

# Hate Crimes and other Hate-motivated Incidents based on Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics



STEERING COMMITTEE  
ON ANTI-DISCRIMINATION,  
DIVERSITY AND INCLUSION (CDADI)

Working Group on SOGIESC (GT-ADI-SOGI)

Second thematic  
implementation review report on  
Recommendation CM/Rec(2010)5

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**Second thematic implementation review  
report on 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**

**STEERING COMMITTEE ON ANTI-DISCRIMINATION,  
DIVERSITY AND INCLUSION (CDADI) –  
Prepared by the CDADI Working Group  
on sexual orientation, gender identity,  
gender expression and sex characteristics (GT-ADI-SOGI)**

French edition:

*Crimes de haine et autres incidents motivés  
par la haine en raison de l'orientation sexuelle,  
de l'identité de genre, de l'expression de  
genre ou des caractéristiques sexuelles*

*Deuxième rapport d'examen  
thématique de la mise en œuvre de la  
Recommandation CM/Rec(2010)5*

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Council of Europe  
F-67075 Strasbourg Cedex France  
E-mail: [sogi@coe.int](mailto:sogi@coe.int)

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# List of Acronyms

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<b>CoE</b>	Council of Europe
<b>CM/Rec(2010)5</b>	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
<b>EB</b>	Equality Bodies
<b>ECHR</b>	European Convention on Human Rights or Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>the Court/ the European Court</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>ILGA-Europe</b>	International Lesbian, Gay, Bisexual, Trans and Intersex Association-Europe
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex people <sup>1</sup>
<b>NHRI</b>	National Human Rights Institutions
<b>OII - Europe</b>	Organisation Intersex International-Europe
<b>OSCE ODIHR</b>	Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe
<b>SOGIESC</b>	Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics
<b>TGEU</b>	Transgender Europe

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1. This report uses the LGBTI acronym while fully acknowledging the existence of diverse identities within the groups it represents. It is also understood that self-determination is central to the human rights protection of persons considering themselves lesbian, gay, bisexual, transgender or intersex and that no fixed identities should be derived from this acronym.



# Introduction

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1. The present thematic report stems from the Committee of Ministers' decision to complement the comprehensive review of the implementation of **Recommendation CM/Rec(2010)5<sup>2</sup> of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity<sup>3</sup>** (hereafter "CM/Rec(2010)5") with thematic reviews on one of the topics covered by this Recommendation. In autumn 2021, the Council of Europe's Committee of Ministers gave this task to the CDADI Working Group on Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics together with the task to prepare a comprehensive review of the Recommendation by the end of 2025.<sup>4</sup>

2. This second thematic review<sup>5</sup> focuses on hate crimes and other hate-motivated incidents based on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). It is taking place against a background of rising violence against LGBTI persons across Council of

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2. 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, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?Reference=CM/Rec\(2010\)5](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Rec(2010)5).
  3. See the exchange of views between the European Governmental LGBTI Focal Points Network (EFPN) and the Steering Committee on Anti-discrimination, Diversity, and Inclusion (CDADI) at the CDADI 2nd Plenary Meeting (2-4 February 2021).
  4. Such comprehensive reviews have been carried out twice so far: in 2013: see review report available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?Objec-tID=09000016805c859a#\\_ftn1](https://search.coe.int/cm/Pages/result_details.aspx?Objec-tID=09000016805c859a#_ftn1), and in 2020, see review report available at <https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8>.
  5. For reference, the first thematic review focused on Legal Gender Recognition. See: Thematic Report on Legal Gender Recognition in Europe, CoE's Steering Committee on Anti-Discrimination, Diversity, and Inclusion (CDADI), June 2022, available here: <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>.



Europe (hereafter: “CoE”) member States<sup>6</sup>, fuelled notably by strong anti-LGBTI rhetoric, including by politicians and religious leaders.<sup>7</sup>

3. As per the Section entitled “**Hate crimes” and other hate-motivated incidents** of CM/Rec(2010)5, (Section B, paragraph 1 to 5), member States “should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; [with due] attention [...] paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials [...]” (paragraph 1). They “should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance” (paragraph 2). They “should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related “hate crimes” and other hate-motivated incidents are encouraged to report these crimes and incidents [...]” (paragraph 3). They should “take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons” (paragraph 4). Finally, they “should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on “hate crimes” and hate-motivated incidents related to sexual orientation or gender identity” (paragraph 5).

4. In 2022, three CoE member States (Albania, France and Romania) volunteered to participate in this thematic review and to use this opportunity as a means of advancing their national reform process.

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6. See ECRI 2021 Annual report available here: <https://rm.coe.int/ecri-2021-annual-report-24052021-en/1680a6a6d3> (for reference, ECRI has been addressing intolerance and discrimination against LGBTI persons since 2013 when it initiated its fifth monitoring cycle). Other international documents that have highlighted such a trend in recent years include the Parliamentary Assembly Resolution 2417 (2022) on Combating rising hate against LGBTI people in Europe (available here: <https://pace.coe.int/en/files/29712/html>). See also the 2022 Annual Review of the Human Rights situation of LGBTI persons by ILGA Europe here: <https://ilga-europe.org/files/uploads/2022/04/annual-review-2022.pdf>.

7. See ECRI’s 2021 Annual Report (page 9): “Several states saw a strong political rhetoric – including, and in some cases especially, from governing parties and their representatives – against a perceived “LGBTI-ideology” [...]. This ongoing controversy often led to virulent forms of public discourse, including comments that could be qualified as intolerant or hateful towards LGBTI persons”. See also the report of the Parliamentary Assembly of the CoE on Combating rising hate against LGBTI people in Europe, 2021.

5. This second thematic review gathered in-depth information and facilitated an informed dialogue on hate crimes based on SOGIESC at national level thanks to the drawing up of national reports, the holding of multi-stakeholder roundtables and the issuing of recommendations in each of the participating countries. This review process also benefited from the reflections and information shared by governmental and non-governmental representatives gathered in Dublin on 27 October 2022 at a Roundtable (hereafter: “the Dublin Roundtable”) organised under Ireland’s Presidency of the CoE to discuss the theme.<sup>8</sup>

6. This report starts with definitional issues and an overview of relevant international standards in general and the case law of the European Court of Human Rights (hereafter: ‘the Court’) in particular (Section I). It then highlights trends with regard to national legislation<sup>9</sup> and institutional responses to combat hate crimes and incidents based on SOGIESC in CoE member States (Section II); and presents available statistics on such crimes and incidents while discussing data collection issues (Section III). It provides insight into implementation challenges posed by hate crime legislation by the police and the judiciary (Section IV); and examines the types of measures to provide support to victims (Section V). Finally, it examines the current range of prevention measures taken by CoE member States against hate crimes and hate incidents based on SOGIESC in detention facilities (Section VI). A last section includes a series of recommendations for the consideration of CoE member States (Section VII).

7. This report may be read in conjunction with the document “Combating hate crimes and hate motivated incidents based on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC): PROMISING PRACTICES”<sup>10</sup>. The examples contained in this document aim to empower and inspire stakeholders in their efforts to combat hate crime based on SOGIESC, more effectively.

8. The information and discussions resulting from this thematic review process should inform the on-going work of the CoE Expert Committee on Hate Crime to develop a Committee of Ministers Recommendation on this

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8. For more information on the Roundtable held in Dublin in October 2022 on the Right to life, security, and protection from violence: combating SOGIESC-based hate crime across Europe, see here: <https://www.coe.int/en/web/sogij/-/european-roundtable-combating-sogiesc-based-hate-crime-across-europe>.

9. The report takes into account legislation that had entered into force by 28 June 2023.

10. Available at: <https://rm.coe.int/2022-thematic-review-en-sogiesc-based-hate-crime-promising-practices/1680ac0eea>.

topic<sup>11</sup>, which will eventually enable the CoE to tailor its cooperation activities<sup>12</sup> to the needs of its member States.

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11. For more information on the work of this Committee, see <https://www.coe.int/en/web/committee-of-experts-on-hate-crime/working-documents>.

12. These cooperation activities are undertaken to help member States reach CoE standards in human rights, rule of law and democracy.

# I. International standards

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## A. Hate Crime Definition

While an internationally accepted definition of hate crimes does not exist, over time efforts have been made in different international fora to provide some guidance.

Based on the Preamble of Decision No. 9/09 on combating hate crimes of the Ministerial Council of the Organisation for Security and Co-operation in Europe (OSCE), its Office for Democratic Institutions and Human Rights (ODHIR) uses a non-binding definition for the purposes of monitoring and policy analysis, according to which “hate crimes are criminal offences committed with a bias motive”.<sup>13</sup>

At the level of the CoE, CM/Rec(2010)5 refers to “hate crime” and “hate motivated incidents”. A definition is not found in the text of the Recommendation, but its Explanatory Memorandum<sup>14</sup> refers to hate crimes as “crimes committed on grounds of the victim’s actual or assumed membership of a certain group, most commonly defined by “race”<sup>15</sup>, religion, sexual orientation, gender identity, nationality, ethnicity, disability etc.” The said Explanatory Memorandum further explains that the term “hate-motivated incident” is “used to encompass any incident or act – whether defined by national legislation as criminal or not – against people or property that involves a target selected because of its real or perceived connection or membership of a group. The term is broad enough to cover a range of manifestations of intolerance from low-level incidents motivated by bias to criminal acts.”

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13. See <https://www.osce.org/files/f/documents/d/9/40695.pdf>.

14. Explanatory Memorandum of the Recommendation CM/Rec(2010)5, document CM(2010)4 add3 final, 31 March 2010, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cf450](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf450).

15. Since all human beings belong to the same species, the Committee of Ministers of the CoE rejects, as does the European Commission against Racism and Intolerance (ECRI), theories based on the existence of different “races”. However, in this document, the term “race” is used in order to ensure that those persons who are generally and erroneously perceived as “belonging to another race” are not excluded from the protection provided for by the legislation and the implementation of policies to prevent and combat hate crime.

A more recent Recommendation of the CoE, CM/Rec(2022)16 on Combating Hate Speech<sup>16</sup>, acknowledges that there are certain forms of hate speech that reach the threshold of criminality, and as such, member States should clearly define in their national criminal law which expressions of hate speech are subject to criminal liability (paragraph 11). Finally, there are certain manifestations of hate crime that are committed against LGBTI spaces and events, such as community spaces, social spaces such as clubs, and events such as Pride marches. These require particular attention from law enforcement, posing a particular threat to the community as a whole.

## **B. Case law of the European Court of Human Rights**

In its case law, the European Court of Human Rights (hereafter: “the Court”) outlined CoE member States’ general obligations to conduct an effective investigation of hate crimes. It applied the doctrine of positive obligation which entails additional duties both procedurally and substantively when tackling these crimes. This section explains how the Court articulated the positive obligation of national authorities to investigate the possible discriminatory motives of an offence when there are reasons to suppose their existence, and how this obligation is then applied to cases involving LGBT persons<sup>17</sup>, including where the crimes in question were committed by private parties. This section also refers to cases when the motive for discrimination is by association, and when motives intersect, and multiple biases are at play. It also discusses state obligations to protect people from anti-LGBT acts in places of detention.

The Court clearly established that Article 2 (right to life) of the European Convention on Human Rights (hereafter: “ECHR”) implies a procedural obligation on the part of the national authorities to carry out an effective criminal investigation, “capable of discovering, identifying and arresting attackers.”<sup>18</sup>

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16. Recommendation CM/Rec(2022)16[1] of the Committee of Ministers to member States on combating hate speech available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a67955](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955).

17. The use of the acronyms LGB, LGBT or LGBTI here uses the wording used in the judgments of the Court.

18. *Menson and others v. United Kingdom* (Application No. 47916/99), decision on admissibility of 6 May 2003. In the present case, the Court found that there were serious flaws in the way in which the investigation into the racist attack towards Michael Menson had been conducted. However, noting that the culprits had been tried and punished, the Court held that “the legal system of the Respondent State did ultimately demonstrate its ability to enforce, within a reasonable time and regardless of race of the victim, the penal law against the authors of a murder”. For this reason, the Court declared the case inadmissible.

In *Nachova and others v. Bulgaria* (2005), the Court went further: for the first time, it inferred from Article 14 (non-discrimination) a distinct obligation for the State to investigate and uncover the discriminatory motive of a crime if there are grounds to suspect one (in this case, a racist motivation).<sup>19</sup>

This “positive obligation principle”, initially posed in relation to the racist motive of a crime, has been extended to other protected characteristics: in several landmark cases, the Court has addressed the **failure of police services to unveil the discriminatory motive of hate crimes** when there are indications that the violence was motivated or influenced by the sexual orientation of the victim.

In *Identoba v. Georgia* (2015)<sup>20</sup>, the Court emphasized the need to address the specificity of the discriminatory motives behind the attacks on LGBT persons that took place on the sidelines of a peaceful demonstration marking the international day against homophobia. In that case, the Court noted that the authorities were aware of the public hostility towards the LGBTI community. The Court concluded that the authorities failed to pursue an effective investigation on the possible discriminatory motives of the incidents and found that there had been a violation of Article 3 in conjunction with Article 14.

The authorities’ failure to implement a timely and objective investigation into attacks on LGBT people in the *Identoba* case was again cited in a case where LGBTI people, who took part in the May 17 protests the following year, were attacked by a group of people (see *Support Group for Women’s Initiatives and Others v. Georgia*, 2021).<sup>21</sup> The Court found a violation of Article 3 in conjunction with Article 14 as well as a violation of Article 11 for the State’s failure to take measures to protect the demonstrators from the crowd, which repeated homophobic insults and physical threats, despite being aware of the risks associated with this event. Furthermore, the Court explained that it could not exclude the possibility that the unprecedented scale of the vio-

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19. *Nachova and others v. Bulgaria* (Application Nos. 43577/98 and 43579/98), 6 July 2005. In this case, the Court found that the authorities had failed in their duty under Article 14, taken in conjunction with Article 2, to take all necessary steps to determine whether discrimination played a role in the shooting deaths of two Roma fugitives during an attempted arrest by the military police. In other words, this conclusion is based on the breach by the Bulgarian authorities of their procedural obligation to investigate; if a discriminatory motive had indeed been found, the violation of the article would have been for substantive reasons. For the application of the concept of positive obligations to the discrimination ground of sexual orientation, see *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, §§ 108 et seq, 14 January 2020.

20. *Identoba and others v. Georgia* (Application No. 73235/12), 12 August 2015.

21. *Women’s Initiatives Supporting Group and others v. Georgia* (Applications Nos. 73204/13 and 74959/13), 16 December 2021.

lence was influenced by the authorities' failure to carry out an objective and timely investigation of the attacks against LGBT persons from the previous year, as dealt with in the *Identoba* case. In that case, the Court acknowledged for the first time that hate crime based on the sexual orientation of individuals peacefully assembling in public amounts to a violation of the prohibition of inhuman or degrading treatment (Article 3).

In another similar case of violence on the sidelines of a Pride March (*MC and AC v. Romania*, 2016), the Court found that the authorities had not only slowed down the investigation but also failed to take "reasonable measures"<sup>22</sup> to study the possible homophobic motives that motivated the attack. This led the Court to find a violation of Article 3 in conjunction with Article 14.<sup>23</sup>

The Court also considered the lack of serious investigation and action taken to **expose the homophobic nature behind the behaviour of the police forces** in *Aghdgomelashvili and Japaridze v. Georgia* (2020).<sup>24</sup> This case concerned a police raid on the offices of an LGBTI organisation in Tbilisi, during which the police insulted and threatened the applicants, subjected them to physical and mental abuse with homophobic and/or transphobic hatred, and coerced them into humiliating strip searches. Noting that the investigation dragged on, the Court found that the respondent state had failed to **properly investigate these facts**, pointing to the "inability, or unwillingness, of the [Georgian] authorities to examine the place that homophobic and/or transphobic motivations held in the alleged police brutality" and that the behaviour of the police officers was not compatible with respect for human dignity. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention on the merits, taken in conjunction with Article 14 (prohibition of discrimination),

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22. Regarding the exact scope of "reasonable steps", see *MC and AC v. Romania*, § 103: "When investigating incidents of violence, such as ill-treatment, national authorities have an obligation to take all reasonable steps to determine the role that discriminatory motives may have played in the act of violence, which, the Court concedes, is a difficult task. The obligation on the respondent State is an obligation to do its best in this respect, and it is not absolute. Authorities must do everything reasonable in the circumstances to collect and secure evidence, to explore all practical means at their disposal to discover the truth, and to reach fully reasoned, impartial and objective decisions, without omitting doubtful facts which could indicate violence induced by racial or religious intolerance, for example, or motivated by gender discrimination (see *Nachova and Others v. Bulgaria [GC]*, Applications Nos. 43577/98 and 43579/ 98, § 160, 2005 -VII, *Members of the Congregation of Jehovah's Witnesses of Gldani and others v. Georgia* §§ 138-42, cited above, and *Mudric v. Republic of Moldova*, Application No 74839/10, §§ 60-64, July 16, 2013, recently reiterated in *Identoba et al.*, cited above § 67)."

23. *MC and AC v. Romania* (Application No. 12060/12) April 12, 2016.

24. *Aghdgomelashvili and Japaridze v. Georgia* (Application N°7224/11), 8 October 2020.

as well as a violation of Article 3 in its procedural limb taken in conjunction with Article 14.

In its case law, the Court also applies the positive obligation on States to carry out **a serious investigation of possible discriminatory motives** in cases involving private persons rather than national authorities (see *Šečić v. Croatia*, 2007<sup>25</sup> and *Angelova and Iliev v. Bulgaria*, 2007<sup>26</sup> regarding failures to adequately investigate a racist attack by private individuals); this positive obligation, including in matters between persons governed by private law, has also been emphasized in cases of homophobic violence (see the previously mentioned case, *MC and AC v. Romania*, 2016, § 109).

In addition to knowing whether the discriminatory motivation of an offence has been investigated, the Court also looked at the **legal response given by the national courts**.

In *Sabalić v. Croatia* (2021)<sup>27</sup>, the Court found that the State had failed in its procedural obligations under Article 3 of the Convention in conjunction with Article 14 regarding the violent attack on the applicant motivated by her sexual orientation. The Court held that the prosecution of the author in a misdemeanor court did not properly consider the hate crime status of the offence and resulted in a nominal fine. According to the Court, the national authorities acted contrary to their **duty to prevent impunity for hate crimes**, which is particularly destructive for fundamental human rights.

In a case concerning the homophobic murder of the applicant's 26-year-old son by secondary school students (*Stoyanova v. Bulgaria*, 2022)<sup>28</sup>, the Court held that the authorities had clearly established the homophobic motivation for the assault. However, it considered that there had indeed been a violation of Article 14 taken in conjunction with Article 2, owing to the derisory follow-up given by the Bulgarian courts. This failure is due, according to the Court, to the fact that Bulgarian criminal law had not given the courts the means to respond to these acts, emphasizing that the murder of a person because

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25. *Šečić v. Croatia*, (Application No. 40116/02, 31 May 2007, § 67). The *Šečić* case concerns the attack on the applicant by a group of skinheads, causing serious bodily harm and hospitalization. The applicant maintained that the Croatian authorities had not carried out a rigorous investigation into this attack because of his Roma origin. The Court, referring to the *Nachova* decision, underlined that when investigating incidents of violence, national authorities have an additional duty to take all reasonable steps to uncover racist motivation, and affirmed that this was "the case including in cases where the treatment contrary to Article 3 of the Convention is inflicted by individuals."

26. *Angelova and Iliev v. Bulgaria* (Application No. 55523/00, 26 July 2007).

27. *Sabalic v. Croatia* (Application No. 50231/13), 14 January 2021.

28. *Stoyanova v. Bulgaria* (Application No. 56070/18), 14 June 2022.



of his real or supposed sexual orientation did not give rise to an aggravating circumstance or a more serious specific qualification. In this respect, the Court indicated in Article 46 of the Convention (binding force and enforcement of judgments) that Bulgaria must ensure that violent attacks against a person motivated by hostility towards his real or supposed sexual orientation be **treated as aggravating circumstances within the meaning of criminal law.**

## Discrimination by association

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The Court further developed the positive obligation of national authorities to investigate and uncover the discriminatory motivations of an offence when it comes to discrimination by association. In *Škorjanec v. Croatia* (2017)<sup>29</sup>, the Court explained that the obligation to investigate effectively and to take account of discriminatory motivations in the judicial process also applies to cases where the victim is targeted not because of his personal status or his real or supposed status but because of his **supposed association** with another person having, in a real or supposed way, such personal status or such characteristics.

## Multiple motivations and intersecting discrimination

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Revealing the discriminatory motivations of a hate crime can be made more difficult by the fact that many perpetrators may have multiple motivations and intersecting hatreds. The Court established that for a “hate crime” to be characterized as such, **it is not necessary that the motivation be entirely related to the characteristics of the victim.** In *Balázs v. Hungary* (2015),<sup>30</sup> the Court considered that “the perpetrators of an offence may have multiple motivations, being influenced by contextual factors as strong or stronger than their discriminatory attitude towards the group to which the victim belongs” (§ 70). Further, the Court introduced for the first time in its jurisprudence an intersectional interpretation of discrimination in the case *B.S. v. Spain*.<sup>31</sup> In this case involving police violence, the Court recognized the particular vulnerability of the applicant, a Spanish sex worker of Nigerian origin due to her “race”, gender, and employment status. The Court considered

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29. *Škorjanec v. Croatia* (Application No. 25536/14) 28 March 2017: this case concerned two perpetrators of a racist attack prosecuted and convicted of a hate crime against the applicant’s partner, who was of Roma origin. However, although the applicant was also beaten and received injuries, the attack on her was not prosecuted as a hate crime, the authorities having considered that, not being Roma herself, there was no reason to believe that the attack on her was motivated by hatred.

30. *Balázs v. Hungary* (Application No. 15529/12), 20 October 2015.

31. *BS v. Spain* (Application No. 47159/08), 24 July 2012.

that the domestic courts had not taken into account the applicant's special vulnerabilities and had not taken all possible measures to ascertain whether or not a discriminatory attitude might have played a role in the events (violation of Article 14 in conjunction with Article 3). There is therefore an increasingly robust ground in the Court's case law to consider multiple and intersectional discrimination approaches in legislation.

## State obligations to protect detainees against anti-LGBTI hate crimes

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(see also other international law references in Section VI- Protection against anti-LGBTI hate crimes in detention facilities)

The Court had the opportunity to examine the measures taken by States to prevent the risk of hate crime in detention facilities under Article 3 of the ECHR. In *Preminyin v. Russia*,<sup>32</sup> the Court established the obligation for States to protect any prisoner from violence at the hands of other inmates and exercise supervision and control in relation to detention to prevent such violence from occurring and apply the necessary preventive measures to avert incident. This includes conducting prompt and effective investigations into reports of ill-treatment by fellow inmates or prison staff. Regarding the risk of anti-LGBTI hate crimes in detention more specifically, the Court has examined in more detail what the responsibilities of the State entails. These revolve around the notion of sufficient, effective and adequate protection against anti-LGBT violence in detention.

### Sufficient and effective protection

In *Stasi v. France* (2011),<sup>33</sup> the applicant, a gay man, complained of ill-treatment, such as physical acts of rape and assault by his fellow prisoners, in particular on account of his homosexuality, and maintained that the authorities had not taken the necessary measures to ensure his protection. In that

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32. *Preminyin v. Russia* (Application No. 44973/04, 10 February 2011). This case concerns allegations of ill-treatment suffered by an inmate suspected of having hacked into a bank's online security system by his fellow inmates in the same cell and guards. The Court considered that the authorities knew or should have known that an applicant was being or was at risk of being ill-treated by his fellow prisoners but had failed to take reasonable measures to eliminate those risks and to protect the petitioner of this violence. It found a violation of Article 3 regarding the authorities' failure to fulfill their positive obligation to preserve Mr Preminyin's physical and psychological integrity, as well as regarding the ineffective investigation carried out following the allegations of systematic mistreatment of Mr. Preminyin by other inmates and guards. It also found a violation of Article 5 § 4 (right to liberty and security).
33. *Stasi v. France* (Application No. 25001/07, 20 October 2011).

case, the Court found that while in prison the applicant had been subjected to acts of violence that were serious enough for the facts in question to be classified as inhuman and degrading treatment. However, the Court did not consider that there had been a violation of Article 3: it concluded that the mechanisms in place gave the applicant effective and sufficient protection against physical violence by, *inter alia*, putting in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions (§ 80). Specifically, the Court considered that in the circumstances of the case, the authorities had taken all reasonable measures to protect the applicant, such as transferring him to another cell, allowing him the possibility of showering alone and being systematically accompanied by a supervisor (§ 96), thus the respondent State did not fail to fulfil its positive obligation under Article 3.

### **Appropriate protection**

The Court has also considered the extent to which decisions taken to ensure an applicant's safety and dignity are appropriate. For example, in *X v. Turkey* (2012),<sup>34</sup> the Court considered that placing a gay prisoner in total isolation and in inadequate conditions for more than eight months to protect him from fellow prisoners was not a justified measure and that the conditions of the applicant's solitary detention had been such as to cause him both mental and physical suffering and a strong feeling of being stripped of his dignity (a violation of Article 3). Further, the Court was not convinced that it was to protect his physical well-being that the prisoner had been excluded from prison life, and instead considered that it was the applicant's sexual orientation that was at issue, concluding that the applicant had been discriminated against on the basis of his sexual orientation by the prison administration (violation of Article 14 in conjunction with Article 3).

## **C. Other relevant international instruments**

### **Hate Crime Legislation: Aggravating Circumstances and Deterrent Sanctions**

Several documents issued by the CoE have recommended that the discriminatory motivation of a hate crime should be considered as an aggravating circumstance when determining the sentence. Regarding the discriminatory motives linked to sexual orientation and gender identity, CM/Rec(2010)5

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34. *X v. Turkey* (Application No. 24626/09, 9 October 2012).

explicitly affirms that “member States should ensure that, when determining a penalty, a motive based on a prejudice linked to sexual orientation or gender identity may be taken into account as an aggravating circumstance” (§2).

Following the adoption of CM/Rec(2010)5, the European Commission against Racism and Intolerance (ECRI) began to examine the facts of discrimination and intolerance against LGBT people in its fifth country monitoring cycle (2012-2018)<sup>35</sup>, as well as those regarding intersex people in its sixth monitoring cycle (which started in 2019). In this context, ECRI examined the criminal legislation of the various CoE member States and its implementation, including regarding LGBTI-phobic acts, in particular with regard to its General Policy Recommendation (GPR) No.7 on national legislation to combat racism and racial discrimination<sup>36</sup> (see also section II of this report). The Explanatory Memorandum to CM/Rec(2010)5 stresses that member States may prohibit racist discrimination as well as other forms of discrimination such as those based on gender, sexual orientation, and other characteristics (see the Explanatory Memorandum, paragraph 4).

**As ECRI itself has pointed out, its recommendations “should not be taken in isolation from applicable CoE and other international standards”.**<sup>37</sup>

The Yogyakarta Principles + 10 (2017), although non-binding, underline that it is necessary, in the application of existing texts relating to human rights, to take into account “the evolutions of [international human rights] law and its application to the lives and experiences of people of diverse sexual orientations and gender identities, across time and in different countries and regions” (Introduction, page 4). The principles also recognize the need, in response to discrimination based on sexual orientation or gender identity, to “consider how this form of discrimination and other forms of discrimination may intersect” and calls for accountability mechanisms to be in place for perpetrators of human rights violations related to sexual orientation or gender identity, whether these are government officials or not (Principle 29).<sup>38</sup>

Other CoE bodies have addressed issues related to hate crimes against LGBTI persons and explicitly highlighted the need to take account of sex

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35. See ECRI’s compilation of national reports’ recommendations concerning LGBT people, 5th monitoring cycle, available online at: <https://rm.coe.int/5th-cycle-ecri-recommendations-on-lgbt-issues/16809e7b66>.

36. See ECRI GPR No.7: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.7>.

37. See ECRI’s factsheet on LGBTI issues, available at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/factsheet-lgbti>.

38. See Yogyakarta Principles +10 (2017) page 9, available at: <http://yogyakartaprinciples.org/principles-en/yp10/>.

characteristics and gender expression in legislation on hate crime. This is the case of the Parliamentary Assembly of the CoE in the framework of its Resolution 2417(2022) on Combating rising hate against LGBTI people in Europe. The Resolution invites member States to “amend criminal legislation as necessary to ensure that its provisions with respect to hate crimes clearly cover all offences committed against a person or group of persons based on their sex, sexual orientation, gender identity, gender expression and sex characteristics, provide for proportionate and dissuasive sanctions, protect victims’ rights and make provision for them to receive compensation” (para. 14.1) and “make motivations based on sex, sexual orientation, gender identity, gender expression and sex characteristics an aggravating circumstance for all ordinary offences” (para. 14.2).

At present, EU law provides for the criminalization of hate crime and hate speech only in relation to a limited number of protected characteristics (“race”, colour, religion, descent or national or ethnic origin) through its Council Framework Decision 2008/913/JHA 28 November 2008 on combating certain forms and manifestations of racism and xenophobia by means of criminal law. Currently, an initiative by the European Commission to include hate speech and hate crimes in the list of “EU crimes” is under consideration by the Council of the European Union. If the Council agrees on this inclusion, this would allow the Commission to take a legislative initiative which would add other grounds to racism and xenophobia, currently prohibited by EU law, and could represent a further step in protecting against anti-LGBTI hate crimes.<sup>39</sup> The Commission proposal for a Directive on violence against women, includes in Recital 11 (if approved by the European Parliament and the Council of the European Union), a specific focus on intersectional and multiple discrimination, pointing out that “Violence against women and domestic violence can be exacerbated where it intersects with discrimination based on sex and other grounds of discrimination prohibited by Union law, namely (...) sexual orientation. Member States should therefore pay due regard to victims affected by such intersectional discrimination, through providing specific measures where intersecting forms of discrimination are present. In particular,

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39. See the Communication from the Commission to the European Parliament and the Council “A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime” accessible here: [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/extending-eu-crimes-hate-speech-and-hate-crime\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/extending-eu-crimes-hate-speech-and-hate-crime_en). In its Communication, the Commission underlined the need to tackle the current fragmentation of the legal framework on hate speech and hate crime in EU member States. According to the Commission, such fragmentation leads to “unequal conditions for people who may be victims of hate speech and hate crime.”

lesbian, bisexual, trans, non-binary, intersex and queer (LBTIQ) women, women with disabilities and women with a minority racial or ethnic background are at a heightened risk of experiencing gender-based violence.”<sup>40</sup>

The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime (hereafter: “EU Victims’ Rights Directive”) requires EU member States to treat victims of crimes, including victims of anti-LGBTI hate crime, as entitled to specific protection (see below). However, it is under consideration to take a further step in protecting against anti-LGBTI hate crimes through an initiative by the European Commission to include in the list of “EU crimes” hate speech and hate crimes on criteria other than racism and xenophobia, in particular in relation to gender, sexual orientation, age, and disability and to combat such hatred “on common grounds.”<sup>41</sup>

Relevant international bodies (OSCE ODIHR, ECRI, the European Commission, FRA) have repeatedly pointed to the need to collect hate crime data in a robust way. They also address the importance of giving victims of crime (including hate crimes) the ability to seek redress. Minimum standards have been established in this regard. These are dealt with directly in the section III on statistics.

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40. See the Commission proposal for a Directive of the European Parliament and the Council on combating violence against women and domestic violence. Article 4 of the proposal also includes a definition of “victims” that would extend the scope of the Directive to “any person, regardless of sex or gender, unless specified otherwise, who has suffered harm, which was directly caused by acts of violence covered under this Directive, including child witnesses of such violence”, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0105>.
  41. See the Communication from the Commission to the European Parliament and the Council “A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime” accessible here: [https://commission.europa.eu/document/download/405d4be5-867b-4dcb-bf97-f61fae89868c\\_en?filename=1\\_1\\_178542\\_comm\\_eu\\_crimes\\_en.pdf](https://commission.europa.eu/document/download/405d4be5-867b-4dcb-bf97-f61fae89868c_en?filename=1_1_178542_comm_eu_crimes_en.pdf). In its Communication, the Commission underlined the need to tackle the current fragmentation of the legal framework on hate speech and hate crime in EU Member States. According to the Commission, such fragmentation leads to “unequal conditions for people who may be victims of hate speech and hate crime.”



## II. Legislation, Policy and Institutional Framework

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**T**here is no universal approach to addressing anti-LGBTI hate crime among CoE member States. Differences in legislation and policies at the national level highlight the lack of a shared understanding of the issue. There may also be variations within the territory of decentralised States, with regional legislation offering at times more extensive protection than at national level (see also below table on hate crime laws). ECRI's country monitoring reports analyse the existing legal frameworks in CoE member States in light of its compliance with General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination. The 5<sup>th</sup> and 6<sup>th</sup> cycle monitoring reports also include an analysis of SOGIESC motivated crimes.<sup>42</sup>

In the section below, the existing legal frameworks have been distributed into main categories, with an assessment of their strengths and weaknesses as discussed at the Dublin Roundtable held on 27 October 2022. The institutional context for developing or updating laws and policies as well as for reviewing their implementation is also discussed in this section. It hereby reflects the practical importance of having an inclusive national cooperation and coordination mechanism for fighting hate crime as highlighted in ECRI's country reports.

### **A. Legislation and policy: protected characteristics, type of hate crime law, multiple and intersecting biases**

#### **1. Protected characteristics**

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Deciding which SOGIESC grounds to include in the law will have a significant impact for society as it sends a strong signal about the government's determination to end all anti-LGBTI hate crimes, without creating a hierarchy among the covered grounds. It will also have consequences on how effectively the law can be used and enforced. A too narrow list of protected characteristics risks excluding groups that are commonly victims of hate crimes. In this regard, ECRI's monitoring work regularly highlights that States should

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42. See Compilation of ECRI country reports recommendations pertaining to LGBT persons (5<sup>th</sup> monitoring cycle) available here: <https://rm.coe.int/5th-cycle-ecri-recommendations-on-lgbt-issues/16809e7b66>.



revise their legislation to include all SOGIESC grounds within the scope of their hate crime provisions.

Research data has recently emerged, showing the extent to which intersex people are being regularly victims of hate speech and crimes (see also in the section below on statistics). So far, a limited number of states/regional governments (6 in total) include intersex persons in the scope of their protective legislation against hate crime. LGBTI organisations such as OII Europe, ILGA-Europe and TGEU have engaged in discussions with governments on this issue, raising awareness on the heightened vulnerability of this group.<sup>43</sup> The same concern has been voiced by international human rights bodies like the CoE Parliamentary Assembly or the Commissioner on Human Rights.<sup>44</sup> The inclusion of sex characteristics in the list of protected characteristics by hate crime legislation was also explicitly called for in the discussions during the Dublin Roundtable held in 2022.

In some instances, SOGIESC bias may be covered by an open-ended list of characteristics or vaguely defined terms.<sup>45</sup> Concerns have been however raised in the Dublin Roundtable about the inefficiency of having such a vague list or terms in view of the possible confusion that this may create in practice for law enforcement and prosecution to implement. For reason of efficiency and clarity, recommendations were then made at the Dublin Roundtable to use terms such as “sexual orientation”, “gender identity”, “gender expression” and “sex characteristics” within the legislation.

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43. See ILGA-Europe’s position paper on Equality and Full Enjoyment of Human Rights for Intersex People (2017) available here <https://www.ilga-europe.org/policy-paper/equality-and-full-enjoyment-of-human-rights-for-intersex-people/>; see OII submission “Towards an extension of the list of EU crimes to hate speech and hate crime” (2021). See also ILGA-Europe/OII-Europe Protecting Intersex People in Europe: A toolkit for law and policy makers (2019).
  44. See the CoE Commissioner on Human Rights Issue Paper on Human Rights and Intersex People (2015), para.5, page 9: “National equal treatment and hate crime legislation should be reviewed to ensure that it protects intersex people. Sex characteristics should be included as a specific ground in equal treatment and hate crime legislation or, at least, the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination”. See also the aforementioned Parliamentary Assembly Resolution 2417 (2022) on Combating rising hate against LGBTI people in Europe.
  45. Examples include the Czech Republic (see section 356 of the Criminal Code (incitement to hatred) which punishes with up to two years imprisonment anyone who publicly incites hatred against any “nation, race, ethnicity, religion, class or *other group of persons*” or Latvia where amendments to the Criminal Law in 2021 recognised that hate crimes committed on grounds of “*social hatred*” amount to aggravating circumstances. Italics are added.

**Table 1: Hate crime legislation and policy<sup>46</sup>**

Protected characteristics included in hate crime definition	Countries
<b>Sexual Orientation</b>	<p><b>29 member States</b></p> <p>Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Georgia, Greece, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Malta, Montenegro, North Macedonia, Norway, Portugal, Romania, San Marino, Serbia, Slovakia, Spain, Sweden, United Kingdom.</p>
<b>Gender Identity</b>	<p><b>21 member States</b></p> <p>Albania, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Georgia, Greece, Hungary, Iceland, Luxembourg, Malta, Montenegro, North Macedonia, Norway, Portugal, Serbia, Spain, Sweden, United Kingdom.</p>
<b>Gender Expression</b>	<p><b>6 member States</b></p> <p>Belgium, Denmark, Greece, Malta, Norway, Sweden.</p>
<b>Sex Characteristics</b>	<p><b>6 member States*</b></p> <p>Belgium, Denmark, Greece, Iceland, Malta, Norway.</p> <p><i>*Scotland explicitly mentions sex characteristics in its legislation on hate crime, and the Balearic Islands of Spain make explicit mention to intersex people in their Law 8/2016, which covers hate crime.</i></p>

## 2. Type of hate crime legislation

Different models exist between substantive offences, sentence enhancement and hybrid models.<sup>47</sup>

46. This includes legislation that had entered into force by 28 June 2023.

47. This section is based on the research presented by Mark Walters, Professor of Criminal Law and Criminology, Deputy Head of Sussex Law School, University of Sussex at the Dublin Roundtable. For further reference, please see: Walters, *Criminalising Hate Law as Social Justice Liberalism* (2022).

### **a. Substantive model**

Some legislation includes substantive hate crime offences. In this model, the offender is convicted of specific hate crime offences which are usually a more serious version of a basic offence, such as assault. They may carry a higher maximum sentence.

An example of such a model is the French Criminal Code referring to “Acts of violence... committed... because of the sex, sexual orientation or actual or supposed gender identity of the victim” (Criminal Code, Art.222-13(5) (a) and (b)).

### **b. Sentence enhancement**

Where legislation addresses the hate element through a sentence enhancement model, the offender is charged with a basic offence, and if convicted, the penalty is enhanced during the sentencing stage. This is deemed to provide wider judicial discretion to those responsible for determining sentences than in the case of a specific offence. Two types of sentence enhancement have been identified: sentence aggravation models, which apply to all criminal offences (see § 21 of ECRI’s GPR No. 7), and penalty enhancements, which apply to specific criminal offences. It seems that the majority of CoE member States follow this model for a number of grounds.<sup>48</sup> In the field of SOGIESC, examples include:

Andorra: Article 30.6 of the Criminal Code provides for penalty enhancements if crimes are committed for “racist and xenophobic motives or reasons related to ideology, religion, nationality, ethnic origin, sexual orientation, disease or physical or mental disability of the victim.”

Belgium: Articles 33–42 of the Law of 10 May 2007<sup>49</sup> designed to fight certain forms of discrimination provide that “hatred against, contempt for, or hostility to a person on the grounds of his so-called “race,” colour of skin, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, wealth, belief or philosophy of life, current and future state of health, disability, language, political conviction, or physical or genetic characteristic or social origin” are aggravating circumstances that can double the penalty of the following specified crimes: indecent assault and rape; manslaughter and intentional injury; non-assistance to a person in danger; violation of personal liberty and of the inviolability of

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48. For more detail see the legal analysis in ECRI’s 5th and 6th cycle monitoring reports.

49. At the time of writing, a revision of the Belgium legislation on anti-discrimination was on-going.

private property; ambush or lying in wait; libel; arson, and destruction of personal possessions or property.

Malta: The Criminal Code specifies that punishments for selected offences aggravated by hatred based on sexual orientation or gender identity are to be increased by one to two degrees (Criminal Code, Articles 222A(2), 251D and 325A).

Sweden: The Criminal Code foresees “As aggravating circumstances when assessing penalty... whether a motive for the offence was to insult a person or a population group on grounds of sexual orientation or transgender identity or expression” (Criminal Code, Ch.29, s.(2)(7)).

### c. Hybrid model

An alternative model of legislating for hate crime is to create a hybrid system whereby any basic offence can be “aggravated” in law and at sentencing. As explained by Walters, “Hybrid laws [...] take elements of substantive offences and either/or sentence aggravation or penalty enhancements. Legislation typically enables prosecutors to charge a criminal offence and additionally include on the charge that it is an “aggravated offence” or a “hate crime”, which then requires the hate-element to be proven at trial (as against at sentencing only). Although not stand-alone offences in law, the offence is still labelled as an aggravated/hate-based one in the indictment and will likely appear on the offender’s criminal record.”<sup>50</sup>

An example of this model is provided by Scotland: Any offence can be “aggravated by prejudice if the offender demonstrates malice and ill-will towards (...) The victim’s actual or presumed membership... or the offence is motivated (wholly or partly) by malice and ill-will towards a group of persons....” (Hate Crime and Public Order (Scotland) Act, Part 1, 2021).

All models have their own merits and weaknesses and these have been extensively discussed in several guidance documents issued on the topic of hate crime laws as well as in academic research papers.<sup>51</sup> Considerations of the pros-and cons of each model need to be carefully examined by the legislator. ECRI insists on the basis of para. 21 of its General Policy Recommendation No. 7 that states introduce a general provision that racist motivation

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50. See Walters, *Criminalising Hate Law as Social Justice Liberalism* (2022), page 132.

51. See *Hate Crime Laws: A Practical Guide* issued by the OSCE ODIHR (2009), see also for a discussion of the models in relations to specific geographical contexts: Goodall and Walters, *Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth*, Equality & Justice Alliance (2019)). Previous research (Hate Crime and the Legal Process, University of Sussex, 2017).

constitutes an aggravating circumstance and extends this to the SOGIESC grounds. Such general provisions have the advantage of avoiding loopholes in the comprehensive criminalisation of hate crime.<sup>52</sup> Discussions held during the aforementioned Dublin Roundtable highlighted in particular the advantages of the substantive offence or the hybrid model approaches in terms of the message criminal law sends to society (anti-LGBTI hate crime is *specifically* condemnable), its preciseness and clarity as well as the positive effect it may have on the hate element of a crime to be recorded. The hybrid model for its part has the advantage of eliminating the need for a dual system of sentencing enhancements and substantive offences which can be complex and confusing for the criminal justice personnel.

### 3. Multiple and intersecting biases

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Hate crimes can have more than one motivation. CM/Rec (2010)5 reflects that reality by calling on member States to “take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity” (section XII of CM/ Rec (2010)5 Discrimination on multiple grounds).<sup>53</sup> In 2020, the report reviewing the implementation of CM/Rec(2010)5 Recommendation adopted by CDDH noted that few States reported having included an explicit provision on multiple discrimination in their anti-discrimination legislation (Georgia, Norway, Sweden were among them).<sup>54</sup>

Intersectional discrimination manifests itself through the interlocking of different grounds creating a qualitatively different form of discrimination. In that it is different from multiple discrimination as grounds of discrimination tend to be assessed separately. Furthermore, intersectionality requires an analysis of the institutional and structural aspects of discrimination. While the need to take into account the intersectional dimension of hate crime in legislation

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52. See for example the ECRI's 5th reports on Germany, §§ 7 et seq. and on Türkiye, §§ 7 et seq.

53. See above under the International standards section, the case of Balázs v. Hungary discussed on page 8.

54. See CDDH Report on the implementation of 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 by the CDDH at its 92nd meeting (26–29 November 2019), page 83, available here: <https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8>

and policies is argued for by international experts and bodies,<sup>55</sup> it is less visible in domestic legislation: few states appear to have indeed embraced an intersectional approach in their hate crime legislation. For example, ENAR research from 2020<sup>56</sup> indicated that 6 states out of the 14 surveyed in that research replied that their legislation included an intersectional approach: Czech Republic, Finland, Greece, Ireland, Lithuania, and Spain. The upcoming comprehensive review of CM/Rec(2010)5 may provide a more updated picture on the issue across CoE member States. Apart from legislation, there are also indications that national courts may not be receptive to intersectional arguments in view of the “prevailing ideology of equality based on isolated categories of non-discrimination”<sup>57</sup> and the high level of unawareness and training to address the structural dimension of discrimination.

## **B. Institutional framework for coordination and cooperation**

The importance of having an institutional set-up at domestic level capable of coordinating the fight against hate crime and closely liaising with civil society is regularly referred to in ECRI’s monitoring reports. It is also dealt with in its GPR No. 11 on Combating racism and racial discrimination in policing. ECRI recommends in particular to establish units within each police division which specialise in dealing with such offences and to set up frameworks for dialogue and co-operation between the police and members of minority groups.<sup>58</sup>

In 2016, the European Commission created the High Level Group on combating hate speech and hate crime, which brings together national authorities, civil society organisations and international organisations to provide guidance and support to public authorities on how to step up their response to

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55. See the recently adopted Resolution of the European Parliament on “Intersectional discrimination in the EU: socio-economic situation of women of African, Middle Eastern, Latin American and Asian descent” adopted in November 2022, available here: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0289\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0289_EN.html).

56. See ENAR briefing document on hate crime: [https://www.enar-eu.org/wp-content/uploads/intersectionality\\_and\\_hate\\_crime\\_briefing\\_final-2.pdf](https://www.enar-eu.org/wp-content/uploads/intersectionality_and_hate_crime_briefing_final-2.pdf)

57. Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *B. S. v. Spain*, Maria Caterina La Barbera and Marta Cruells López, Law and Society Review, Volume 53, Issue 4 p. 1167-1201, 2019.

58. See § 18 of ECRI’s GPR No. 11 and § 67 of its explanatory memorandum.

hate speech and hate crime on the ground. Specific discussions were held also on how to tackle anti-LGBTIQ hate crime<sup>59</sup>.

Inter-institutional coordination mechanisms such as working groups on hate crime/hate speech will vary according to their given mandate and in particular whether they address hate crime/hate speech comprehensively or focus on specific grounds. The type of mandate will decide on the representation of the ministries concerned and may also influence how LGBTI civil society organisations are involved.

At national level, institutional cooperation on issues of hate crime would typically include government officials from the ministries responsible for internal affairs, administration, and justice, National Human Rights Institutions (NHRI) and Equality Bodies (EB), and civil society organisations. There are also examples of formalised cooperation at local level between the justice, police, and NGOs sectors (see for example, the document on 'Promising Practices'<sup>60</sup>).

Different formats of participation of civil society representing targeted communities at national level may exist between models where NGOs are full members of the working group and other models where they are only invited for input depending on the issues up for discussion on the agenda.

In principle, the mandate given to and the role taken up by NHRI and EB (monitoring, collecting relevant data, reporting, strategic litigation, legal assistance to survivors of hate crime) have great potential when it comes to fighting LGBTI hate crime.<sup>61</sup> These bodies operate in diverse contexts in relation to LGBTI people and this will have consequences on what they can do and how they are able to usefully engage on LGBTI issues. European-wide discussions have been held on how to capitalize on that potential, in particu-

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59. [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en)

60. As an illustration, the document refers to the initiative of the Public Prosecutor of Saint-Gaudens (France) to have an agreement signed between the Ministry of Justice, law enforcement representatives and three associations and shop-owners which makes their shop shelters for victims of anti-LGBT violence. They may alert on cases of abuse of LGBT people for follow-up action by law enforcement and judicial authorities. Available at: <https://rm.coe.int/2022-thematic-review-en-sogiesc-based-hate-crime-promising-practices/1680ac0eea>

61. According to information by the European Network of Equality Bodies (Equinet): 34 Equinet members had a mandate to address discrimination on the ground of sexual orientation and 30 had a mandate to address discrimination on the ground of gender identity in employment or beyond (education, housing, social protection and goods and services). This work includes dealing with complaints, providing legal support, providing guidance to duty bearers (including equality duties), conducting research, pursuing legislative and policy change, and raising awareness about discrimination issues.

lar when it comes to developing an effective range of outreach strategies to LGBTI persons, improving equality data or more recently on focusing on intersectionality as a way to contribute to effective equality.<sup>62</sup>

At the local level, there are various examples of cooperation, often involving civil society organisations and law enforcement agencies (see also section III). The document on ‘Promising Practices’<sup>63</sup> provides some of these examples. Experience has shown however that cooperation activities are often based on externally funded projects and are therefore highly dependent on the availability of funds. Besides, funds may be only for a limited duration, which may negatively affect the sustainability and the systematic nature of the co-operation.

Assessing the degree of effectiveness of such government-led working groups falls outside of the scope of this study and it may be difficult to get insight on the extent to which LGBTI issues are specifically discussed in these groups. Issues of effectiveness of such groups (regular, timely and action-oriented meetings), leadership (follow-up to the meetings conclusion) and inclusivity (close cooperation with NGOs) may be particular points for further discussion.

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62. For an overview of some of the discussions held, see *inter alia* the ECRI webpage on Thematic seminars with Equality bodies (<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/seminars>) and Equinet activities on LGBTI issues (<https://equineteurope.org/?s=LGBTI>).

63. Available at: <https://rm.coe.int/2022-thematic-review-en-sogjesc-based-hate-crime-promising-practices/1680ac0eea>





# III. Data, Statistics and Research

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## A. Overview of international and national data and sources on hate crimes and incidents based on SOGIESC (including victim surveys)

### 1. International data

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The OSCE ODIHR annual Hate Crime Report remains the largest dataset with official recorded hate crime data reported by OSCE participating States. It follows a methodology<sup>64</sup> according to which information and data on hate crime is provided by National Points of Contact on Hate Crimes (NPCs), appointed by the governments of OSCE participating States. The data is expected to focus on the specific bias motivations on which ODIHR has been asked to concentrate on and includes anti-LGBTI hate crime. Incidents reported by civil society groups and intergovernmental organisations are also published.

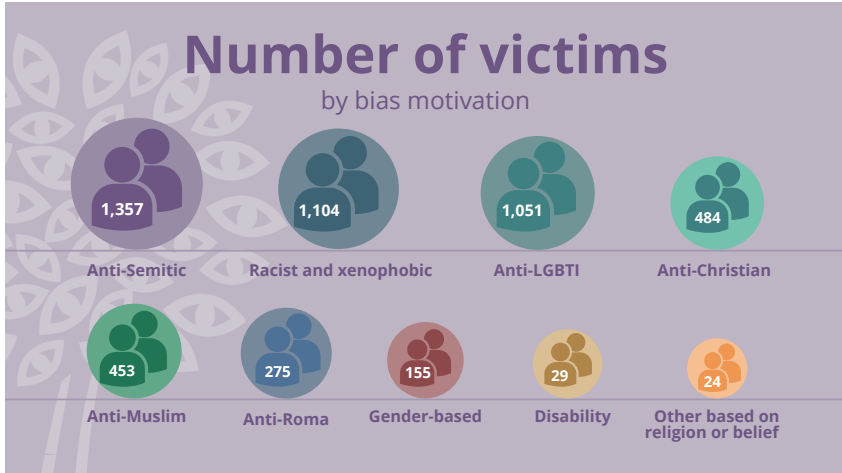
In the last annual Hate Crime Report, published by the OSCE ODIHR in November 2022 (2021 data), 41 States provided information on hate crime data, including 23 which provided disaggregated official hate crime statistics. A total number of 6,391 hate incidents, including 2,363 official disaggregated hate crime statistics and 4,028 descriptive incidents were reported by civil society, international organisations and the Holy See.<sup>65</sup> The latter cases reported by civil society, IGOs and the Holy See are recorded and published as “incidents” as opposed to “crimes” in view of ODIHR’s practical incapacity to verify whether incidents reported by civil society organisations can be classified as crimes. Civil society incidents are therefore not necessarily comparable to officially recorded hate crimes.

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64. See here for further details on methodology: <https://hatecrime.osce.org/our-methodology>

65. See <https://hatecrime.osce.org/infocus/2021-hate-crime-data-now-available>

In that same report, LGBTI people were reported to be the third largest group of victims in the 22 OSCE participating States reporting on anti-LGBTI hate crime<sup>66</sup> after victims of crimes based on antisemitic and racist and xenophobic bias (see graphic below).

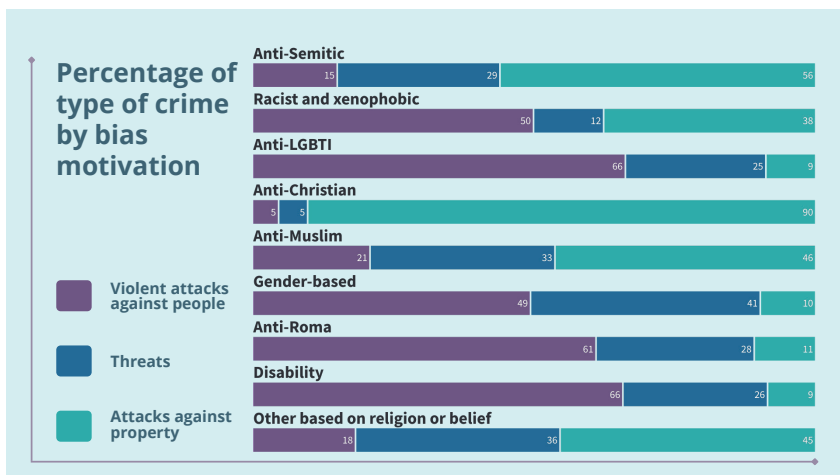


Source: *Key findings, OSCE ODIHR Hate Crime, 2021 Data*<sup>67</sup>

A distribution of the type of crimes by bias included in the said report shows that violent attacks against LGBTI people predominate with 66% of all anti-LGBTI hate crimes as compared to threats (22%) and attacks on property (9%).

66. Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Montenegro, Netherlands, Norway, Poland, Spain, United Kingdom report on hate crimes against LGBTI people defined as crimes motivated by a bias based on a person’s sexual orientation, gender identity and/ or sex characteristics. ODIHR noted also that recording practices vary, with some States recording hate crimes against transgender persons as a separate category.

67. Available here: [https://hatecrime.osce.org/sites/default/files/2022-11/2021%20Hate%20Crime%20Data%20Findings%20-%20presentation\\_161122.pdf](https://hatecrime.osce.org/sites/default/files/2022-11/2021%20Hate%20Crime%20Data%20Findings%20-%20presentation_161122.pdf).



Source: *Key findings, OSCE ODIHR Hate Crime, 2021 Data*<sup>68</sup>

In 2020, the Fundamental Rights Agency (FRA) published its second survey (2019 data) on LGBTI people in the European Union, North Macedonia, and Serbia. Its first such survey was carried out in 2012.<sup>69</sup>

Although this survey includes only some of the member States of the CoE, it offers the largest set of comparative data on hate crime against LGBTI persons in Europe to date and provides key information on LGBTI experiences across a range of areas of social life. Its main findings (see the extract below) show the high level of harassment and violence experienced by LGBTI people. A majority of LGBTI respondents (58 %) say that they experienced, during the five years before the survey, harassment in the form of offensive or threatening situations – including incidents of a sexual nature – at work, on the street, on public transport, in a shop, on the internet, or anywhere else. Trans people (70%) experienced the highest level of in-person harassment in the last five years, followed by intersex people (64%), lesbian and bi women (59%) and gay and bi men (49%). Intersex (22%) and transgender (17%) persons experienced physical or sexual attacks for being LGBTI at higher rates than the group average (11%). These attacks are also more common among young adults, aged 18 to 24, which seem to decrease with age, down to 7%

68. Available here: [https://hatecrime.osce.org/sites/default/files/2022-11/2021%20Hate%20Crime%20Data%20Findings%20-%20presentation\\_161122.pdf](https://hatecrime.osce.org/sites/default/files/2022-11/2021%20Hate%20Crime%20Data%20Findings%20-%20presentation_161122.pdf).

69. European Union Fundamental Rights Agency (2020), EU-LGBTI: A long way to go for LGBTI equality, Luxembourg, Publications Office of the European Union. Available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf)

among respondents who are 55+. Levels of reporting remains low: only 14% went to the police to report attacks or threats of violence in 2019 when asked if they or anyone else reported the incidents to the police among a series of possible organisations or institutions listed in the question. As part of the reasons for this states of affairs, the EU LGBTI Survey indicated that 25% of LGBTI violent hate crime victims did not report violent crimes to the police as they did not trust them or feared homophobic or transphobic reaction from the police.<sup>70</sup>

## KEY FINDINGS

- One in 10 LGBTI respondents (11 %) in the EU were physically or sexually attacked in the five years before the survey because they are LGBTI. Trans (17 %) and intersex (22 %) respondents experienced attacks at higher rates.
- Only one in five (21 %) incidents of physical or sexual violence was reported to any organisation, including the police (14 %).
- In the year before the survey, two in five LGBTI respondents (38 %) experienced harassment for being LGBTI. Rates are even higher (47 %) for respondents aged 15 to 17. Among all LGBTI respondents, trans (48 %) and intersex (42 %) indicate the highest rates of harassment.
- Only one in 10 (10 %) incidents of such harassment were reported anywhere. Just 4 % were reported to the police.
- On average, of those respondents across the EU who did not report the most recent incident of physical or sexual violence to the police, 25 % said that they did not do so because of fear of homophobic and/or transphobic reactions by the police. One in three (32 %) trans respondents did not report such incidents for fear of transphobic reactions from the police.

*Source: A long way to go for LGBTI equality, Findings of the 2019 survey on LGBTI people in the EU and North Macedonia and Serbia, FRA (2020)*

## 2. National data

At national level, different official and civil society sources may be of use. State practices for collecting and publishing hate crime statistics differ greatly from country to country.

While hate crime statistics of some member States cover a number of grounds, including SOGIESC, others only report on some or none of the SOGIESC biases. Within States themselves, different data may be collected by different institutions and using different systems, methods, and concepts, making it difficult to track cases across the system, from police to prosecution to courts, and obtaining crucial information about victims' needs.<sup>71</sup>

70. European Union Fundamental Rights Agency (2020), EU-LGBTI: A long way to go for LGBTI equality, Luxembourg, Publications Office of the European Union. Available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf)

71. For further reference, see the OSCE ODIHR Guide entitled Hate Crime Data Collection and Monitoring: A Practical Guide (2014) available here: <https://www.osce.org/odihr/datacollectionguide>.

Some of the recurring issues with States practices of data collection have been analysed in ECRI country reports as well as other international research documents. They are discussed in the subsection B below.

Besides governmental data, other sources include:

*National equality bodies:* a number of EBs have commissioned research on the experience of LGBTI victims of hate crime. Examples of research and survey activities have been reported in various publications (see for example, Equality Bodies working on the rights and discrimination faced by trans and intersex persons, Equinet, 2020 with examples spanning from Bosnia-Herzegovina to Germany and Belgium to Poland).<sup>72</sup>

*Victimization surveys* that include questions on experiences with hate-motivated crime and violence are useful to understand the reporting gap and develop measures to address such crimes. Some states conduct official victimization surveys among a sample of the general public and include specific questions on hate crimes to the surveys, including LGBT persons (for example in Denmark<sup>73</sup> France<sup>74</sup> or North Macedonia<sup>75</sup>). In some other instances such as in the United Kingdom<sup>76</sup> or in Belgium<sup>77</sup>, a specific national survey was launched resulting in a substantial base of information on issues of safety, among other areas investigated in the survey.

*Civil society:* The aforementioned OSCE ODIHR annual hate crime reports have shown that over years an increasing number of national civil society organisations collect and publish data on hate crimes or hate incidents, including on anti-LGBTI hate crimes. International NGOs have also mobilised their networks to fill in the gaps in data collection. For example, the Trans Murder Monitoring (TMM) project, undertaken by TGEU, systematically monitors, collects and analyses reports of homicides of trans and/or gender-diverse

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72. Available here: <https://equineteurope.org/equality-bodies-working-on-the-rights-and-discriminations-faced-by-trans-and-intersex-persons/>.

73. See Denmark's Annual victimisation survey which includes the question: 'To which extent was the violence, in your victim's perception, motivated by either racism or the victim's (alleged) sexual orientation?'

74. See France' annual crime victimisation survey – the 'Living Environment and Security Crime Victimization Survey: Victimization and Perceptions with Regard to Security' which includes since 2018, new questions to better identify victims of hate crime, hate incidents and discrimination, and to better qualify the bias motivations of perpetrators.

75. See here <https://www.osce.org/mission-to-skopje/424193>

76. See the 2018 National Survey on LGBT available here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/722314/GEO-LGBT-Survey-Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722314/GEO-LGBT-Survey-Report.pdf)

77. See the survey carried out by the Domestic Governance Agency of the Flemish government on experiences of violence towards LGBTI (2014).

people worldwide and publishes updates annually. ILGA-Europe also documents anti-LGBTI hate crimes or incidents through its partner NGOs in most of the 54 countries covered in its annual review.

An overall challenge to collecting data is the *ad hoc* nature of the research done, due *inter alia* to the lack of availability of funding or lack of multiannual funding necessary for such data collection. The lack of an ongoing accepted methodology is also an issue. Project-based research or monitoring may create difficulties to track changes and evaluate the effectiveness of policy interventions over time.

## **B. State of discussions on improving the collection of hate crime data and incidents based on SOGIESC**

The abovementioned OSCE ODIHR Hate Crime Report shows that a number of CoE member States report figures on hate crime (out of the 41 States submitting hate crime information, 32 are CoE member States). As far as anti-LGBTI hate crimes are concerned, the number of States reporting goes down to 22 States, 21 of them being CoE member States, although not all collect disaggregated data according to the SOGIESC bias concerned.

As noted in section II on Legislation, disparate legislation produces methodological differences with respect to data collection.<sup>78</sup> Besides, it is widely acknowledged that the actual number of hate crimes are likely to be significantly higher than officially reported, often revealing gaps between police statistics, those gathered by NGOs and even more those gathered through representative surveys. This may be due to underreporting, caused by distrust of authorities or failure on the part of authorities to register anti-LGBTI crimes as hate crimes, and an increased trust of LGBTI people to approach NGOs, but also to the need for substantial improvements in the collection of data, particularly with regard to the categorization and recording of hate crimes.

The need for **disaggregated data** for combating hate crime is widely acknowledged as a priority issue for improving data collection. According to information available for EU member States (2018), only 10 EU member States collect data pertaining to hate crime, disaggregated by the category sexual orientation/gender identity bias motivation.<sup>79</sup> Under the European

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78. Perry, B. (2010). Counting – And countering – Hate Crime in Europe *European Journal of Crime, Criminal Law, and Criminal Justice*, 18(4), 349.

79. These are Belgium, Denmark, Croatia, Estonia, Finland, Germany, Netherlands, Spain, Sweden, United Kingdom. "Violence and Harassment against Women and LGBTI People in the EU: The Legal and Policy Framework" by the European Union Agency for Fundamental Rights (FRA) (2020)

Commission and the FRA, a dedicated working group of the High Level Group on combating hate speech and hate crime is in place to enhance hate crime reporting, recording and data collection. The working group brings together experts and civil society organisations from EU member states and elaborated important guidance, including of relevance for anti-LGBTIQ hate crime.<sup>80</sup>

There are some promising initiatives in this area with some States collecting official data on hate-motivated incidents against LGBT people (see document of 'Promising Practices'<sup>81</sup>) but it was pointed out that where data collection efforts have been undertaken, these have more frequently concentrated on the situation of lesbian, gay and bisexual people, less so on transgender and intersex people.<sup>82</sup>

This also raises the question of **establishing categories** when designing any data collection systems for LGBTI people; consultation with LGBTI civil society organisations will be important to ensure that the most appropriate choices are made in this respect and in particular, that the choices made are sensitive to the diversity of identities and takes into account the views of LGBTI communities.

In its monitoring work, ECRI reviewed the data collection systems in place in CoE member States and the main challenges it identified and related recommendations may be summarised as follows:

- ▶ **Ensuring a comprehensive, consistent, and integrated approach to data collection:** the national system to collect data should produce statistics offering an integrated and consistent view of the cases of racist and anti-LGBTI hate crime brought to the attention of the police and/or being pursued through the courts. Such an approach should enable to identify at what point of the process the SOGIESC element of the crime may no longer be included in the system and the reasons for it to be dropped.
- ▶ **Tracking hate crimes at each stage of the criminal justice system:** hate crime data collection systems should be designed to trace **hate**

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80. [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en)

81. Available at: <https://rm.coe.int/2022-thematic-review-en-sogiesc-based-hate-crime-promising-practices/1680ac0eea>

82. European Union Agency for Fundamental Rights (FRA). EU LGBTI Survey II: Violence and discrimination against LGBTI people. Luxembourg: Publications Office of the European Union, 2020. Mark Bell, Analysis and comparative review of equality data collection practices in the European Union. Data collection in relation to. LGBTI, European Commission, 2017.



**crimes** from the beginning of a police investigation to its prosecution and treatments by the courts of incidents involving hate crimes, including SOGIESC-based ones. This includes disaggregated data on hate crime prosecutions that reflects the types of crimes, their specific bias motivations and the number of cases prosecuted and their results.

**Making the data public:** sharing data with the LGBTI communities and the wider public is important to inform about the number of hate crimes that the police handled successfully. Regular release of statistics, press releases, newsletters will help to communicate on the issue of anti-LGBTI hate crimes. It will also send a signal to the communities that combating hate crimes is a priority for law-enforcement agencies.

## C. State of research on anti-LGBTI hate crime

There are some examples of universities, research institutes and NGOs in CoE member States that have gathered some data on the experience of LGBTI people, although systematic data may be missing. In some instances, some specific research centres have been established at national level.<sup>83</sup> Some research has been possible through a cooperation between academia and national NGOs<sup>84</sup> or a consortium of NGOs in the case of multi-country research (see also document on 'Promising practices'<sup>85</sup>). Availability of international funding is often key in this area. Initial steps to improve the body of knowledge on intersex people exist but are reported as being too limited.

Research has expanded beyond a rights-based approach to address anti-LGBTI hate crimes, delving into the underlying factors that contribute to such crimes. It is acknowledged that imposing harsher penalties for anti-LGBTI hate crimes alone is insufficient in combating transphobia, lesbophobia, homophobia, biphobia and intersexphobia. Consequently, additional strategies are required, notably in the field of education. Emerging research emphasises the necessity of adopting a comprehensive approach

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83. See for example, the LGBT Observatory at the Department of Social Sciences of the Federico II University of Naples (Italy), Centre of expertise for the Study of LGBTQIA+ Issues of the University of Groningen (Netherlands), the Centre for Lesbian, Gay, Bisexual and Trans Research, De Montfort University (United Kingdom). The Centre for Hate Studies at the University of Leicester is often mentioned for its research and for delivering training to practitioners.

84. See for example, the survey conducted by the University of Warsaw in collaboration with LGBTI NGOs in 2019, with sample over 11,000 respondents, available here: <https://kph.org.pl/wp-content/uploads/2019/07/Situation-of-LGBTQA-Persons-in-Poland-10.07.pdf>.

85. Available at: <https://rm.coe.int/2022-thematic-review-en-sogiesc-based-hate-crime-promising-practices/1680ac0eea>

to preventing violence against LGBTI individuals, including on interpersonal, community, societal, regional and international levels.<sup>86</sup>

The setting up 10 years ago of the International Network for Hate Studies as a cross-jurisdictional and interdisciplinary organisation has helped to share knowledge about the study of hate and hate crime across disciplines. Some examples of research initiatives, notably in the field of reporting across Europe have been listed on the website.<sup>87</sup> The research work facilitated by this network explores issues of restorative justice as a way to repair the emotional, social, and cultural damage caused by hate-motivated incidents. Although restorative justice is not as such discussed in this report, there is a body of literature, international texts and projects,<sup>88</sup> which examine the benefits and other considerations in applying restorative justice solutions for hate crime victims.

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86. Ahlenback, V. (2022) Ending Violence Against LGBTIQ+ People: Global evidence and emerging insights into what works, Policy Brief, Ending Violence Helpdesk, London UK, available here: <https://www2.preventvawg.org/sites/default/files/2022-09/WhatWorks-FlagshipReport%20online.pdf>

87. See here: <https://internationalhatestudies.com/promising-practices/reporting/>

88. See for example: Recommendation CM/Rec(2018) of the Committee of Ministers to member States concerning restorative justice in criminal matters, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016808e35f3](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808e35f3). As far as projects are concerned, see for example the “Let’s go by talking” project led by the University of Barcelona in collaboration with NGOs and other academic institutions into restorative justice for LGBTI victims of hate crime: <https://www.letsbygobytalking.eu/>



## IV. Implementation: Police and Judiciary

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**T**he rise in hate crimes based on SOGIESC is not limited to a specific geographic region and is occurring across Europe. Providing an effective criminal justice response to hate crimes is a challenge across CoE member States. This section focuses on some of these challenges and examples of responses provided by the police and the judiciary. Identifying adequate and good practice examples for supporting LGBTI victims of hate crime is also an essential pathway for helping others to implement effective measures. It is dealt with in more detail in the following section (see section V entitled “Support to Victims”).

### **A. Challenges for recording, investigating, prosecuting, and sentencing hate crimes based on SOGIESC**

This section highlights practical challenges to providing an adequate criminal justice response to hate crimes: while some of these challenges may apply to all hate crimes independently of the personal characteristic concerned, specific attention is paid here to those measures which address these challenges in a way that is LGBTI sensitive.

#### **Definition**

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As was already noted in the 2020 CoE report on the review of the implementation of CM/Rec(2010)5, the lack of a “working definition” of hate crime on how to register data by criminal justice agencies sometimes results in different practices across countries but also across the public institutions within those countries. Furthermore, standard rules for recording crime that leave the determination of the crime motive to the subjective interpretation of law enforcement were noted of particular concern as the perception of the victim or another person reporting the crime are discounted. To remedy such weaknesses, international recommendations have been made to adopt a shared definition.

In its qualitative research on justice professionals in the EU,<sup>89</sup> FRA highlighted the need for specific criminal law definitions that cover the most frequent forms of hate crime where such definitions would enhance the recording of hate crime and prevent the police from overlooking bias motives.

The OSCE ODIHR Practical Guide on Hate Crime Data-Collection and Monitoring Mechanisms<sup>90</sup> specified further the recommendation to adopt a “**common, comprehensive and simple definition**”:

*Common:* a single definition of hate crimes across criminal justice agencies, allows for tracking of hate crime cases at each stage of the criminal justice system.

*Comprehensive:* The necessary data categories (i.e., criminal offences and bias motivations) should be included. Legal definitions of hate crimes, criminal offences, and sentencing provisions if they exist should be included.

*Simple:* The said definition should be understandable by all, victims, law-enforcement agencies and the general public alike.

At the CoE, the work of the Committee of Experts on Hate Crime on a Committee of Ministers’ recommendation to combat hate crime is on-going and is aimed at including a working definition of hate crime.

At national level, there are several examples of CoE member States using a working definition to record and deal with hate crimes, even in cases where there is no definition in legislation. The comprehensiveness of the bias motivations listed may vary. They may only partially cover SOGIESC grounds.<sup>91</sup>

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89. FRA (2016) Ensuring justice for hate crime victims: professional perspectives, available at: <https://fra.europa.eu/en/publication/2018/hate-crime-recording-and-data-collection-practice-across-eu>

90. See OSCE ODIHR Practical Guide on Hate Crime Data-Collection and Monitoring Mechanisms, 2014, page 12 and 13 available here: [https://adsdatabase.ohchr.org/IssueLibrary/ODIHR\\_Practical%20guide%20-%20Hate%20crime%20data%20collection%20and%20monitoring.pdf](https://adsdatabase.ohchr.org/IssueLibrary/ODIHR_Practical%20guide%20-%20Hate%20crime%20data%20collection%20and%20monitoring.pdf)

91. See for example: Croatia’s hate crime definition as contained in the criminal code is shared across criminal justice agencies. It covers a comprehensive range of bias motivations: “a criminal offence committed because of the race, different colour, religion, national or ethnic origin, disability, sex, sexual orientation, or gender identity of another person. Such behaviour shall be taken as an aggravating circumstance if the law does not expressly prescribe a more severe punishment.” In Germany: a definition was developed for monitoring purposes. It is used at national level but is not comprehensive on SOGIESC grounds: “Politically motivated criminal offences are regarded as hate crimes if, in view of the circumstances and/or the perpetrator’s attitude, there are indications that these offences are directed at other persons because of their nationality, ethnic origin, race, skin colour, religion, origin; outward appearance; handicaps, sexual orientation, or social status”.

## Co-operation

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Investing in **institutional co-operation on hate crime recording may be instrumental in developing a common definition and unifying practices** (see also section on [institutional framework for coordination and cooperation](#)). Stepping up **co-operation across the criminal justice** system can enable the development of comparative analyses between prosecution and police data. This can help identify areas that require special attention or improvement and ultimately enhance the comparability and compatibility of methodologies.

Official governmental working groups on addressing hate crimes to improve the recording of data may be a way forward. Examples of such groups operating in CoE member States include Slovenia's Working Group of State prosecutors on hate speech and hate crime which aims *inter alia* to unify prosecutorial practices and penal policy on hate crime and hate speech; or Belgium's Working Group dealing with the implementation of the joint circular for the police divisions of the Integrated Police and the prosecutors on hate crime (COL 13/2013). See also the document on 'Promising Practices'<sup>92</sup> for further reference.

Developing genuine cooperation with civil society is crucial for effectively identifying and recording hate crimes with a SOGIESC dimension. In particular, partnering with LGBTI NGOs can provide valuable insight into the obstacles that victims face when reporting hate crimes and the impact that different definitions and methodological approaches can have. By leveraging the trust that LGBTI NGOs have built with victim groups, it is possible to gain a better understanding of the scope and nature of hate crimes based on SOGIESC, and to ensure that these crimes are recorded properly. Ultimately, this can contribute to more effective responses to hate crimes and greater protection for vulnerable communities.

## Regulations and guidance

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Specific **regulations or guidance for police officers** to recognise, unmask and officially record hate crimes based on SOGIESC may be helpful. For example, in Norway, a guide for the police on registering bias-motivated crimes, including on grounds of sexual orientation, was released in 2018 to create systematic procedures on the monitoring and registration of hate crimes across all police districts in the country. In Croatia, a Protocol for Procedure

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92. Available at: <https://rm.coe.int/2022-thematic-review-en-sogiesc-based-hate-crime-promising-practices/1680ac0eea>

in Case of Hate Crimes regulates the work of all official bodies involved in detection and prosecution of hate crimes, as well as to ensure the monitoring of the outcomes of hate crime proceedings. In the United Kingdom, a new guidance released in 2020 provides detailed information to help police forces to investigate and record hate crime and non-crime hate incidents, including guidance on how to address the particular needs of victims of sexual orientation or gender identity and expression related hate crimes.

In the judiciary, keeping in mind the importance of judicial independence, guidelines and continued professional training of the judiciary may help judicial interpretation, notably to be consistent with the Court case-law. An example is provided by the Crown Prosecution Service operating in England and Wales which issued a specific Prosecution Guidance on “Homophobic, Biphobic and Transphobic Hate Crime” in 2022.<sup>93</sup>

## Specific structures

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In some countries, specialised police officers and prosecution authorities have been established with a view to facilitate work and increase expertise on anti-LGBTI hate crimes. Examples of specialised structures include the Canton of Tuzla in Bosnia and Herzegovina appointing a contact point in the Prosecutor’s Office to provide oversight on cases involving anti-LGBTI hate crime. Other examples include the special LGBT section set up within the Amsterdam Police in the Netherlands; or the special unit for diversity management in the Police of Fuenlabrada, Spain where staff work on the prevention of hate crime in collaboration with community organisations, including LGBT organisations.

Although their number may have increased over time, there were only nine CoE member States that reported having established special units for investigation of SOGI-related hate crime in the 2020 report on the review of the implementation of CM/Rec(2010)5. The need to designate specialised police officers and prosecutors or to establish specialised authorities within the police and the prosecution is also highlighted in some of ECRI’s country reports.<sup>94</sup>

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93. Homophobic, Biphobic, and Transphobic Hate Crime, Crown Prosecution Service (2022). Available here: <https://www.cps.gov.uk/legal-guidance/homophobic-biphobic-and-transphobic-hate-crime-prosecution-guidance>

94. See ECRI’s compilation of national reports’ recommendations concerning LGBT people, 5th monitoring cycle, section “Specialised police officers and prosecution authorities” page 17 and following: 137. (§ 90) ECRI recommends that the [Belgian] authorities proceed without any further delay to designate in each police district a contact person responsible for racism and homo/transphobic issues. These contact persons should be networked and

## B. Structural measures to increase trust

Fear of LGBTI-phobic reactions from the police, low expectations as to how one's complaint will be dealt with by law enforcement, lack of confidentiality, fear of deportation or arrest in the case of undocumented migrants or those who work in criminalised industries, and the lack of safe pathways to report are some of the issues that have been highlighted in research exploring the reasons why LGBTI victims do not engage with national authorities.<sup>95</sup> This, if

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there should be close communication between the contact person in the police in the police district and the contact prosecutor in the corresponding prosecution department. 138. (§ 68) ECRI recommends that the Georgian authorities set up a specialised unit within the police to deal specifically with racist and homo-/transphobic hate crime. When establishing this unit, the authorities should seek expert advice from the Public Defender, relevant NGOs, and international organisations. 139. (§ 80) ECRI recommends [to Greece] including sexual orientation and gender identity in the mandate of the new anti-racism police units. 140. (§ 62) ECRI recommends that the Italian authorities... appointing a contact person in each police district to deal with questions of racism and homophobia/transphobia, as well as a contact person in the corresponding public prosecutor's office. These contact persons should work together as a network, with good communication between the police contact persons and those in the prosecutors' offices. 141. (§ 40) ECRI recommends, as a matter of priority, that the [Latvian] authorities establish a unit within the State Police tasked with reaching out to vulnerable groups in order to increase trust in the police and address the problem of under-reporting of racist and homo-/transphobic hate crimes. 142. (§ 43) ECRI recommends that the [Norwegian] authorities set up specialised units or appoint specialised officers in each police district to deal with racist and homo-/transphobic incidents; these should also liaise with the vulnerable groups. 143. (§ 48) ECRI recommends that the police services and the Portuguese prosecutor's office adopt a broad definition of a racist, homo- or transphobic incident and register any hate speech or crime perceived as being racist, homo- or transphobic by the victim or any other person as such. In addition, they should further step up their interaction with the groups exposed to racism and intolerance and encourage them to lodge complaints. 144. (§ 67) ECRI recommends that the Portuguese authorities introduce within the police services a policy of zero tolerance towards racism and homo- and transphobia, which should shine through in the basic and further training of police officers. The police services should intensify dialogue and cooperation with the groups at risk from racism and intolerance. 145. (§ 63) ECRI recommends that the [Romanian] authorities provide further training for police, prosecutors, and judges on how to deal with racist and homo-/transphobic acts of violence. This should include improved procedures for recognising bias-motivations. Furthermore, it also recommends that, to address the problem of underreporting, the authorities enhance cooperation between the police and vulnerable groups, in particular the Roma and the LGBT communities. 146. (§ 64) ECRI recommends that the [Russian] authorities facilitate cooperation between LGBT communities and the police and establish regular dialogue with a view to improving reporting and preventing and combating homo/transphobic violence.

95. European Union Agency for Fundamental Rights. (2020). LGBTI survey results: Violence and discrimination against LGBTI people.



left unaddressed, may *de facto* undermine LGBTI hate crime victims' access to justice.

Some positive measures have been taken in some CoE member States for structurally improving victims' trust and confidence in the criminal justice system. These include:

► **Supporting a variety of pathways to reporting and enabling alternative mechanisms, such as third-party and anonymous reporting**

Making different options available for victims of hate crime to report incidents could encourage more victims to come forward.<sup>96</sup> Allowing third-party reporting and anonymous reporting can provide means by which the police can be informed of experiences of victimisation and provide an evidence base for the design of preventive and policy measures. Examples of alternative pathways include the Irish Police launching in 2021 a new online system for reporting hate crime which is designed to make it easier for victims to come forward or the possibility for third party reporting whereby civil society organisation can report on behalf of a victim. In Portugal, alternative reporting channels including anonymous reporting, and reporting through an online form or through social networks such as Twitter is available. Equality bodies can provide third party reporting mechanisms that are trusted by LGBTI victims and may also have the possibility of providing legal support or support in going to court. When third party reporting is offered by bodies who can connect victims with support services, whether it be equality bodies or civil society organisations, the likelihood of LGBTI victims taking up these services is increased.

► **Standardization of referrals procedures**

Standardizing referral procedures can be an effective strategy to improve the response to hate crimes against LGBTI individuals. In the absence of standardized referral procedures, frontline officers who directly interact with LGBTI victims may rely on ad hoc solutions and practices, which can lead to inconsistencies in the treatment of victims and undermine their trust in the criminal justice system. For instance, a standardized referral procedure could involve a clear and consistent protocol for referring LGBTI victims to relevant support services such as victim advocates, legal aid, or mental health professionals. By establishing awareness and training programs for police and criminal justice personnel, they can become more knowledgeable

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96. See FRA (2020), A long way to go for LGBTI equality, available at: <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>

about the different support services available, thereby ensuring a more effective and sensitive response to hate crimes against LGBTI individuals.

► **Improving national recording and data collection systems (see above)**

The measures taken for improving the national data collection described above should eventually contribute to increasing the ability of national law enforcement systems to identify and record hate crimes correctly. Progress in this area is likely to have a positive effect on encouraging the reporting of hate crime.

► **Tackling prejudiced behaviour**

Securing LGBTI victims' access to justice is also dependent on whether they trust that the practitioners and in particular the police officers will respect their dignity and importantly, upholding rights. Cases of police misconduct greatly erode such trust. A combination of preventive action and sanction against such misconduct have been recommended to recognise, accepting, and addressing institutional prejudice and discrimination systems.

Building safeguards against institutional forms of discrimination have been highlighted by the FRA, ECRI and CERD<sup>97</sup>, especially in the context of fighting racism. Such safeguards can be applied *mutatis mutandis* to fighting LGBTI-phobic behaviour. They should include clear mission statements and robust systems of performance review.

The existence and enforcement of adequate disciplinary measures in case of misconduct are important to restore confidence. In line with its Policy Recommendation No. 11 on Combating racism and racial discrimination in policing, ECRI recommended in several country reports the creation of an independent police complaints service tasked to investigate *inter alia* allegations of racist and LGBTI-phobic violence by police officers and highlighted the need for a system enabling a victim to bring a complaint in full confidence to an independent police complaint body. In another case, it recommended to have complaints on LGBTI-phobic remarks and behaviour by law

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97. ECRI General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, Strasbourg, 29 June 2007; UN, CERD (2005), General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005. See also FRA (2021), Fundamental Rights Report 2021, Chapter 4, 'Racism, Xenophobia and Related Intolerance'.

enforcement officers subjected to a formal complaint and not just a police report.<sup>98</sup>

Developing educational policies to enable or improve the capacity of police officers, prosecutors and judges to understand the specific life circumstances of LGBTI persons may also help to prevent bias behaviour among criminal justice practitioners and other practitioners dealing with hate crimes and hate related incidents. Such policies are addressed in the section below on awareness-raising and training.

### **C. Awareness-raising and training**

Overall, the experience of NGOs suggests that the general level of knowledge on LGBTI-phobic behaviour is low among police and justice professionals. The lack of data on hate crime based on SOGIESC and low reporting rates of victims may have made the issue of anti-LGBTI violence invisible to them, feeding the idea that this is a non-issue and eroding the understanding of the advantages to have specific measures in place to address the needs of the LGBTI community.

There are many examples across the CoE area whereby NGOs in partnership with the police and judiciary have put in place awareness raising activities and training sessions about fighting LGBTI-phobic hate crimes. These

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98. See Compilation of ECRI country reports recommendations pertaining to LGBT persons (5<sup>th</sup> monitoring cycle reports): (§ 109) ECRI recommends that the French authorities intensify the training of law enforcement representatives with regard to the contents of the Code of Ethics concerning the need for exemplary relations with the population, that they review the system of numbers affixed to police uniforms in order to facilitate identification, including by testing the solutions proposed by the CNCDH and the Defender of Rights, and that they take steps to implement the Ministry of Justice's instructions on recording racist offences in the form of a formal complaint and not as a record in the police daybook, and to extend this arrangement to homophobic/transphobic offences. (§ 59) ECRI recommends to [Lithuania]... the creation of an independent police complaints service that will be tasked to investigate, inter alia, allegations of racist and/or homo- /transphobic violence committed by law enforcement officials. See also the sixth monitoring cycle report regarding France: (§ 114): ECRI is also concerned to note that, according to several of its civil society interlocutors, when victims try to lodge complaints and have the abuses punished, they are often persuaded to file police reports rather than lodge formal complaints, or else are subjected to intimidation and reprisals or even to "counter-complaints" which, unlike the initial complaints, are dealt with immediately.

activities have often benefited from international support.<sup>99</sup> Awareness about interphobic hate crime is reported to be especially low and only a few states started to take a stand in this respect. However, overall government-led activities remain the exception rather than the rule and the bulk of the work relies on the knowledge and expertise of the LGBTI civil society.

Some of the challenges encountered in carrying out these activities include the insufficiency or complete lack of funding for some training programmes. Additionally, the irregular character of the activities carried out and the small number of criminal justice professionals who are offered the training means a limited percentage of professionals reached who might come into contact with anti-LGBT victims.

ECRI also recommended that the authorities carry out an **evaluation of the impact of the trainings** held with a view to better identify the needs of the police and judiciary and tailor training programmes in accordance with those needs. The lessons learned from these trainings may feed into the drafting of new national policies or action plans. For example, training needs have been integrated in the Belgium LGBTI Action plan, *LGBTQI+ Friendly Belgium* with some structural training measures to be taken at Federal level; or in France where discussions are being held regarding the renewal of the National Action Plan to Promote Equal Rights and Combat Anti-LGBT+ Hatred and Discrimination after 2023.

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99. See for example in Portugal, the launch of the Portuguese manual on “*Policing Hate Crime against LGBTI Persons*” which was complemented by a training of police officers, prosecutors, and judges.: <https://www.coe.int/en/web/sogi/-/portugal-takes-a-stand-on-homophobic-transphobic-and-interphobic-hate-cri-2>



# V. Support for victims

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## A. Policies to reach out to LGBTI hate crime victims and to provide LGBTI sensitive support services

International standards relating to victims' rights include the CoE's Committee of Ministers' Recommendation (2023)<sup>2</sup> on Victim Support Services and at EU level, the Victims' Rights Directive which establishes a duty to protect and support victims of hate crime. Both texts set out minimal standards and apply to all crime victims.

At the level of the CoE, the **Committee of Ministers Recommendation (2023)<sup>2</sup> on Victim Support Services**<sup>100</sup> includes some principles to ensure the effective recognition of, and respect for, the rights of victims without discrimination. It outlines measures to this end such as the establishment and co-ordination of dedicated victim support services and the training of their staff, the victims' access to information of relevance to their case and access to legal aid.

At the level of the EU, **the Victims' Rights Directive**<sup>101</sup> aims "to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings" (Article 1). The Victims' Rights Directive refers to all victims of hate crime on an equal footing and recognises victims of hate crime as being particularly vulnerable victims who require individual assessments to identify their specific protection and support needs (Article 22). It also encourages states to raise awareness on the rights of victims as set out in this Directive, notably by co-operating with civil society and other stakeholders on awareness raising campaigns, research, and education programmes (Article 26). It also mandates that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their

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100. Recommendation (2023)<sup>2</sup> of the Committee of Ministers to member States on rights, services and support for victims of crime adopted by the Committee of Ministers on 15 March 2023 at the 967th meeting of the Ministers' Deputies, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680aa8263](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680aa8263).

101. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>.

contact with victims. The training should enable them to deal with victims in an impartial, respectful and professional manner.<sup>102</sup>

At the EU level, an assessment of the implementation of the EU Victims' Rights Directive<sup>103</sup> revealed an uneven implementation: the right to general support services (Article 8 of the Directive) is not fully transposed, with member States limiting access to such services to certain categories of victims such as victims of domestic violence or victims of trafficking in human beings. The obligation of competent authorities to refer victims to support services (Article 8(2)) is a challenge in some member States: there is no common or established practice regarding standardised referrals and structured cooperation between the police and national equality bodies across the EU; or if victims are referred to victim support services, only a certain category of victims is referred (for example, victims of domestic violence).

Country-specific and group specific studies have highlighted substantial challenges in ensuring that support services are inclusive of all victims and that the specific needs of the LGBTI victims of hate crimes are adequately addressed. For example, an EU funded report on the "Obstacles in the Access to Justice for Victims of Anti-LGBTI Hate Crimes"<sup>104</sup> which included a selection of 10 States, highlighted that State-sponsored support services for crime victims are "rarely LGBT-inclusive or -sensitive" and that specific protocols or measures in place for victims of anti-LGBT hate crimes are lacking. Instead, the report points out that specific support services for anti-LGBT hate crime victims are mainly provided by LGBTI NGOs (see below role of civil society). While the urban/rural discrepancy in the availability of services may be a general concern for victims of hate crimes, this discrepancy is also negatively affecting access to support for LGBTI hate crime victims.

Dedicated emergency housing or shelters for LGBTI victims of domestic violence are reported to be rare. Access to shelters on a non-discriminatory basis is covered by the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence, known as the Istanbul Convention

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102. See FRA (2020), A long way to go for LGBTI equality, available at: <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>

103. Report of the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM/2020/188 final, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:188:FIN>.

104. Running through Hurdles: Obstacles in the Access to Justice for Victims of Anti-LGBTI Hate Crimes, Editors: Piotr Godzisz and Giacomo Viggiani, 2018.

(see Article 4, paragraph 3)<sup>105</sup>, and the importance of ensuring that LGBTI women (including lesbian women and persons who identify as women) are admitted to women's shelters was highlighted in several of the reports of the Group of Experts in Action Against Violence Against Women and Domestic Violence (GREVIO).

## **B. LGBTI community awareness of organisations providing victim support**

The aforementioned FRA survey on LGBTI people in the EU, North Macedonia and Serbia gives a broad understanding of the level of awareness of victim support services of the LGBTI community, when such services exist. Even if it does not cover all of CoE member States, the FRA survey indicates that the majority of LGBTI respondents (66%) are aware of organisations that can offer support or advice to victims of discrimination in their country, but this percentage is at great variance between countries with Sweden having the highest percent (77%). The same variation applies regarding the awareness of equality bodies (an average of 61% of all respondents have at least heard of one EB in their country, with the highest share in Poland (93%), hereby contrasting with one out of three respondents being aware of their respective EB in Slovakia, Slovenia, Italy and Luxembourg).<sup>106</sup>

Having heard of support services does not mean that victims are willing to engage with them or with the criminal justice system: other factors may be seen as obstacles such as the perception of a procedure seen as bureaucratic, costly and/or time consuming.

## **C. Role of civil society**

States often rely on civil society organisations to provide specialist support services. It is widely recognised that NGOs or community-based organisations are at the forefront of support and are a unique source of expertise. This is especially true when it comes to providing services to victims who experience multiple and intersecting forms of discrimination and/or violence such

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105. Article 4, paragraph 3, reads as follows: "The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status."

106. *Ibid*, page 35.



as LGBTI asylum seekers, undocumented LGBTI migrants, LGBTI people with disabilities, LGBTI sex workers, racialised LGBTI people, and particularly those who belong to several of these groups simultaneously.

Equally, a number of challenges associated with that role have emerged. Firstly, their financing remains insufficient to ensure the sustainable and comprehensive provision of support, leading in some countries to limited support to legal assistance and referrals. Secondly, the limited funds often do not allow NGOs to provide nationwide services. There may also be difficulties in meeting professional quality standards for all those who need them, due to a lack of personnel or personnel working on a volunteer basis with insufficient training. Thirdly, civil society may be entrusted with some key responsibilities in this area but may not be considered as equal partners and thus not be involved in consultations on the development of victim support policies.

# VI. Protection against anti-LGBTI hate crimes and incidents in detention facilities

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## A. Measures to ensure the safety and dignity of detainees, and implementation issues

### 1. Detention - Risks situations

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LGBTI persons in detention are in a situation of particular vulnerability, as their exposure to risks of human rights abuses is exacerbated while they are deprived of their liberty. While this section focuses on situations of risk for LGBTI persons in the criminal justice system, the principles posed by CM/Rec(2010)5 can also be applied to other places where LGBTI persons are deprived of their liberty under the responsibility of state authorities. This includes psychiatric hospital establishments as referred to in the Explanatory Report of CM/Rec(2010)5, and immigration detention centres (see section 1-A paragraph 4 of CM/Rec(2010)5: “Member States should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons” and the related parts of the Explanatory Report).

These risks are particularly salient in certain areas. These include decisions regarding the placement of LGBTI detainees in units and cells. Body searches may also be critical times for ensuring that attitudes and language of prison officials respect the dignity and privacy of the individual searched. LGBTI persons may be more exposed to violence from fellow detainees as well as possible abuse by prison personnel. Finally, there are reports that isolation and solitary confinement are used as a protective measure for ensuring LGBTI detainees’ safety, putting unjustifiable limitations on their social interaction and access to legal counsel or medical doctors. In addition, prolonged solitary confinement can amount to cruel, inhuman or degrading treatment or punishment and even torture.

## 2. Responses

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International documents have progressively addressed the specific issues faced by LGBTI persons when it comes to deprivation of liberty. They all point to the need of establishing specific policies to combat anti-LGBTI violence in detention.

At the CoE of Europe level, the relevant case law of the Court is already included in Section I of this report. The monitoring reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) are also useful, as the CPT has recommended in some instances the establishment of policies to combat the discrimination and exclusion faced by transgender prisoners.<sup>107</sup> Article 9 of the Yogyakarta Principles Plus 10 highlights the need for States to adopt and implement policies to combat violence and discrimination of detainees based on SOGIESC and set out obligations for those responsible for detention. This is notable in terms of guaranteeing access to appropriate care of LGBTI detainees, including access and continuation of gender affirming treatment and involving LGBTI detainees in the decision regarding their placement to a given detention facility. The United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules, provide for self-determination in matters of gender identity during imprisonment.<sup>108</sup>

At national level however, policy responses to risks of violence against LGBTI detainees appear to be still underdeveloped. This is an issue that merits further attention.

### a. Data and state of research

It remains difficult to obtain a good insight into the situation of LGBTI persons in prisons, reflecting even more acutely the data gap that already exists regarding the human rights aspects of the treatment of LGBTI persons outside prison settings.

It is reported that very few prison authorities actively gather data regarding the SOGIESC identities of prisoners<sup>109</sup>, while respecting the right of LGBTI

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107. See for example, CPT reports covering issues of transgender detainees on HUDOC CPT database: <https://hudoc.cpt.coe.int/eng#%7B%22fulltext%22:%5B%22transgender%22%5D%22sort%22:%5B%22CPTDocumentDate%20Descending%2C%22CPTDocumentID%20Ascending%2C%22CPTSectionNumber%20Ascending%22%5D%7D>.

108. See Rule 7 available here: [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf)

109. For some examples of data collection, see <https://www.telegraph.co.uk/politics/2019/11/28/half-jails-have-least-one-transgender-prisoner-government-figures/>

persons to disclose or not to disclose their sexual orientation, gender identity or sex characteristics. Where such data is available, it is assumed that it underestimates the share of LGBTI persons due to the limited modes of data collection used and due to the fact that a good share of LGBTI persons do not come out as they fear further discrimination and violence if they identify as such.

At the level of research and monitoring, most attention concerns imprisonment of transgender people and the field seems to be dominated by US-focused literature. While a more in-depth overview may be needed, attention given to LGBTI detainees in other contexts include for example the empirical research conducted in the Netherlands in 2022<sup>110</sup> and the 2016 study of the needs and experiences of LGBT prisoners within the Irish context.<sup>111</sup>

Faced with the paucity of information, TGEU launched some research exploring the issue of transgender people in ‘closed settings’ in Central and Eastern Europe and Central Asia, providing an overview of rights violations against trans people in the criminal justice system in the region<sup>112</sup>. The 2018 report draws attention to the fact that “violence against trans detainees is sporadically documented in the region” and that there are hardly any security assessments carried out in the region, let alone consultation of transgender people in detention to assess their security risks. Transgender detainees are often separated either in solitary confinement or LGBT-only cells or in sex-segregated departments, male or female wards, according to their legal sex, without their informed consent and for reasons and periods of time that would contravene UN Standard Minimum Rules on Treatment of Prisoners (the Nelson Mandela rules).

## **b. Policy framework**

Information on preventive and other measures aimed at ensuring LGBTI persons’ safety in detention facilities as recommended in CM/Rec(2010)5 is

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110. See P. Jacobs, *Transgender achter de deur. Een onderzoek naar en aanbevelingen voor de behandeling van transgender gedetineerden* external link <https://dspace.library.uu.nl/handle/1874/425219>, *Nederlands Tijdschrift voor Strafrecht* 2022/77, p. 268-278 (in Dutch, information in English about the research is available here: <https://www.uu.nl/en/research/empirical-research-into-institutions-for-conflict-resolution-eri-research-on-transgender-prisoners>).

111. Dr Nicola Carr, Dr Siobhán McAlister and Dr Tanya Serisier, *Out on the Inside The Rights, Experiences and Needs of LGBT People in Prison*, Irish Penal Reform Trust (IPRT), 2016, available here [https://www.iprt.ie/site/assets/files/6369/iprt\\_out\\_on\\_the\\_inside\\_2016\\_embargo\\_to\\_1030\\_feb\\_02\\_2016.pdf](https://www.iprt.ie/site/assets/files/6369/iprt_out_on_the_inside_2016_embargo_to_1030_feb_02_2016.pdf).

112. TGEU 2018, *Deprived of liberty, deprived of rights: A community report on policing and detention of trans people in Central-Eastern Europe and Central Asia*, available here: [https://tgeu.org/wp-content/uploads/2018/11/Prison\\_Report\\_2018\\_EN.pdf](https://tgeu.org/wp-content/uploads/2018/11/Prison_Report_2018_EN.pdf).

scarce. The 2020 review of the implementation of CM/Rec(2010)5 indicated that LGBTI detainees are often grouped under the category of “vulnerable persons” in prison settings. A limited number of countries have adopted policy approaches to guide prison officials in preventing or dealing with LGBTI hate crimes in prisons. Examples of such policies or guidelines include:

**Belgium:** The Federal Action Plan for an LGBTIQ+ friendly Belgium (2021-2024) includes a series of actions to train frontline centre staff handling diversity requests and gender in the context of asylum and migration and foresees contact with specialized organisations to provide LGBTIQ+ asylum seekers in open and closed reception centres with necessary information.

**Cyprus:** Some police guidelines are in place concerning the treatment of LGBTI persons in police custody only.

**Finland:** The Equality and non-discrimination plan of the Criminal Sanctions Agency includes references to the provision to staff and detainees of information and training on diversity in terms of gender and sexual orientation and highlights that gender or sexual orientation is not an obstacle to participating in activities in prison or which section of the prison one is placed.<sup>113</sup>

**Malta:** Trans, Gender Variant, and Intersex Inmates Policy (Correctional Services).<sup>114</sup>

**Romania:** Decision 157/2016 approving the Regulation for implementing Law 254/2013 on the execution of punishments from 10 March 2016 establishes a separate status for vulnerable inmates, and sexual orientation is one of the first criteria of vulnerability explicitly identified by the regulation. It involves the possible separation of LGBTI prisoners from the main prison population.<sup>115</sup>

**United Kingdom:** Policy on The Care and Management of Individuals who are Transgender<sup>116</sup> (updated in 2020) for England and Wales, and the Scottish

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113. See FRA, Criminal detention conditions in the European Union: rules and reality (2019) available here [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-criminal-detention-conditions-in-the-eu\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf), page 40.

114. Available here: <https://meae.gov.mt/en/Documents/TRANS%20GENDER%20VARIANT%20and%20INTERSEX%20INMATES%20POLICY/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy.pdf>

115. Available here: <https://anp.gov.ro/wp-content/uploads/sites/37/rapoarte/hg%20157%20-%20extras.pdf>

116. Available here: <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>

Prison Service Gender Identity and Gender Reassignment Policy for those in our Custody (2014) for Scotland).<sup>117</sup>

In the absence of a policy framework, decisions regarding violence against LGBTI persons in prisons may be left to the prison administration's judgement and may be influenced by possible personal or institutional preconceptions and prejudices.

In some cases, prison procedures foresee to ask transgender detainees about their views on which part of the prison estate best reflects the gender with which they identify (see for example the United Kingdom Prison Service Instruction 17/201656). There are also examples of policies at subnational level such as in Berlin or in Catalonia where specific provisions are in place to allow transgender detainees who have not completed their legal gender recognition procedure to be placed according to their gender identity.<sup>118</sup> However, overall policies and methods to acknowledge people's self-identified gender and to carry out proper risk assessments are reportedly lacking, resulting in placement of transgender detainees based on their legally attributed gender while the gender identity of the person is rarely considered.<sup>119</sup>

### C. Training

Addressing the issues and risks faced by LGBTI detainees requires that once specific policies are developed, adequate training is rolled out across all staff involved in detention of LGBTI people (see also the Yogyakarta Principles).<sup>120</sup>

Such training may include knowledge-building about the different groups concerned, understanding the diversity of situations existing among the LGBTI population and their specific needs and risks, and the implementation of standards related to detention in a way that avoids their stigmatization.

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117. Available here: <https://www.sps.gov.uk/Corporate/Publications/Publication-2561.aspx>

118. See Berlin's legislation here: <https://www.berlin.de/justizvollzug/service/recht/gesetze/stvollzg-blm/artikel.516237.php#11> and information on the situation in Catalonia here: <https://www.catalannews.com/society-science/item/non-transitioned-inmates-can-apply-for-transfers-to-prisons-according-to-gender-identity>

119. See the joint statement urging greater protection for LGBTI people in detention which was issued by the UN Subcommittee on Prevention of Torture, the UN Committee against Torture, the UN Special Rapporteur on Torture and other cruel, inhuman, or degrading treatment or punishment, and the Board of Trustees of the UN Voluntary Fund for Victims of Torture in 2016.

120. Principle 9 reads as follows: States shall "Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and nondiscrimination, including in relation to sexual orientation and gender identity".

Training and related guidance to prison personnel are reported to be under-developed, especially when compared to the training offered to other categories of public officials (see also the above section on training). Some initiatives exist however, in some instances with international facilitation; they would merit to be expanded further.<sup>121</sup>

At an international level, some guidance aimed at monitoring bodies have been published, following up on the Yogyakarta Principles to provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity. The Association for the Prevention of Torture (APT) has published a monitoring guide that outlines the state of the law and provides guidance on how to protect the human rights of LGBTI persons (Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide<sup>122</sup>) and the OSCE ODIHR released its guide on Preventing and Addressing Sexual and Gender-Based Violence in Places of Deprivation of Liberty: Standards, Approaches and Examples from the OSCE Region.<sup>123</sup>

## B. Available complaint mechanisms and oversight

The Yogyakarta Principles highlight the need to “provide for **effective oversight of detention facilities**, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics” (Yogyakarta Principles Plus (YP+10), Principle 9 (J), Relating to the Right to Treatment with Humanity while in Detention).

There are various monitoring mechanisms carrying out independent oversight in places of deprivation of liberty in CoE member States. In addition to the CPT, the National Preventive Mechanisms (NPMs) established in accordance with the terms of the Optional Protocol to the UN Convention against

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121. See for example, the ‘ Training on the Treatment of LGBTI prisoners in correctional institutions organised in cooperation with the Institution of Ombudsman for Human Rights of Bosnia and Herzegovina in 2016. More information available here: <https://www.coe.int/en/web/inclusion-and-antidiscrimination/-/sensitised-treatment-of-lgbti-prisoners-in-correctional-institutions>

122. Available here: [https://www.apr.ch/sites/default/files/publications/apr\\_20181204\\_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf](https://www.apr.ch/sites/default/files/publications/apr_20181204_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf)

123. Available here: <https://www.osce.org/files/f/documents/f/b/427448.pdf>.

Torture (OPCAT) are leading institutions to undertake this task in the national States parties to OPCAT and there are examples where recommendations have been issued with regard to the treatment of LGBTI persons.<sup>124</sup>

As far as **prison complaint mechanisms** are concerned, there are reports that many complaints about sexual abuse and rape in general receive no or little response from prison administrations, and especially if such complaints are made by LGBT prisoners. In addition, LGBTI detainees themselves are very reluctant to complain due to fears of retaliation, often as a result of open threats by the perpetrators against reporting.

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124. See in France: [https://www.cglpl.fr/wp-content/uploads/2022/08/Opinion-NPM-France-Transgender\\_EN-version.pdf](https://www.cglpl.fr/wp-content/uploads/2022/08/Opinion-NPM-France-Transgender_EN-version.pdf)





## VII. Recommendations

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**K**eeping in mind the ongoing work of the Committee of Experts on Hate Crime on a draft recommendation on this topic for adoption by the Council of Europe’s Committee of Ministers, the present report highlights the following 12 priority recommendations that require CoE member States’ attention in addressing hate crimes and incidents based on SOGIESC:

1. Ensure that legislation and policies provide a standard and accepted definition of hate crime, explicitly listing and defining the terms “sexual orientation”, “gender identity”, “gender expression”, and “sex characteristics” among hate crime grounds, at par with other relevant protected characteristics, such as “race”, religion, gender or disability, and ensure that the intersectional dimension of hate crime victimisation is taken into account in such legislation and policies.
2. When framing hate crime legislation, ensure that the criminal law provisions opted for are sufficiently precise and operational for the criminal justice system to prosecute and sentence hate crimes based on SOGIESC and that they send a strong signal to society that hate crimes based on SOGIESC are punishable.
3. Ensure that there is an inclusive and operational multi-stakeholder institutional set-up for co-ordinating the fight against hate crime based on SOGIESC and developing or reviewing related national strategies. Ensure that LGBTI civil society can genuinely participate and contribute to it and support the role and work of the police, the prosecution services, Equality Bodies and National Human Rights Institutions in preventing and combating such crimes.
4. Ensure that data pertaining to hate crimes is disaggregated based on gender and SOGIESC grounds, and made publicly available. A comprehensive, consistent, and integrated approach to data collection on hate crimes based on SOGIESC should be in place across the criminal justice system. This approach should allow relevant stakeholders to track the follow-up given to all anti-LGBTI hate crimes and incidents, including judicial follow-up.

5. Allocate attention and resources, including financial support, towards research on hate crimes based on SOGIESC, including victimisation surveys, in a way that allows the gap between reported and actual numbers of cases to be measured and to track developments over time.
6. Take the necessary measures to ensure that support services for victims of hate crime are sensitive to the specific needs of LGBTI victims. Ensure that specialised and targeted support services are made available to them, and that those services are provided with adequate means to carry out their tasks and are accessible nationwide.
7. Support civil society organisations that work with LGBTI victims of hate crime by ensuring that they receive sufficient financial support to carry out their tasks, which range from awareness-raising, monitoring and data collection to offering targeted support to victims.
8. Take the necessary measures to encourage reporting of hate crimes based on SOGIESC by offering alternative pathways to reporting, such as online or anonymous reporting, and by taking measures to build trust in the police and prosecution, notably through educational and monitoring measures. Cases of LGBTI-phobic behaviour by state officials or institutions should be of particular concern and subject to effective independent investigation and sanctions.
9. Take policy measures to address the specific needs of LGBTI detainees, in particular through the adoption of guidance including on carrying out proper risk assessments and paying due attention to the person's self-determined gender identity.
10. Monitor and evaluate the effectiveness of policies and measures aimed at combating hate crimes based on SOGIESC, and regularly review and update them as necessary. This should involve ongoing consultation with LGBTI civil society organisations and other relevant stakeholders.
11. In order to facilitate the implementation of the preceding recommendations, develop policies that raise awareness amongst the police and the staff of the criminal justice and penitentiary sector as well as victim support services, about the specific concerns of LGBTI people, including those who face intersectional and multiple discrimination, with a focus on unmasking the SOGIESC element of hate crimes. These policies should be underpinned by continuous training programmes.
12. Conduct research into and take targeted policy measures to address the root causes of hate crimes based on SOGIESC, such as prejudice, stigmatisation and discrimination, and raise awareness among the general public

about the impact of such crimes and the importance of preventing and combating them. These preventive measures can include promoting diversity and inclusion in all areas of society, including education, employment, and healthcare, and conducting public education campaigns, social media, and community outreach programmes.

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