i>Vera Turcanu-Spatari</i>
Monaco	<i>Caroline Mecary</i>
Montenegro	<i>Tea Gorjanc Prelevic</i>
Netherlands	<i>Kees Waaldijk</i>
Norway	<i>Lene Løvdal</i>
Poland	<i>Adam Bodnar Aleksandra Gliszczyńska-Grabias Katarzyna Sękowska-Kozłowska Anna Śledzińska-Simon</i>
Portugal	<i>Alexandre Sousa Pinheiro Dinamene de Freitas Inês Marinho</i>
Romania	<i>Romanița Elena Iordache Iustina Ionescu</i>
Russian Federation	<i>Kseniya A. Kirichenko</i>

Country	Name
San Marino	<i>Maria Gabriella Francioni</i>
Serbia	<i>Dragana Vučković</i>
Slovak Republic	<i>Eva Kovacechova</i>
Slovenia	<i>Arne Marjan Mavčič Matej Avbelj</i>
Spain	<i>Teresa Freixes Sanjuán Francisco Balaguer Callejón Cristina Elías Méndez</i>
Sweden	<i>Victoria Kawesa</i>
Switzerland	<i>Alecs Recher</i>
“The former Yugoslav Republic of Macedonia”	<i>Ninoslav Mladenovic</i>
Turkey	<i>Yasemin Öz</i>
Ukraine	<i>Serhiy Ponomaryov</i>
United Kingdom	<i>David Harris Therese Murphy Jeffrey Kenner Toni Johnson</i>

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