

COMBATING  
DISCRIMINATION ON GROUNDS  
OF SEXUAL ORIENTATION  
OR GENDER IDENTITY

**Council of Europe standards**

French edition:

*Combattre la discrimination fondée sur l'orientation sexuelle ou l'identité de genre*

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# Foreword

The Council of Europe's standards and mechanisms seek to promote and ensure respect for the human rights of every individual. These include equal rights and dignity of all human beings, including lesbian, gay, bisexual and transgender persons.

In our societies, homophobia and intolerance towards lesbian, gay, bisexual and transgender persons are still widespread. Many of them are still suffering from discrimination, violence and exclusion on grounds of their sexual orientation or gender identity. Discrimination on grounds of sexual orientation or gender identity is not compatible with Council of Europe standards.

The commitment of the Council of Europe to fighting discrimination based on sexual orientation has a long history: the first recommendation by its Parliamentary Assembly dates back to 1981. Since then, the Assembly, the Committee of Ministers and the Congress of Local and Regional Authorities have dealt with the issue in several texts. The case law of the European Court of Human Rights has also been essential in combating discrimination, regularly recognising since the early 1980s violations of the human rights of lesbian, gay, bisexual and transgender persons under various aspects.

A historical step was made on 31 March 2010 with the adoption by the Committee of Ministers of Recommendation CM/Rec(2010)5 to member states on measures to combat discrimination based on sexual orientation or gender identity. This recommendation is the first instrument in the world dealing specifically with one of the most persistent and difficult forms of discrimination. It sets out the principles deriving from existing European and international instruments, with particular emphasis on the European Convention on Human Rights, in the light of European Court of Human Rights case law. It identifies specific measures to be adopted and effectively enforced by member states in order to combat discrimination, to ensure respect for human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them.

A few weeks later, on 29 April 2010, the Parliamentary Assembly also adopted a new Resolution 1728 (2010) and a new Recommendation 1915 (2010) on discrimination on the basis of sexual orientation or gender identity.

This publication contains the relevant legal and political texts adopted by the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. It should serve as a reference for the governments, international institutions, non-governmental organisations, media professionals and to all those who are professionally or otherwise involved or interested in protecting and promoting the human rights of lesbian, gay, bisexual and transgender persons. But legal responses and political declarations, whilst essential, are not sufficient. They need to be combined with educational, cultural and awareness-raising measures likely to eradicate discrimination and intolerance in the long term.

This objective requires determined action – in the first place by the Council of Europe member states themselves, to implement the agreed standards and to put an end to any form of discrimination based on sexual orientation and gender identity in the enjoyment of human rights.

Thorbjørn Jagland  
Secretary General

# **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 Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, and that this aim may be pursued, in particular, through common action in the field of human rights;

Recalling that human rights are universal and shall apply to all individuals, and stressing therefore its commitment to guarantee the equal dignity of all human beings and the enjoyment of rights and freedoms of all individuals without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) (hereinafter referred to as “the Convention”) and its protocols;

Recognising that non-discriminatory treatment by state actors, as well as, where appropriate, positive state measures for protection against discriminatory treatment, including by non-state actors, are fundamental components of the international system protecting human rights and fundamental freedoms;

Recognising that lesbian, gay, bisexual and transgender persons have been for centuries and are still subjected to homophobia, transphobia and other forms of intolerance and discrimination even within their family – including criminalisation, marginalisation, social exclusion and violence – on grounds of sexual orientation or gender identity, and that specific action is required in order to ensure the full enjoyment of the human rights of these persons;

Considering the case law of the European Court of Human Rights (hereinafter referred to as “the Court”) and of other international jurisdictions, which consider sexual orientation a prohibited ground for discrimination and have contributed to the advancement of the protection of the rights of transgender persons;

Recalling that, in accordance with the case law of the Court, any difference in treatment, in order not to be discriminatory, must have an objective and reasonable justification, that is, pursue a legitimate aim and employ means which are reasonably proportionate to the aim pursued;

Bearing in mind the principle that neither cultural, traditional nor religious values, nor the rules of a “dominant culture” can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity;

Having regard to the message from the Committee of Ministers to steering committees and other committees involved in intergovernmental co-operation at the Council of Europe on equal rights and dignity of all human beings, including lesbian, gay, bisexual and transgender persons, adopted on 2 July 2008, and its relevant recommendations;

Bearing in mind the recommendations adopted since 1981 by the Parliamentary Assembly of the Council of Europe regarding discrimination on grounds of sexual orientation or gender identity, as well as Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe on “Freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons”;

Appreciating the role of the Commissioner for Human Rights in monitoring the situation of lesbian, gay, bisexual and transgender persons in the member states with respect to discrimination on grounds of sexual orientation or gender identity;

Taking note of the joint statement, made on 18 December 2008 by 66 states at the United Nations General Assembly, which condemned human rights violations based on sexual orientation and gender identity, such as killings, torture, arbitrary arrests and “deprivation of economic, social and cultural rights, including the right to health”;

Stressing that discrimination and social exclusion on account of sexual orientation or gender identity may best be overcome by measures targeted both at those who experience such discrimination or exclusion, and the population at large,

Recommends that member states:

1. examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;
3. ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination;
4. be guided in their legislation, policies and practices by the principles and measures contained in the appendix to this recommendation;
5. ensure by appropriate means and action that this recommendation, including its appendix, is translated and disseminated as widely as possible.

## *Appendix to Recommendation CM/Rec(2010)5*

### **I. Right to life, security and protection from violence**

#### *A. “Hate crimes” and other hate-motivated incidents*

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

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

2. Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.
3. Member states should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related “hate crimes” and other hate-motivated incidents are encouraged to report these crimes and incidents; for this purpose, member states should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses.
4. Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons.
5. Member states should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on “hate crimes” and hate-motivated incidents related to sexual orientation or gender identity.

#### *B. “Hate speech”*

6. Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such “hate speech” should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.
7. Member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination.
8. Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.

## **II. Freedom of association**

9. Member states should take appropriate measures to ensure, in accordance with Article 11 of the Convention, that the right to freedom of association can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, discriminatory administrative procedures, including excessive formalities for the registration and practical functioning of associations, should be prevented and removed; measures should also be taken to prevent the abuse of legal and administrative provisions, such as those related to restrictions based on public health, public morality and public order.
10. Access to public funding available for non-governmental organisations should be secured without discrimination on grounds of sexual orientation or gender identity.
11. Member states should take appropriate measures to effectively protect defenders of human rights of lesbian, gay, bisexual and transgender persons against hostility and aggression to which they may be exposed, including when allegedly committed by state agents, in order to enable them to freely carry out their activities in accordance with the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities.
12. Member states should ensure that non-governmental organisations defending the human rights of lesbian, gay, bisexual and transgender persons are appropriately consulted on the adoption and implementation of measures that may have an impact on the human rights of these persons.

## **III. Freedom of expression and peaceful assembly**

13. Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.
14. Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.
15. Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.
16. Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order.
17. Public authorities at all levels should be encouraged to publicly condemn, notably in the media, any unlawful interferences with the right of individuals and groups of individuals to exercise their freedom of expression and peaceful assembly, notably when related to the human rights of lesbian, gay, bisexual and transgender persons.

## **IV. Right to respect for private and family life**

18. Member states should ensure that any discriminatory legislation criminalising same-sex sexual acts between consenting adults, including any differences with respect to the age of consent for same-sex sexual acts and heterosexual acts, are repealed; they should also take appropriate measures to ensure that criminal law provisions which, because of their wording, may lead to a discriminatory application are either repealed, amended or applied in a manner which is compatible with the principle of non-discrimination.
19. Member states should ensure that personal data referring to a person's sexual orientation or gender identity are not collected, stored or otherwise used by public institutions including in particular within law enforcement structures, except where this is necessary for the performance of specific, lawful and legitimate purposes; existing records which do not comply with these principles should be destroyed.
20. Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.
21. Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.
22. Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed.
23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.
24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.
25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.
26. Taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.

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

## **V. Employment**

29. Member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation.
30. Particular attention should be paid to providing effective protection of the right to privacy of transgender individuals in the context of employment, in particular regarding employment applications, to avoid any irrelevant disclosure of their gender history or their former name to the employer and other employees.

## **VI. Education**

31. Taking into due account the over-riding interests of the child, member states should take appropriate legislative and other measures, addressed to educational staff and pupils, to ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.
32. Taking into due account the over-riding interests of the child, appropriate measures should be taken to this effect at all levels to promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity. This should include providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity. Furthermore, member states may design and implement school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Such measures should take into account the rights of parents regarding education of their children.

## **VII. Health**

33. Member states should take appropriate legislative and other measures to ensure that the highest attainable standard of health can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, they should take into account the specific needs of lesbian, gay, bisexual and transgender persons in the development of national health plans including suicide prevention measures, health surveys, medical curricula, training courses and materials, and when monitoring and evaluating the quality of health-care services.
34. Appropriate measures should be taken in order to avoid the classification of homosexuality as an illness, in accordance with the standards of the World Health Organisation.
35. Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender health care, without being subject to unreasonable requirements; no person should be subjected to gender reassignment procedures without his or her consent.
36. Member states should take appropriate legislative and other measures to ensure that any decisions limiting the costs covered by health insurance for gender reassignment procedures should be lawful, objective and proportionate.

## **VIII. Housing**

37. Measures should be taken to ensure that access to adequate housing can be effectively and equally enjoyed by all persons, without discrimination on grounds of sexual orientation or gender identity; such measures should in particular seek to provide protection against discriminatory evictions, and to guarantee equal rights to acquire and retain ownership of land and other property.
38. Appropriate attention should be paid to the risks of homelessness faced by lesbian, gay, bisexual and transgender persons, including young persons and children who may be particularly vulnerable to social exclusion, including from their own families; in this respect, the relevant social services should be provided on the basis of an objective assessment of the needs of every individual, without discrimination.

## **IX. Sports**

39. Homophobia, transphobia and discrimination on grounds of sexual orientation or gender identity in sports are, like racism and other forms of discrimination, unacceptable and should be combated.
40. Sport activities and facilities should be open to all without discrimination on grounds of sexual orientation or gender identity; in particular, effective measures should be taken to prevent, counteract and punish the use of discriminatory insults with reference to sexual orientation or gender identity during and in connection with sports events.

41. Member states should encourage dialogue with and support sports associations and fan clubs in developing awareness-raising activities regarding discrimination against lesbian, gay, bisexual and transgender persons in sport and in condemning manifestations of intolerance towards them.

## **X. Right to seek asylum**

42. In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.
43. Member states should ensure particularly that asylum seekers are not sent to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity.
44. Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.

## **XI. National human rights structures**

45. Member states should ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity; in particular, they should be able to make recommendations on legislation and policies, raise awareness amongst the general public, as well as – as far as national law so provides – examine individual complaints regarding both the private and public sector and initiate or participate in court proceedings.

## **XII. Discrimination on multiple grounds**

46. Member states are encouraged 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; national human rights structures should have a broad mandate to enable them to tackle such issues.

### *Explanatory memorandum*

The present explanatory memorandum was prepared by the Secretariat in co-operation with the Chairperson of the Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT).

## **I. Introduction**

Numerous texts have been adopted by various Council of Europe bodies on this question in the course of nearly 30 years. The Parliamentary Assembly (PACE) has adopted several recommendations to the Committee of Ministers since 1981 and a

report on “Discrimination on the basis of sexual orientation and gender identity” is currently in preparation within the Committee on Legal Affairs and Human Rights. In March 2007 the Congress of Local and Regional Authorities of the Council of Europe adopted Recommendation 211 (2007) on freedom of assembly and expression by lesbians, gays, bisexuals and transgender persons. The Committee of Ministers itself has adopted replies to the aforementioned Parliamentary Assembly and Congress recommendations and, more recently, various replies to written questions from PACE members in which it reiterates the principle of equal enjoyment of human rights for all, regardless of personal characteristics such as sexual orientation and gender identity, and chiefly covering the issues of freedom of expression, assembly and association, and speech. The Secretary General and the Commissioner for Human Rights have made several public statements condemning homophobia and discrimination based on sexual orientation or gender identity in the member states of the Council of Europe. The Commissioner for Human Rights has also devoted part of his annual activity reports, particularly for 2006 and 2008, to the problem of discrimination against lesbian, gay, bisexual and transgender persons and prepared a number of theme-based documents.

In the European Convention on Human Rights system, although the list of grounds of discrimination prohibited by Article 14 of the Convention and its Protocol No. 12 (general prohibition of discrimination) does not expressly mention sexual orientation or gender identity, this list is open and there is nothing to prevent their inclusion, in practice, among the protected characteristics. The European Court of Human Rights (hereinafter “the Court”) has already recognised that Article 14 covers sexual orientation<sup>1</sup> and the explanatory report to Protocol No. 12 indicates that this instrument would provide protection against discrimination based on sexual orientation. While this was not expressly stated with regard to gender identity, it may reasonably be considered that it would also be covered by both Article 14 and Protocol No. 12. The Court stated that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>2</sup> The Court has furthermore held that the margin of appreciation left to the states in such cases, touching on one of the most intimate questions of private life, is narrow, and there must be particularly serious grounds to justify interference by the public authorities.<sup>3</sup> The proportionality test does not merely require that such interference be in principle suited for realising the aim sought: it must also be shown that it is necessary to achieve that aim.<sup>4</sup>

Other international organisations have also drawn up various texts.

Within the European Union, Article 13 of the Treaty instituting the European Community expressly includes sexual orientation in the list of grounds of discrimination, and Article 21(1) of the Charter of Fundamental Rights of the European

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1. See, *inter alia*, *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 2001, and *Karner v. Austria*, judgment of 24 July 2003.

2. See *Karner*, paragraph 37.

3. See *Karner*, paragraph 41 and *Schlumpf v. Switzerland*, judgment of 8 January 2009, paragraph 115.

4. See *Karner*, paragraph 41.

Union contains a general anti-discrimination provision expressly mentioning “sexual orientation” in the list of prohibited grounds. The Council of the European Union has adopted a directive establishing a general framework for equal treatment in employment and occupation,<sup>5</sup> which explicitly covers sexual orientation and a proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in areas other than employment is now being examined. The Court of Justice of the European Communities (ECJ) has also had occasion to rule on a number of aspects of the issue of discrimination against lesbian, gay, bisexual and transgender persons,<sup>6</sup> particularly on the situation of transgender persons regarding access to employment and social security. According to the case law of the court, dismissing someone who intends to undergo or has undergone gender reassignment is considered to be discrimination based on sex under European Community law.<sup>7</sup> Finally, the European Union Agency for Fundamental Rights (FRA) has published two reports entitled “Homophobia and discrimination on the grounds of sexual orientation and gender identity”<sup>8</sup>

The Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) has recently published several reports and documents analysing certain aspects of issues of discrimination based on sexual orientation or gender identity in OSCE participating states: the 2006 and 2007 annual reports of the OSCE/ODIHR on “Hate crimes in the OSCE region: incidents and responses”, which contain sections on intolerance towards lesbian, gay, bisexual and transgender persons; the OSCE report of 9 March 2009 on “Hate crime laws: a practical guide”; the Handbook on human rights and fundamental freedoms of armed forces personnel of the OSCE/ODHIR,<sup>9</sup> the report on “Human rights defenders in the OSCE region: challenges and good practices”, April 2007-April 2008.<sup>10</sup>

Within the United Nations, a declaration, backed by 66 states,<sup>11</sup> was made within the framework of the United Nations General Assembly on 17 December 2008, condemning rights violations based on sexual orientation and gender identity, such as killings, torture, arbitrary arrests, deprivation of economic, social and cultural rights, including the right to health. This was the very first declaration on the subject

5. Council Directive 2000/78/EC of 27 November 2000.

6. See for example the case of *P. v. S. and Cornwall County Council*, case No. C-13/94, judgment of 30 April 1996 (available in English only), the case of *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, case No. C-423/04, judgment of 27 April 2007, and the case of *K. B. v. National Health Service Pensions Agency and Secretary of State for Health*, case No. C-117/01, judgment of 7 January 2004.

7. See *P. v. S. and Cornwall County Council*, paragraph 21 of the judgment.

8. Part I: legal analysis and Part II: the social situation, available in English at [www.fra.europa.eu](http://www.fra.europa.eu).

9. Available in English only at [www.osce.org/item/30553.html](http://www.osce.org/item/30553.html).

10. Available in English only at [www.osce.org/item/35711.html](http://www.osce.org/item/35711.html).

11. Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, the Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, the Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, the Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, São Tomé and Príncipe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, East Timor, the United Kingdom, Uruguay and Venezuela. The United States of America in March 2009 have also aligned themselves with that statement.

within the General Assembly. The mechanisms of the United Nations covering human rights – the treaty bodies and the Human Rights Council – are ever more frequently called upon to deal with questions of discrimination based on sexual orientation.<sup>12</sup> More generally speaking, concerns over discrimination based on sexual orientation are increasingly taken into account. One example is a guidance note on refugee claims relating to sexual orientation and gender identity<sup>13</sup> published by the United Nations High Commissioner for Refugees (UNHCR) in November 2008, and the United Nations Economic and Social Council's Committee on Economic, Social and Cultural Rights has published general comments on non-discrimination in the exercise of economic, social and cultural rights set forth in Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, reiterating that sexual orientation and gender identity are some of the grounds for discrimination prohibited by the covenant, in the "other status" category.<sup>14</sup> Also the UN Committee on the Rights of the Child has made it clear that the Convention on the Rights of the Child requires that contracting states take appropriate measures, including of legislative nature, which provide protection against discrimination of children on grounds of sexual orientation.<sup>15</sup> The committee has also expressed concern that young homosexual and transsexual persons do not get access to the appropriate information, support and necessary protection to enable them to live their sexual orientation.<sup>16</sup>

The present text is the first instrument drawn up by the Committee of Ministers dealing specifically with the question of discrimination based on sexual orientation or gender identity.

At the 1031st meeting of the Ministers' Deputies on 2 July 2008, the Committee of Ministers emphasised its attachment, in a declaration, to the principle of equal rights and dignity of all human beings, including lesbian, gay, bisexual and transgender persons. Noting that instances of discrimination on grounds of sexual orientation or gender identity as well as homophobia and intolerance towards transgender persons were regrettably still widespread in Europe, the Committee of Ministers reiterated that the Council of Europe's standards of tolerance and non-discrimination applied to all European societies, and discrimination on grounds of sexual orientation or gender identity was not compatible with this message.

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12. In the case of *Toonen v. Australia* (Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992(1994)), the Human Rights Committee expressly recognised that the rights of gay and lesbian persons were protected under the United Nations human rights system, pointing out that Article 26 of the International Covenant on Civil and Political Rights (ICCPR) covered "sexual orientation" under the notion of "sex" mentioned in that provision. In the cases of *Young v. Australia* (Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000(2003)) and *X v. Colombia* (Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005 (2007)) this position has been again confirmed in relation to discrimination against a surviving same-sex partner's right to survivor's pension benefits.

13. Available in English only, "Guidance note on refugee claims relating to sexual orientation and gender identity", November 2008, [www.unhcr.org/refworld/topic,4565c22547,,48abd5660,0.html](http://www.unhcr.org/refworld/topic,4565c22547,,48abd5660,0.html).

14. See the Committee on Economic, Social and Cultural Rights document, paragraph 32: [www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20\\_fr.doc](http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20_fr.doc).

15. Concluding observations of the Committee on the Rights of the Child re. the United Kingdom (Isle of Man), 16 October 2000, document CRC/C/15/Add. 134.

16. Concluding observations of the Committee on the Rights of the Child re. the United Kingdom, 9 October 2002, document CRC/C/15/Add. 188.

In this context, the Committee of Ministers gave the Steering Committee for Human Rights (CDDH) terms of reference to draw up a recommendation on measures to combat discrimination based on sexual orientation or gender identity, to ensure respect for human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them. It was specified that the recommendation should indicate measures to be taken to this end, which thus implies that the instrument to be drafted should not only be firmly based on human rights standards and principles but should also pursue a practical objective.

It also decided to call on all the steering committees and other committees involved in intergovernmental co-operation at the Council of Europe to give, within their respective terms of reference, due attention in their current and future activities to the need for member states to avoid and remedy any discrimination on grounds of sexual orientation or gender identity and to make proposals for specific intergovernmental and other activities designed to strengthen, in law and in practice, the equal rights and dignity of lesbian, gay, bisexual and transgender persons and to combat discriminatory attitudes against them in society.

At its 1048th meeting, on 16 February 2009, the Committee of Ministers approved the terms of reference thus entrusted to the Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT), under the authority of the CDDH. The committee of experts met three times in order to prepare a draft recommendation. It decided that an appendix to the recommendation should set out the principles deriving from existing European and other international instruments, with particular emphasis on the European Convention on Human Rights, in the light of European Court of Human Rights case law. The CDDH approved the proposed text of the present recommendation at its 69th meeting (24-27 November 2009) and transmitted it to the Committee of Ministers, which adopted it on 31 March 2010, at the 1081th meeting of the Ministers' Deputies.

## **II. Comments**

### **General considerations**

The present recommendation invites the member states to guarantee that the principles and measures set out in its appendix are applied in national legislation, policies and practices relative to the protection of the human rights of lesbian, gay, bisexual and transgender persons and the promotion of tolerance towards them.

The starting point for the principles and measures set out in the appendix to the recommendation is the need to combat a high level of discrimination based on sexual orientation or gender identity. Lesbian, gay, bisexual and transgender individuals have indeed been for centuries and are still subjected to homophobia, transphobia and other forms of widespread and enduring intolerance – leading to hostile acts ranging from social exclusion to discrimination – all over Europe and in all areas of life, on grounds of sexual orientation or gender identity. As a result, countless people have to conceal or suppress their identity and to live lives of fear and invisibility, even within their family.

The principles are based essentially on the European Convention on Human Rights and the European Social Charter (including the revised Charter) but also contain references, among others, to the Charter of Fundamental Rights of the European Union, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention Relating to the Status of Refugees, and to the case law of the respective courts and treaty bodies. Only those member states having ratified these texts, which form the foundation of the principles in the recommendation, are bound by the obligations and the case law arising from them. Nevertheless, inspiration can be drawn from these important international human rights instruments and all the member states are encouraged to respect the principles and implement the appropriate measures to combat discrimination based on sexual orientation or gender identity and promote tolerance. Other important references are made throughout the text to other instruments, including the White Paper on Intercultural Dialogue, the European Sports Charter, Parliamentary Assembly Resolutions 1608 (2008) on child and teenage suicide in Europe: a serious public health issue and 1660 (2009) on the situation of human rights defenders in Council of Europe member states, and recommendations of the Committee of Ministers to member states No. R (97) 20 on “hate speech”, Rec(2001)10 on the European Code of Police Ethics, and Rec (2007) 17 on gender equality standards and mechanisms, and to ECRI General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education.

Action to combat discrimination based on sexual orientation or gender identity should begin with a review of existing legislative and other measures which could result, directly or indirectly, in discrimination of a person or a group of persons on these grounds. It should then include the carrying out of relevant research, the collection and analysis of relevant data, in order to regularly and effectively monitor the impact of legislative and other measures on the right not to be discriminated against on the basis of sexual orientation or gender identity, and to redress any direct or indirect discrimination on these grounds. This action will clearly require some time to be fully implemented, and different timing could be envisaged for the different issues mentioned. It is also understood that only discriminatory restrictions would need to be lifted.

In this connection, the European Court of Human Rights, in its judgments in the *Dudgeon v. the United Kingdom*<sup>17</sup> and *Norris v. Ireland*<sup>18</sup> cases, held that the maintenance in force of legislation prohibiting homosexual acts in private constituted a continuing interference with the applicant’s right to respect for his private life (which included his sexual life) even where the law in question would no longer result in prosecution. The previously existing European Commission of Human Rights, in its report on the case of *Sutherland v. the United Kingdom*,<sup>19</sup> stated that

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17. *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A No. 45, p. 21, paragraph 41. This was the first case in which the Commission and the Court took a stance against the existence of laws making homosexuality illegal.

18. *Norris v. Ireland*, judgment of 26 October 1988, Series A No. 142, p. 18, paragraph 38.

19. *Sutherland v. the United Kingdom*, No. 25186/94, Commission report of 1 July 1997, not published, which criticises the existence of legislation establishing a higher minimum age of consent to male homosexual, and heterosexual, acts.

even though the applicant had not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life. In its reply to Recommendation 211 (2007) of the Congress of Local and Regional Authorities, the Committee of Ministers furthermore pointed out that “in a series of judgments,<sup>20</sup> the Court has emphasised that any discrimination based on sexual orientation is contrary to the Convention. All member states must observe the Convention when they apply national law, notably in the light of the case law of the Court.”<sup>21</sup>

Regarding control measures, one option could be that member states adopt and effectively implement periodic action plans at national, regional and local levels and indicators to measure their results and the progress made in implementing them.

In addition, specific measures should be adopted and effectively enforced in order to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them. Member states should ensure that their legislative and other measures are adequate to combat discrimination on such grounds, and should adopt and effectively implement a comprehensive strategy, including long-term education and awareness-raising programmes, aimed at tackling discriminatory or biased attitudes and behaviour within the general public and correcting prejudices and stereotypes (with, for example, clear political messages aimed at the general public, including media professionals).

Member states should ensure that victims have effective access to legal remedies before a national authority, even if a violation is committed by persons acting in an official capacity. Such remedies should be effective, proportionate and dissuasive, including, when appropriate, the awarding of adequate reparation to the victims of discrimination. They should also take measures to ensure that victims are made aware of the existence of such remedies.

Member states are also invited to ensure, through appropriate means and initiatives (including through the Internet), that the content of this recommendation, including its appendix, is disseminated as widely as possible in order to inform lesbian, gay, bisexual and transgender persons of their right to equal treatment but also to raise the awareness throughout public administration, law enforcement structures, including the judiciary and the penitentiary system, national human rights protection structures, the educational and the health-care systems, as well as among representatives of public and private sector employees and employers, the media, and relevant non-governmental organisations.

Where follow-up to the recommendation is concerned, the governments of the member states are invited to review its application, through the Committee of Ministers, three years after its adoption.

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20. Notably, *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 2000; *L. and V. v. Austria*, judgment of 9 January 2003; *Karnerv. Austria*, judgment of 24 July 2003; *B.B. v. the United Kingdom*, judgment of 10 February 2004.

21. Reply adopted by the Committee of Ministers on 16 January 2008 at the 1015th meeting of the Ministers’ Deputies – CM/Cong(2008)Rec211 final.

# I. Right to life, security and protection from violence

## A. “Hate crimes” and other “hate-motivated incidents”

1-2. Hate crimes are crimes committed on grounds of the victim’s actual or assumed membership of a certain group, most commonly defined by race, religion, sexual orientation, gender identity, nationality, ethnicity, disability, etc.<sup>22</sup> For the purpose of this recommendation, 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.<sup>23</sup> “Hate crimes” and other “hate-motivated incidents” are very upsetting for the victims and the community to which they belong, and it is all the more striking that, from the victim’s point of view, what matters most is having suffered such a crime because of an immutable fundamental aspect of their identity.<sup>24</sup> But they also threaten the very basis of democratic societies and the rule of law, in that they constitute an attack on the fundamental principle of equality in dignity and rights of all human beings, as inscribed in Article 1 of the Universal Declaration of Human Rights of the United Nations. Lesbian, gay, bisexual and transgender persons are the target of many such crimes or incidents. According to the OSCE/ODIHR report “Hate crimes in the OSCE region: incidents and responses”,<sup>25</sup> homophobic crimes or incidents are often characterised by a high degree of cruelty and brutality, often involving severe beatings, torture, mutilation, castration or even sexual assault, and may result in death. They may also take the form of damage to property, insults or verbal attacks, threats or intimidation.

It is understood that the most appropriate measures and procedures to deal with a hate crime or a hate motivated incident will depend on the applicable national regulations and on the circumstances of the case, i.e. whether it concerns a violation of national criminal, civil or administrative law or other regulations (disciplinary procedures, etc.). Terms such as “investigation” and “sanctions” should therefore be read, in this respect, in a broad sense, having regard to the circumstances of the case.

Legislative measures to combat these crimes are vital. By condemning discriminatory motives, they send out a signal to offenders that a just and humane society will not tolerate such behaviour. By recognising the harm done to the victims, they give these people and their community the assurance of being protected by the

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22. In the introduction to the OSCE report: *Hate crime laws – A practical guide*, (p. 7), where hate crimes are described as “Crimes motivated by intolerance towards certain groups in society”. The OSCE/ODIHR also provides a “working definition” in its annual report for 2006, whereby a hate crime is “Any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a group”. See also the definition given by the Home Office: [www.homeoffice.gov.uk/crime-victims/reducing-crime/hate-crime/](http://www.homeoffice.gov.uk/crime-victims/reducing-crime/hate-crime/) or the US Department of Justice– Bureau of Justice Assistance: *A policymaker’s guide to hate crimes*: [www.ncjrs.gov/pdffiles1/bja/162304.pdf](http://www.ncjrs.gov/pdffiles1/bja/162304.pdf).

23. See OSCE annual report for 2006, p. 9, [www.osce.org/publications/odihr/2007/09/26296\\_931\\_en.pdf](http://www.osce.org/publications/odihr/2007/09/26296_931_en.pdf).

24. See OSCE report: *Hate crime laws – A practical guide*, p. 42, [www.osce.org/publications/odihr/2009/03/36671\\_1263\\_en.pdf](http://www.osce.org/publications/odihr/2009/03/36671_1263_en.pdf).

25. See OSCE annual report for 2006, pp. 53-54.

criminal justice system. In addition, the existence of such laws renders hate crimes or other hate-motivated incidents more visible and makes it easier to gather statistical data, which in turn is of importance for the designing of measures to prevent and counteract them.

In legislation, hate crimes will generally be punished by a more severe penalty, as the offence is committed with a discriminatory motive. A failure to take into account such biased motives for a crime may also amount to indirect discrimination under the ECHR.<sup>26</sup> Member states should ensure that when determining sanctions a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. They should furthermore ensure that such motives are recorded when a court decides to hand down a more severe sentence.<sup>27</sup> At least 14 Council of Europe member states have already included sexual orientation as an aggravating circumstance in the committing of an offence in their legislation.<sup>28</sup>

Indeed, it appears from many reports that few of these crimes or incidents are complained of or reported to the police or any public authority. The fact that hostility may be shown to lesbian, gay, bisexual and transgender persons by police officers themselves, either when a victim goes to the police station or at the officers' own initiative, makes them even less likely to do so.<sup>29</sup>

The right to state protection from all forms of violence or injury guaranteed by Articles 2 and 3 of the Convention implies the introduction of effective investigative mechanisms in the event of use of lethal force or inhuman or degrading treatment, whether carried out by representatives of the state or by private individuals.

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26. *Angelova and Iliev v. Bulgaria*, No. 55523/00, judgment of 26 July 2007, para.115: “[W]hen investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.”

27. The OSCE practical guide (op. cit.) points out that (p. 36) in some states the reasons for penalty enhancements are not publicly recorded, which deprives the law of much of its symbolic and statistical value.

28. By way of example, Article 132-77 of the French Criminal Code stipulates that “In the cases provided for in law, the penalties incurred for a crime or misdemeanour shall be more severe when an infringement is committed on grounds of the victim’s sexual orientation.” The European Union Agency for Fundamental Rights notes that 10 member states of the European Union have included sexual orientation as an aggravating circumstance in the committing of an offence. These are Belgium, Denmark, Spain, France, the Netherlands, Portugal, Romania, Finland, Sweden and the United Kingdom. See “Homophobia and discrimination on grounds of sexual orientation in the EU member states” (Part I – Legal analysis), p. 122, available at [www.fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_0608\\_en.htm](http://www.fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_0608_en.htm). Where Council of Europe member states are concerned, Andorra, Croatia, Iceland and Norway have also done so.

29. See the FRA report – Part II p. 46-47.

The Court has already acknowledged that, for allegations of violent acts of a discriminatory nature, a special procedure may have to be adopted to gather evidence. In one case before it, the Court stated that it is not excluded that a measure may be considered as discriminatory on the basis of evidence of its impact (disproportionately prejudicial effects on a particular group), even if it is not specifically aimed at that group.<sup>30</sup> Where the use of violence is motivated by homophobic or transphobic discrimination, Articles 2 and 3 in conjunction with Article 14 (rights and freedoms set forth in the Convention to be enjoyed without discrimination) should prompt states to take reasonable measures to establish the role played by the alleged prejudices and, consequently, to ensure that a distinction is drawn both in the legal system and in practice between cases where excessive force has been used and those involving hate crimes. States should make special efforts to investigate any homophobic or transphobic connotations in an act of violence, and all the more so since, in practice, it may be difficult to prove a homophobic or transphobic motive. As discriminatory motives are tricky to prove, the quality of investigations are all the more important. Similarly, the obligation to investigate cases with racist connotations must be fulfilled without discrimination, as required by Article 14 of the Convention.<sup>31</sup> Such obligations are clearly applicable when a crime is motivated by a person's sexual orientation or gender identity.

3. Member states should introduce appropriate measures to encourage the victims and witnesses of hate crimes or other hate-motivated incidents based on sexual orientation or gender identity to report these acts. Such measures could include:

- a. drawing up and disseminating a simple and comprehensible definition of "hate crimes" including the motive of sexual orientation or gender identity, aimed at the general public so that these crimes are more frequently reported and at the police services which log the complaints;
- b. setting up training programmes in order to ensure that the different structures of the law enforcement authorities, including the judicial system, possess the knowledge and skills required to provide victims and witnesses with adequate assistance and support;
- c. creating special units tasked, *inter alia*, with investigating crimes and incidents linked to sexual orientation or gender identity and special liaison officers for maintaining contact with local communities in order to foster a relationship of trust;
- d. placing special emphasis on the setting up of independent and effective machinery for receiving and investigating reports of hate crimes or hate-motivated incidents allegedly committed by law enforcement staff, particularly where sexual orientation or gender identity constitute one of the motives;

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30. *Hugh Jordan v. the United Kingdom*, No. 24746/94, paragraph 154, 4 May 2001.

31. See the Court's argumentation in the case of *Nachova and Others v. Bulgaria*, judgment of 26 February 2004, paragraphs 155-162, concerning killings with racist connotations: "The right to life under Article 2 of the Convention and the prohibition of discrimination in general, and of racial and ethnic discrimination in particular, under Article 14 reflect basic values of the democratic societies that make up the Council of Europe. Acts motivated by ethnic hatred that lead to deprivation of life undermine the foundations of those societies and require particular vigilance and an effective response by the authorities". Furthermore, a failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], No. 34369/97, paragraph 44, ECHR 2000-IV).

- e. introducing systems of anonymous complaints or online complaints or using other means of easy access and allow reporting by third parties in order to gather information on the incidence and particular nature of these incidents;

In addition, member states should take steps to ensure that lesbian, gay, bisexual and transgender persons are treated without discrimination within law enforcement structures and other structures set up in order to encourage reporting by victims and witnesses of hate crimes or hate-motivated incidents, by providing for codes of good conduct and training. They should also take steps to ensure that homophobic or transphobic acts, including acts of torture or inhuman or degrading treatment such as sexual abuse, unduly intrusive body searches and denigrating language, be avoided in these structures and – where applicable – make use of disciplinary or criminal sanction mechanisms.

4. The use of torture or any other inhuman or degrading treatment is strictly prohibited by the European Convention on Human Rights (Article 3). Persons deprived of their liberty, including in psychiatric hospital establishments, under the guard and responsibility of the state authorities, are particularly vulnerable and the authorities have a duty to protect them, be it from actions of state officials or actions of other detainees. This is all the more the case for lesbian, gay, bisexual and transgender persons, who are even more vulnerable to certain abuses and subject to bullying, violence, humiliation, sexual assault, rape and other forms of ill-treatment. States should be particularly attentive to these situations, ensure that the obligations arising from the Court's case law are complied with and introduce adequate and effective procedures for determining the disciplinary or criminal liability of those responsible for such actions or for failings in the supervision of places of detention.

Where transgender persons are concerned, the authorities should be particularly careful with the choice of prison (male or female) so as to adequately protect and respect the gender identity of the individual to be imprisoned. The significance of an individual's subjective choice is inseparably linked to objective criteria relevant to that person's identity. Therefore, the respect for gender identity does not imply, in this context, a right for an individual to choose arbitrarily his or her gender identity. In cases where the official documents are insufficient to determine the choice of prison, the authorities should carry out an objective assessment of the case, taking into account, not only, the subjective choice of the individual and the official documents, but also, for instance, the state of advancement of the process of gender reassignment.

5. To be able to combat discrimination it is vital to conduct relevant research and to gather data on discriminatory measures and practices, particularly where "hate crimes" and "hate-motivated incidents" related to sexual orientation or gender identity are concerned, having due regard to the right to respect for private life. The Commissioner for Human Rights, for one, has noted the lack of data on the situation of transgender persons in Europe, particularly in the member states not belonging to the EU.<sup>32</sup>

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32. "Human rights and gender identity", issue paper, Commissioner for Human Rights, 29 July 2009, p. 9, [www.coe.int/t/commissioner/Activities/IPList\\_en.asp](http://www.coe.int/t/commissioner/Activities/IPList_en.asp).

Tools of this kind should go beyond merely recording incidents, and be of use for future initiatives to prevent such incidents and raise public awareness of what homophobic and transphobic aggression entail and for developing adequate measures to combat it. Member states therefore should equip themselves with effective tools for the analysis of data and information to arrive at a better quantitative and qualitative grasp of discrimination towards lesbian, gay, bisexual and transgender persons, particularly where hate crimes are concerned. They should also actively encourage research into the nature and causes of hostile or negative behaviour towards lesbian, gay, bisexual and transgender persons, with a view to framing effective policies to combat these phenomena.

### B. “Hate speech”

6-8. In its Recommendation No. R (97) 20 of 30 October 1997 on “hate speech”, the Committee of Ministers stated that the term “hate speech” is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including discrimination and hostility against minorities. For the purpose of this recommendation, the term “hate speech” is intended as covering such forms of hate-motivated expression whichever means of expression is used, including the Internet and any other new media.

As the White Paper on Intercultural Dialogue also points out, public debate must respect cultural diversity.<sup>33</sup> Public expressions of racism, xenophobia or any other form of intolerance, whether from individuals in public office or members of civil society, should be rejected and condemned, in line with the relevant provisions of the European Convention on Human Rights, including Article 17. Homophobic public statements by public figures are particularly worrying in that they negatively influence public opinion and fuel intolerance.

In the same recommendation, the Committee of Ministers asserts that “public authorities and public institutions ... have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech ... or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur” (Principle 1). At the same time, it is important that interferences with freedom of expression are “narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria [and] subject to independent judicial control” (Principle 3).

The Court has stated that “whoever exercises his freedom of expression undertakes ‘duties and responsibilities’ the scope of which depends on his situation and the technical means he uses”<sup>34</sup> and the exercise of these freedoms may be subject to restrictions, particularly for the protection of the rights of others.<sup>35</sup> The Court also held that, while Article 10 leaves little scope for restrictions on political speech or

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33. In section 5.1 of the White Paper it is stated, *inter alia*, that “states should have robust legislation to outlaw ‘hate speech’ and racist, xenophobic, homophobic, anti-Semitic, Islamophobic and anti-Gypsy or other expressions, where this incites hatred or violence”.

34. *Handyside v. the United Kingdom* of 7 December 1976, Series A No. 24, p. 25, paragraph 49.

35. Article 10, paragraph 2, of the Convention.

debate, the exercise of freedom of expression by elected politicians who at the same time are holders of public offices in the executive branch of government entails particular responsibility.<sup>36</sup> Those individuals must exercise this freedom with restraint, therefore, bearing in mind that their views can be regarded as instructions by civil servants whose employment and careers depend on their approval.

Accordingly, member states should make public authorities and bodies – at national, regional and local levels – aware of their responsibility to abstain from statements, particularly to the media, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. When conducting dialogue with representatives of the different sectors of civil society, including private companies, trade unions and employers' organisations, political organisations or other NGOs, as well as philosophical or religious communities, public officials and other representatives of the state should also strive to promote tolerance and respect for lesbian, gay, bisexual and transgender persons, among others, and the use of responsible and non-violent speech.

It should be understood that combating hate speech may not require the systematic criminalisation of each expression motivated by intolerance, and that the most appropriate measures and procedures will depend on the applicable national regulations and on the circumstances of each case.

Committee of Ministers Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance stresses the importance of the professional practices of the media and the responsibility they have to protect various groups and individuals from negative stereotyping or to publicise their positive contributions to society. Media organisations, including those operating on the Internet, should be encouraged to promote in their own practices a culture of respect, tolerance and diversity in order to avoid negative and stereotyped representations of lesbian, gay, bisexual and transgender persons and the use of degrading material or sexist language. Practices developed in certain countries entail the drawing up of codes of conduct for dealing with matters related to lesbian, gay, bisexual and transgender persons in a non-discriminatory manner. Another good practice to be encouraged entails the organisation of campaigns to raise awareness of media promoting positive representations of lesbian, gay, bisexual and transgender persons.

Given the growing importance of the Internet and the difficulty of detecting and punishing those who perpetrate “hate speech” on the Internet, the member states should establish or maintain a solid and adequate legal framework applicable to the new media and services or communication networks, including in the area of “hate speech” based on sexual orientation or gender identity.<sup>37</sup> Measures of this kind should be taken in compliance with the requirements laid down by Article 10, paragraph 2, of the Convention, so that interference with freedom of expression is as limited as possible, provided for in law and proportionate to the aim sought. States should, *inter alia*:<sup>38</sup>

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36. *Baczowski and Others v. Poland*, No. 1543/06, judgment of 3 May 2007, paragraphs 98-99.

37. See also, in this respect, the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Council of Europe Treaty Series, No. 189.

38. The Additional Protocol to the Convention on Cybercrime of 30 January 2003 already establishes the principle that acts of a racist and xenophobic nature disseminated via computer systems must be criminalised.

- ensure that sexual orientation and gender identity are covered in the relevant texts with respect to the criminalisation of infringements committed via the Internet and prosecute those responsible;
- encourage specific measures to avoid the dissemination of homophobic material, threats or insults on the Internet under website supervision by access providers;
- improve international co-operation and mutual assistance between judicial authorities to combat the dissemination of hate-motivated material, including material based on sexual orientation or gender identity, via the Internet.

## II. Freedom of association

9. The Court held that the positive obligation of states to ensure real and effective respect for freedom of association and assembly is “of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation”<sup>39</sup>

A PACE Committee on Legal Affairs and Human Rights report of 24 February 2009 on “The situation of human rights defenders in Council of Europe member states” reveals that, while the activities of human rights defenders working for the rights of lesbian, gay, bisexual and transgender persons has greatly intensified in the last few years in Council of Europe member states, this trend has encountered very strong opposition and these individuals run a particularly high risk.<sup>40</sup> The OSCE report entitled “Human rights defenders in the OSCE region: challenges and good practices”<sup>41</sup> shows that obstacles to freedom of association may take the form of refusal of registration, dissolution, expulsion or threats of expulsion from premises, damage to or attacks on premises, defamation campaigns and abuses of taxes. The report further lists the eventuality of repressive measures: criminal sanctions for activities not registered, abusive prosecutions, demands for exorbitant registration and re-registration fees, checks, audits or investigations by state officials, abusive or even illegal taxation.

Anyone should be able to form and gain accreditation for associations, without discrimination, which pass on information to or about lesbian, gay, bisexual and transgender persons, facilitate communication between them or advocate their rights. States should ensure that notions of public order, public morality, public health or public safety are not abused to restrict the exercise of the right to freedom of association in this respect. Refusal to register an association should be on the basis of an objectively justified and properly reasoned decision open to appeal. States where laws or practices prohibit the setting up of organisations advocating the human rights of lesbian, gay, bisexual and transgender persons should abolish those laws or practices and also allow for the possibility of re-registration where dissolu-

39. See for instance *Baczkowski and Others v. Poland*, op. cit., paragraph 64.

40. Paragraphs 31-32 of the report.

41. [www.osce.org/publications/odihr/2008/12/35711\\_1217\\_en.pdf](http://www.osce.org/publications/odihr/2008/12/35711_1217_en.pdf), pp. 19 *et seq.*

tion has been ordered.<sup>42</sup> States should not only abstain from interference in these associations' activities resulting in discriminatory restriction of the exercise of their right to freedom of association but also take appropriate steps to ensure that such organisations operate freely, to defend their interests when necessary and to facilitate and encourage their work. States should also involve them on a partnership basis when framing and implementing public policies, so that their voice may be heard.

10. Access to public funding earmarked for non-governmental organisations should be guaranteed without discrimination on grounds of sexual orientation or gender identity. NGOs should be free to solicit and receive contributions – donations in cash or kind – not only from the public authorities in their own state but also from institutional or individual donors, and other state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.<sup>43</sup>

11. Those who defend the human rights of lesbian, gay, bisexual and transgender persons are, as recalled by the Parliamentary Assembly,<sup>44</sup> among the most exposed of human rights defenders to attacks and abuses, because of their identity or because of the issues on which they work. In accordance with the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities of 6 February 2008,<sup>45</sup> member states should take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities, and should create an environment conducive to their work, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights.

This may include, for instance, allowing human rights defenders to network with each other as well as with national independent human rights institutions and ombudsmen, the media, human rights defenders in other countries and international organisations, and encouraging the participation of human rights defenders in training sessions, international conferences or other activities aimed at upholding human rights.

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42. See *Presidential Party of Mordovia v. Russia* (judgment of 5 October 2004); *United Communist Party of Turkey and Others v. Turkey* (judgment of 30 January 1998); *The Metropolitan Church of Bessarabia and Others v. Moldova* (judgment of 13 December 2001) or *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria* (judgment of 20 October 2005) and the Committee of Ministers follow-up to the execution of these judgments (see, for example, document CM/Inf/DH(2007)8 of 7 February 2007).

43. See in this connection Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.

44. See Parliamentary Assembly of the Council of Europe Resolution 1660 (2009) on the situation of human rights defenders in Council of Europe member states, paragraph 5.

45. Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities (adopted on 6 February 2008 at the 1017th meeting of the Ministers' Deputies).

It is also important in this connection that member states provide for swift assistance and protection measures for human rights defenders in danger in third countries, such as by attending and observing trials where appropriate and/or, if feasible, issuing emergency visas.

12. Member states are strongly encouraged to develop arrangements for cooperating with organisations defending the human rights of lesbian, gay, bisexual and transgender persons, exchanging information and good practices on ways of preventing discrimination based on sexual orientation or gender identity and promoting respect and tolerance. States are also invited to engage in awareness-raising activities in order to encourage a climate of trust and mutual respect between the members of communities and the public administration. Member states should appropriately consult organisations defending the human rights of lesbian, gay, bisexual and transgender persons on the adoption and implementation of measures that may have an impact on their human rights.

### **III. Freedom of expression and peaceful assembly**

13. The right to freedom of expression, in particular to share and express one's identity, is fundamental to promoting diversity and tolerance in society.<sup>46</sup> The Court has repeatedly ruled that freedom of expression and peaceful assembly is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. "Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society".<sup>47</sup>

Everyone must have the right to freedom of expression and peaceful assembly without discrimination, including on the grounds of their sexual orientation or gender identity. This right includes the right to express identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium.<sup>48</sup>

States should take appropriate steps to encourage the receipt and transmission of information and ideas relating to sexual orientation and gender identity, including activities that support the human rights of lesbian, gay, bisexual and transgender persons, the publication of material, media coverage, the organisation of and/or participation in conferences and the dissemination of, and access to, information on safe sexual practices. They should also encourage pluralism and non-discrimination in the media in respect of issues of sexual orientation and gender identity.

14. Within Council of Europe member states, it has been observed that the exercise of freedom of expression and peaceful assembly by lesbian, gay, bisexual and transgender persons and the organisations that represent them sometimes arouses hostility which at times even results in the banning of "gay pride" marches or violent

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46. Committee of Ministers reply of 16 January 2008 to Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe.

47. *Handyside v. the United Kingdom*, 7 December 1976, No. 5493/72, 1 EHRR 737, paragraph 49.

48. Article 19 of the UN International Covenant on Civil and Political Rights of 16 December 1966; Article 19 of the Universal Declaration of Human Rights.

attacks on demonstrators and failure by the police to protect these demonstrators. In many cases, it was observed that the authorities, despite having a positive obligation to protect their citizens against discrimination, are actually endorsing, actively supporting or perpetrating these injustices, thus encouraging homophobic or transphobic attitudes and actions.<sup>49</sup>

15. That means the authorities have a positive obligation to take effective measures to protect and ensure the respect of lesbian, gay, bisexual and transgender persons who wish to assemble and express themselves, even if their views are unpopular or not shared by the majority of the population. The local authorities, the courts, the police and national human rights structures, including ombudspersons thus have a duty to protect the right to freedom of expression and peaceful assembly also of lesbian, gay, bisexual and transgender persons and organisations defending such persons' rights.

As regards the law enforcement agencies in particular, it should be noted that the Committee of Ministers in its recommendation of 19 September 2001 on the European Code of Police Ethics<sup>50</sup> stated that the police, in carrying out their activities, "shall always bear in mind everyone's fundamental rights, such as freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions" and that "police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups."

16. Although the Convention allows restrictions to be placed on the exercise of freedom of expression and assembly, such restrictions must be prescribed by law and necessary in a democratic society, in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.<sup>51</sup> Member states should ensure that these notions are not abused to interfere with the exercise of freedom of opinion and expression in support of lesbian, gay, bisexual and transgender persons. Moreover, according to the established case law of the European Court of Human Rights, peaceful demonstrations, be they in favour of the rights of lesbian, gay, bisexual and transgender persons or others, cannot be banned simply because of the existence of attitudes hostile to the demonstrators or to the causes they advocate. On the contrary, the state has a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.<sup>52</sup>

The Court has ruled in its case law that a demonstration may "annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to

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49. FRA report, *op. cit.*, "Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU member states: Part II", pp. 54-58.

50. Committee of Ministers Recommendation Rec(2001)10 on the European Code of Police Ethics adopted by the Committee of Ministers, on 19 September 2001, at the 765th meeting of Ministers' Deputies, paragraphs 43 and 44.

51. See also OSCE/ODIHR – Venice Commission, "Guidelines on freedom of peaceful assembly", in particular paragraph 69.

52. Committee of Ministers reply of 16 January 2008 to Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe, paragraph 3.

fear that they will be subjected to physical violence by their opponents; ... In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”<sup>53</sup>

In any event, any interference with the exercise of freedom of expression should be “narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria” and should be “subject to independent judicial control.”<sup>54</sup>

17. Public authorities, at all levels, should be encouraged to condemn publicly – notably in the media – any unlawful interference with the right of an individual or group of individuals to exercise their freedom of expression and peaceful assembly, including where the parties concerned wish to defend the cause of lesbian, gay, bisexual and transgender persons, and to support the exercise of this right, including by demonstrating alongside them, if necessary.

#### **IV. Right to respect for private and family life**

18. The right to freedom of sexual expression, as an element of private life, is protected by Article 8 of the Convention. The Court strongly condemns not only the existence of laws that criminalise same-sex sexual relations between consenting adults in private,<sup>55</sup> but also legislation that prescribes one age of consent for such relations and another for heterosexual relations.<sup>56</sup> It has also ruled that this being one of the most intimate aspects of a person’s private life, the margin of appreciation afforded to states in this area is narrow.

States should accordingly repeal any legislation that criminalises same-sex sexual relations between consenting adults and ensure that their legislation prescribes the same minimum age of consent for such relations as for heterosexual relations. They should also take care to repeal any criminal law provisions which, because of their wording, are liable to be applied in a discriminatory manner or whose scope might lead to people being stopped and searched on the grounds of their sexual orientation or gender identity.

19. Member states should ensure that personal data referring to a person’s sexual orientation or gender identity are not collected, stored or otherwise used by public institutions, including notably within law enforcement structures,<sup>57</sup> except where this is necessary for specific, lawful and legitimate purposes.

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53. *Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, Series A No. 139, p. 12, paragraph 32.

54. Committee of Ministers Recommendation No. R (97) 20 on “hate speech”.

55. *Dudgeon v. the United Kingdom*, No. 7525/76, judgment of 22 October 1981; *Norris v. Ireland*, judgment of 26 October 1986 and *Modinos v. Cyprus*, judgment of 23 April 1993. See also *A.D.T. v. the United Kingdom*, No. 35765/97, 30 July 2000, in which the Court found the UK law prohibiting male homosexual acts in private involving more than two partners to be in breach of the Convention.

56. See also the judgments *L. and V. v. Austria* and *S.L. v. Austria*, of 9 January 2003.

57. Committee of Ministers Recommendation Rec(2001)10 on the European Code of Police Ethics states that the police shall only interfere with an individual’s right to privacy when strictly necessary and only to obtain a legitimate objective. The collection, storage and use of personal data by the police shall be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes. The police register containing information relating to private life must satisfy the requirements of Article 8 of the Convention.

This applies notably to any criminal register, record or file or any other document related to a criminal investigation (for example, files containing information on the sexual orientation or gender identity of persons heard as victims, witnesses or perpetrators in proceedings), as well as existing special records on lesbian, gay, bisexual and transgender persons. Existing records containing such information should be re-examined with a view to ensuring the immediate destruction of records which do not comply with these principles.<sup>58</sup>

Of course, the benefit of collecting statistics on discriminatory behaviour and other offences against lesbian, gay, bisexual and transgender persons, motivated by their sexual orientation or gender identity, is not incompatible with the need to protect personal data relating to sexual orientation or gender identity – which is a legitimate aim – provided that these statistics are collected anonymously or rendered anonymous as soon as they are no longer necessary in an identifiable form. They should, in any event, serve only these purposes and must on no account be used to take decisions or measures in respect of the data subjects or to supplement or correct existing files which have a non-statistical purpose.<sup>59</sup>

20-21. Two areas that pose problems for transgender persons are the eligibility requirements for gender reassignment procedures and the issue of legal recognition.

As affirmed in Committee of Ministers Recommendation CM/Rec(2007)17 on gender equality standards and mechanisms, “both women and men must have a non-negotiable right to decide over their own body, including sexual and reproductive matters. Such acknowledgement must be reflected in the development, implementation, access to, monitoring and evaluation of health-care services and in research priorities.”<sup>60</sup>

In some countries access to gender reassignment services is conditional upon procedures such as irreversible sterilisation, hormonal treatment, preliminary surgical procedures and sometimes also proof of the person’s ability to live for a long period of time in the new gender (the so-called “real life experience”). In this respect, existing requirements and procedures should be reviewed in order to remove those requirements which are disproportionate. It should be noted, in particular, that for some persons it may not be possible, for health reasons, to complete every hormonal and/or surgical step required. Similar considerations apply with respect to the legal recognition of a gender reassignment, which can be conditional to a number of procedures and prior requirements, including changes of a physical nature.

The Court has been dealing with the issue of legal recognition of the new gender identity of post-operative transsexuals for a number of years now. In the cases of *B. v. France* of 25 March 1992 and in particular *Christine Goodwin v. the United Kingdom*, the Court found that refusal by a state to legally recognise a completed sexual reassignment constituted a violation of Article 8.

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58. As already provided in 1981 by Parliamentary Assembly Recommendation 924 (1981).

59. Committee of Ministers Recommendation No. R (97) 18, of 30 September 1997, concerning the protection of personal data collected and processed for statistical purposes, principles 3.3 and 4.1. See also on this subject the European Union Agency for Fundamental Rights report, Part I, pp. 145-148.

60. Committee of Ministers Recommendation CM/Rec(2007)17, of 21 November 2007, Principle 44.

States thus have a positive obligation to legally recognise the new identity of a transsexual person<sup>61</sup> who has undergone a complete gender reassignment. This includes the issuing of official documents such as birth certificates, identity papers, driving licences, passports, social insurance cards and numbers, electoral, land and tax registers. The Court has stressed that it is of “crucial importance” that the Convention be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.<sup>62</sup> There is an obligation on states to issue e.g. new birth certificates, and also non-official documents issued by non-government agencies such as diplomas, certificates of employment, insurance or banking documents should, where appropriate and upon request, be altered to conform to the new gender identity of such persons.

States should also ensure that the procedures for legally changing a person’s gender and name are swift, transparent, accessible and that they respect the person’s physical integrity and their private life (so that no third party can become aware of the gender reassignment).

22. Transgender persons have a right to marry a person of the sex opposite to their own newly assigned sex, provided that their gender reassignment has been recognised in accordance with applicable law and paragraphs 20 and 21. The Court has recognised that persons who have undergone a complete gender reassignment have the right to marry and ruled that the allocation of sex in national law, for the purposes of marriage, to that registered at birth is a limitation impairing the very essence of the right to marry.<sup>63</sup> It further considered that although the text of Article 12 referred in express terms to the right of a man and woman to marry, it was not persuaded that it could now still be assumed that these terms must refer to a determination of gender by purely biological criteria.<sup>64</sup> Similarly, the refusal to award a pension to the unmarried transsexual partner of a woman (the couple having been unable to marry because of the legislation on gender reassignment) affiliated to a pension scheme, under which benefits were payable only to her surviving spouse, amounts to discrimination on grounds of sex under European Community law as ruled by the ECJ.<sup>65</sup>

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61. Judgments *B. v. France* of 25 March 1992, Series A No. 232-C, pp. 52-54; *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 2021; *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, 11 July 2002, paragraphs 89 and 124, ECHR 2002-VI and *Grant v. the United Kingdom*, No. 32570/03, ECHR 2006-VII.

62. *Christine Goodwin v. the United Kingdom*, op. cit., paragraph 74.

63. *Christine Goodwin v. the United Kingdom*, op. cit., and *I. v. the United Kingdom*, 11 July 2002, paragraphs 101 and 81.

64. *Ibid.*, paragraphs 100 and 80. Note that this case law does not pave the way for same-sex marriages, as the Court merely accepts the notion of “social gender” as a decisive factor in determining sex. A case is nevertheless pending before the Court concerning the annulment of a civil marriage between two people of the same sex, notably on the ground that under the legislation in question, “marriage is a union between a man and a woman”. Case of *Chapin and Charpentier v. France*, No. 40183/07, see the Communicated Cases Collection: statement of facts and questions to the parties: [cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=40183/07&sessionid=30302497&skin=hudoc-cc-fr](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=40183/07&sessionid=30302497&skin=hudoc-cc-fr).

65. *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, ECJ, case C-117/01, judgment of 7 January 2004.

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex couples and different-sex couples. The Court, for example, has already considered a number of specific issues, taking the view that differences based on sexual orientation require particularly serious reasons by way of justification and that the margin of appreciation afforded to member states in this area is narrow. In matters relating to tenancy rights, for example, it ruled that the refusal to allow a surviving unmarried same-sex partner to succeed to his partner's tenancy, when unmarried heterosexual partners were permitted to do so, amounted to discrimination on the ground of sexual orientation in the exercise of the right to respect for the home, in breach of Articles 8 and 14 of the Convention.<sup>66</sup>

In the case *Young v. Australia*, the UN Human Rights Committee considered that the refusal by a state to grant a person in a same-sex relationship a pension on the ground that he does not meet with the definition of "dependant" violated Article 26 of the ICCPR, on the basis of his sexual orientation. In reaching this conclusion, the committee recalled its constant jurisprudence that not every distinction amounts to prohibited discrimination under the ICCPR, as long as it is based on reasonable and objective criteria, and noted that the state party provided no arguments on how the distinction between same-sex partners, who were excluded from pension benefits under law, and unmarried heterosexual partners, who were granted such benefits, was reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction.<sup>67</sup>

24. If under national legislation registered partnerships between persons of the same sex are recognised, their legal status and their rights and obligations should be equivalent to those of heterosexual couples in a comparable situation.<sup>68</sup> The evaluation of whether under national law a same-sex couple is in a "comparable situation" with an opposite-sex couple is, however, left to the appreciation of national authorities on the basis of the specific circumstances of each case.<sup>69</sup> This means that in some circumstances same-sex couples may not be considered as being in a situation comparable to opposite-sex couples.

25. It is recalled that the right to marry as set out in Article 12 of the European Convention on Human Rights refers to traditional marriage between persons of the opposite sex. This has been confirmed by the European Court of Human Rights in several cases. The study prepared for the Council of Europe's European Committee on Legal Co-operation (CDCJ) by the Danish Institute for Human Rights on various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation

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66. *Karner v. Austria*, No. 40016, 24 July 2003, paragraphs 37-42.

67. See *Young v. Australia* (Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000(2003)), paragraph 10.2. Similar considerations were applied also in the case *X v. Colombia* (Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005 (2007), paragraph 7.2).

68. For a full review of national regulations on same-sex partnerships in Council of Europe member states, see the study prepared for the CDCJ by the Danish Institute for Human Rights on various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity, Document CDCJ(2009)9, pp. 18-22.

69. *Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen*, case C-267/06, paragraphs 65 to 73.

or gender identity also concludes that the lack of access to marriage or to obtain a similar partnership status for same-sex couples has a negative impact on the effective protection of lesbian, gay, bisexual and transgender persons' human rights.<sup>70</sup>

Where national law recognises neither same-sex registered partnerships nor unmarried couples, member states should at least consider the possibility of providing same-sex couples with some legal or other means to deal with the practical problems arising from this lack of legal recognition, without discrimination of any kind. It is clear, in particular, that this should not result in discriminatory treatment of different-sex couples where they have similar needs. In this respect, it should also be noted that already in 2000, the Parliamentary Assembly of the Council of Europe, in its Recommendation 1474 (2000), had invited member states to adopt legislation which made provision for registered partnerships for same-sex couples.<sup>71</sup>

26. Throughout family life and when parents separate or divorce, the primary consideration in all decisions on parental responsibility or guardianship, i.e. care and protection, the provision of education, maintenance of personal relations, the child's place of residence, administration of the child's assets, legal representation, etc. should be the child's best interests, in accordance with Article 3, paragraph 1, of the International Convention on the Rights of the Child. Taking this into account, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.<sup>72</sup> In the *Salgueiro da Silva Mouta v. Portugal* case,<sup>73</sup> concerning the award of custody of a child to the applicant's ex-wife, the Court found that the national court had made a distinction in this context based on the applicant's sexual orientation, which was not acceptable under the Convention. The Court therefore found a violation of the applicant's right to respect for his family life (Article 8) and taken together with the prohibition on discrimination on grounds of sexual orientation (Article 14).

27. No state is obliged to allow unmarried persons to adopt children individually. If they choose to allow for such adoptions under their national law they should, however, apply such legal provisions without discrimination.<sup>74</sup> Lesbian, gay, bisexual and transgender persons should therefore be able to adopt individually in the same way as heterosexuals in a comparable situation, with the primary consideration in all decisions that affect children being the child's best interests.<sup>75</sup>

The Court has already had occasion to rule on the issue of discrimination on grounds of sexual orientation with respect to adoption of children by unmarried individuals. In the *Fretté v. France* case, after finding that "the decision [to dismiss his application for authorisation to adopt] contested by the applicant was based

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70. Study for the CDCJ, op. cit., p. 23.

71. More recently, on 14 January 2009, the European Parliament called on those member states who had not yet done so, and in application of the principle of equality, to take legislative action to overcome the discrimination experienced by some couples on the grounds of their sexual orientation.

72. With respect to gender identity, this may imply for instance that if either of the parents changes sex, that should have no effect on their initial parental status, nor be a relevant issue when ruling on a parental right.

73. *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 1999, paragraphs 34-36.

74. See *E.B v. France*.

75. See Article 3 of the International Convention on the Rights of the Child.

decisively on the latter's avowed homosexuality<sup>76</sup>; the Court held that the justification given by the government appeared objective and reasonable and that the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention,<sup>77</sup> and there was no doubt that the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure.<sup>78</sup> Later in a Grand Chamber judgment in the *E.B. v. France* case, the Court found that the sexual orientation of the applicant was a decisive factor in the authorities' decision to refuse her the authorisation which was necessary for her to be allowed to adopt a child. The Court, citing its ruling in the *Salgueiro da Silva Mouta* case, therefore concluded that the authorities had "made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention". The Court found a violation of Articles 8 and 14 of the Convention.

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

## V. Employment

29. According to the case law of the Court, employment matters may also come under the protection of private life in Article 8. In *Niemietz v. Germany*,<sup>79</sup> the Court stated that "There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that ... it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not." It is also under this perspective that states should ensure the establishment and implementation of appropriate legislative and other measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation.

In the public and private sectors, measures should be adopted to guarantee equal conditions of employment (including with respect to recruitment and promotion) to everyone and to prevent and combat discrimination and harassment on grounds of sexual orientation or gender identity and all forms of victimisation, including for example:

- the adoption of codes of conduct applying both to employers and to employees;
- training and awareness-raising programmes aimed both at employers and at employees on issues relating to such discrimination in the workplace and on the

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76. *Fretté v. France*, judgment of 26 May 2002, paragraph 37.

77. *Ibid.*, paragraph 43.

78. *Ibid.*, paragraph 38.

79. See *Niemietz v. Germany*, No. 13710/88, judgment of 16 December 1992, paragraph 29.

legal consequences of discriminatory practices, with the emphasis on recruitment and promotion procedures;

- distribution to employees of information material explaining their rights, any available complaint mechanisms and effective remedies;
- recruitment efforts directed at lesbian, gay, bisexual and transgender persons.
- It should be encouraged that such measures be developed in co-operation with existing employee groupings or associations recognised as being representative of lesbian, gay, bisexual and transgender persons.

In particular, states should take the appropriate measures to abolish laws, regulations and practices which discriminate on grounds of sexual orientation or gender identity, as regards access to and the career advancement within certain professions or occupations, such as the armed forces. With respect in particular to the latter, measures should be designed and implemented in order to provide protection against interferences based on sexual orientation or gender identity in the everyday lives of members of the armed forces (e.g. investigations, warnings, harassment, bullying, cruel initiation rites, humiliation and other forms of ill-treatment), in accordance with the case law of the Court.<sup>80</sup> Codes of conduct and training programmes designed to combat discrimination on grounds of sexual orientation or gender identity in the armed forces should be put in place to promote tolerance and the respect of the human dignity of every individual.

The above is without prejudice to the possibility that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate. The principle of non-discrimination will not be violated if the distinction between individuals in analogous situations has an objective and reasonable justification by pursuing a legitimate aim and employing means which are reasonably proportionate to the aim sought to be realised.<sup>81</sup>

30. Discrimination in employment and occupation is a particular concern for transgender persons, who are hard hit by unemployment and social exclusion. The number of transgender persons made redundant, particularly during a gender reassignment procedure, who leave their jobs to avoid any forms of harassment or who decide against gender reassignment for the same reasons is also very high.<sup>82</sup>

Member states should therefore ensure that measures designed to combat discrimination in employment also apply to gender identity issues, take care to avoid unnecessary disclosure of a transgender person's gender background or previous

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80. See *Smith and Grady v. the United Kingdom* and *Lustig-Prean and Beckett v. the United Kingdom*, judgments of 27 December 1999. The question of discrimination against lesbian, gay, bisexual and transgender persons in the armed forces is also referred to in a draft Committee of Ministers recommendation on the human rights of members of the armed forces.

81. See also Recommendation CM/Rec(2010)4 of the Committee of Ministers on human rights of members of the armed forces (adopted on 24 February 2010 at the 1077th meeting of the Ministers' Deputies).

82. Employment is also vital for access to certain gender reassignment treatments as it can provide health insurance cover.

name, both in recruitment procedures and during working life,<sup>83</sup> and develop programmes focusing specifically on employment opportunities for transgender persons.

## VI. Education

31. The right to education is expressed in Article 2 of the Protocol to the Convention. The health and development of young people are heavily influenced by the environment in which they live, and school has a crucial place in that, especially in view of the fact that discrimination on grounds of sexual orientation or gender identity among young people is a factor contributing to isolation, underachievement and malaise and may even lead to suicide attempts. The right of children not to be discriminated in the enjoyment of their rights is also expressed in Article 2 of the Convention on the Rights of the Child, and Article 29, paragraph 1, of the same convention provides that education shall be directed to “the development of the child’s personality, talents and mental and physical abilities to their fullest potential”. The United Nations Committee on the Rights of the Child notes in this connection that sexual orientation is a prohibited grounds of discrimination in this respect, and that many young lesbian, gay, bisexual and transgender persons do not have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation and that adolescents’ human rights need to be promoted in order to ensure that they enjoy the highest attainable standard of health, develop in a well-balanced manner and are adequately prepared to enter adulthood and assume a constructive role in their communities and in society at large.<sup>84</sup>

States should therefore safeguard the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity. They should also take the appropriate measures to ensure that head teachers and teaching staff are able to detect, analyse and effectively respond to and combat any form of discrimination on grounds of sexual orientation or gender identity at school, and that discipline is enforced in educational institutions in a manner compatible with human dignity, without any such discrimination. Lesbian, gay, bisexual and transgender pupils or students who suffer exclusion or violence should not be set apart or isolated for reasons of protection: their best interests should be determined and respected on a participatory basis and measures to remedy such situations should rather primarily be directed against the perpetrators.

32. Failure to address the issue of sexual orientation or gender identity may have harmful consequences for the self-esteem of young lesbian, gay, bisexual and transgender persons. States should therefore deal with the issue of sexual orientation and gender identity in a respectful and objective manner in curricula or in sex and health

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83. According to the report by the FRA (Part I, p. 155), even after a gender reassignment has been officially recognised, information may still be collected on the past of the persons concerned, particularly in the context of job applications, through access to certain records. The ECJ, in the *P. v. S. and Cornwall City Council* case (C-13/94), censured the dismissal of a person for a reason relating to a gender reassignment as constituting sex discrimination.

84. Committee on the Rights of the Child, General Comment No. 4 (2003): “Adolescent health and development in the context of the Convention on the Rights of the Child”, 1 July 2003.

education classes, for example, and set up initial and in-service training programmes or support and guidance for teachers and other educational staff to address these issues, in particular from an anti-discrimination perspective. The European Committee on Social Rights has recently affirmed that by officially approving or allowing the use of the textbooks that contain anti-homosexual statements a state has failed in its positive obligation to ensure the effective exercise of the right to protection of health by means of non-discriminatory sexual and reproductive health education, which “extends to ensuring that educational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to the social exclusion, embedded discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation”.<sup>85</sup>

States should also encourage access by students to information on sexual orientation and gender identity and the adoption of codes of conduct against homophobic or transphobic attitudes or any other direct or indirect discriminatory treatment, produce and distribute handbooks for educational staff and encourage the mounting of school campaigns and cultural events against homophobia and transphobia, with the participation of relevant players in such fields – including, where appropriate, representatives of lesbian, gay, bisexual and transgender organisations – with the aim of raising awareness of issues of discrimination on grounds of sexual orientation or gender identity among educational staff, pupils, students and parents.

Education methods, curricula and resources should serve to enhance understanding of and respect for, *inter alia*, different individuals irrespective of sexual orientation or gender identity, including the particular needs of pupils, students, their parents and family members. For example, states should take measures to adequately meet the special needs of transgender students in their school life (e.g. facilitating the changing of the entry as to first name or gender in school documents).

All measures should take into account the rights of parents regarding education of their children, such as the right to ensure education and teaching in conformity with their own religious and philosophical convictions, as enshrined in Article 2 of Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms.

## VII. Health

33. International human rights law asserts that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care and necessary social services, and that states recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>86</sup> Recommendation Rec(2006)18 of the Committee of Ministers to member states on health services in a multicultural society, adopted on 8 November

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

86. Article 25 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

2006, recommends that states adapt their health services to the needs of multicultural societies, *inter alia* by developing “culture competence” for health professionals, which may be defined as the ability to offer effective health services while having due regard, among other things, to the patient’s sexual orientation.

The report by the FRA shows that many lesbian, gay, bisexual and transgender persons suffer discrimination in the health-care area: for example, they are advised to undergo psychiatric treatment, and gay men are still associated with HIV and even paedophilia.<sup>87</sup> Therefore, many lesbian, gay, bisexual and transgender persons do not disclose their sexual orientation to their general practitioner and forego treatment for fear of discrimination or intolerant reactions, which may lead to not only physical but also mental health problems,<sup>88</sup> including dietary problems, drug or alcohol misuse, depression, suicide and suicide attempts.<sup>89</sup>

States should therefore take appropriate measures to guarantee that everyone has access to health-care institutions, goods and services and that everyone has access to their own medical records, without any discrimination on the basis of sexual orientation or gender identity.

States should put in place the appropriate education and training policies and programmes to enable persons working in the health-care sector to deliver the highest attainable standard of health care to all persons, with full respect for each person’s sexual orientation and gender identity. This includes, for example:

- encouraging studies and research on the health of lesbian, gay, bisexual and transgender persons to identify and meet their specific needs;
- taking account of lesbian, gay, bisexual and transgender persons’ special needs in the design of national health plans, health surveys, medical training programmes, and training courses and materials, and in the monitoring and quality assessment of health-care services;
- guaranteeing that education, prevention, care and treatment programmes and services in the area of sexual and reproductive health respect the diversity of sexual orientations and gender identity, and are equally available to all;
- encouraging health professionals and social workers to create an environment that is reassuring and open to young lesbian, gay, bisexual and transgender persons, for example by conducting information campaigns.

When it comes to the issue of who has access to a hospitalised person and information on his or her state of health, as well as to the issue of medical decision-making in emergencies, states should recognise as “next of kin” a person identified as such by the patient him- or herself. In any event national rules on issues regarding “next of kin” should be applied without discrimination on grounds of sexual orientation or gender identity.

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87. FRA report, Part II, p. 78.

88. In connection with the refuse of disclosing sexual orientation for fear of discrimination to the general practitioners, a marked tendency towards psychological problems, suicide and suicide attempts may be observed among lesbian, gay, bisexual and transgender persons, and particularly among younger lesbian, gay, bisexual and transgender persons.

89. See also Parliamentary Assembly Resolution 1608 (2008) on child and teenage suicide in Europe: a serious public health issue, in particular paragraphs 9 and 10.

34. The World Health Organization (WHO) has made it clear that homosexuality is not to be considered as a disease, by removing that concept from its International Statistical Classification of Diseases and Related Health Problems in 1990 and declassifying it from the diseases list at its 1992 Congress, with relevance for all states signatory to the WHO Charter. Consequently, states should take the necessary measures to have homosexuality explicitly removed from their national classifications of diseases. They should also ensure that no one is forced to undergo any form of treatment, protocol or medical or psychological test, or confined in a medical institution, because of his or her sexual orientation or gender identity.

35-36. The Court's case law considers the right to sexual self-determination as one of the aspects of the right to respect for one's private life guaranteed by Article 8 of the Convention and requires contracting states to provide for the possibility to undergo surgery leading to full gender-reassignment, but also that insurance plans should cover "medically necessary" treatment in general, which gender reassignment surgery may be part of.<sup>90</sup> Where legislation provides for coverage of necessary health-care costs by public or private social insurance systems, such coverage should then be ensured in a reasonable, non-arbitrary and non-discriminatory manner,<sup>91</sup> taking into account also the availability of resources.

Concerning the conditions governing gender reassignment procedures, international human rights law provides that no one may be subjected to treatment or a medical experiment without his or her consent.<sup>92</sup> Hormonal or surgical treatments as preconditions for legal recognition of a gender change (see paragraph 19 above) should therefore be limited to those which are strictly necessary, and with the consent of the person concerned. Similarly, therapy to force transgender persons to accept their birth gender should be abandoned, and states should take appropriate measures to ensure that no child has his or her body irreversibly changed by medical practices designed to impose a gender identity without his or her full, free and informed consent, in accordance with his or her age and maturity, unless such medical interferences are necessary for other health reasons.

## VIII. Housing

37. States should take appropriate measures to ensure non-discriminatory security of tenure and access of lesbian, gay, bisexual and transgender persons to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation.<sup>93</sup>

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90. *Van Kück v. Germany*, No. 35968/07, judgment of 12 June 2003, paragraphs 73 -86.

91. See *L. v. Lithuania*, judgment of 11 September 2007, paragraph 59, and *Schlumpf v. Switzerland*, No. 29002/06, judgment of 8 January 2009, paragraph 115.

92. See in this connection General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, paragraph 8, and the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, ETS No. 164, Chapter II.

93. General Comment No. 4 of the Committee on Economic, Social and Cultural Rights relating to Article 11 of the ICESCR, document E/1992/23. See also *Karner v. Austria*, op. cit., relating to Article 8 of the European Convention. The proposal for a European directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation provides explicitly for protection of lesbian, gay, bisexual and transgender persons against discrimination in access to goods and services, including housing.

In accordance with this principle, measures should be taken to prevent, for example, the refusal to sell or rent housing to a person, or to give financial assistance to a person for the purchase of housing, or to recognise the rights of a tenant's partner, because of his or her sexual orientation or gender identity. In the *Karner v. Austria* case,<sup>94</sup> the European Court of Human Rights held in this connection that the refusal to allow a surviving unmarried same-sex partner to succeed to his partner's tenancy, whereas this possibility exists for unmarried heterosexual partners, constitutes discriminatory treatment on grounds of sexual orientation in the exercise of the right to respect for one's home, in violation of Articles 8 and 14 of the Convention. Information material to this effect could, for example, be made available to landlords and tenants in order to identify and prevent instances of discrimination in housing.

Adequate and effective legal or other appropriate remedies should be available to those claiming to be victims of sexual orientation or gender identity discrimination with respect to their right to access to housing.

38. Many lesbian, gay, bisexual and transgender persons, in particular young persons, are rejected by their own families and may find themselves homeless. States should therefore establish social programmes, including support programmes, to address factors relating to sexual orientation and gender identity which increase vulnerability to homelessness, especially for children and young people<sup>95</sup> and promote schemes of neighbourhood support and security. States should also provide training and awareness-raising programmes to ensure that relevant agencies are aware of and sensitive to the needs of those facing homelessness or social disadvantage as a result of their sexual orientation or gender identity, in particular young lesbian, gay, bisexual and transgender persons.

## IX. Sports

39-41. Sport can play a key role in social integration and in the promotion of tolerance and respect for diversity in society. Lesbian, gay, bisexual and transgender persons are often at a disadvantage when it comes to participation in sports activities both in regular sports organisations or at school. Homophobia, transphobia, and discrimination on grounds of sexual orientation or gender identity in sports, both among participants and in their relations with spectators, are, like racism and other forms of discrimination, unacceptable and should be combated.

Member states should therefore take appropriate measures to implement the sports-related recommendations and principles adopted by Council of Europe bodies with respect to sexual orientation and gender identity, whether or not they include such specific references or not. States should consider PACE Recommendation 1635 (2003) of 25 November 2003 on lesbians and gays in sport, calling on states to "include homophobia and abusive language directed at lesbians and gays as grounds for accusation of discrimination and harassment on the basis of sexual orientation; make homophobic chanting at or around sports events a criminal

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94. *Karner v. Austria*, op. cit., paragraphs 37-42.

95. Such as social exclusion, domestic and other forms of violence, discrimination, lack of financial independence and rejection by families or cultural communities.

offence, as is presently the case with racist chanting in many member states; involve NGOs from the gay and lesbian community in their sports campaigns and in all other necessary confidence-building steps.” They should likewise implement the relevant provisions of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, the European Sports Charter and ECRI’s General Policy Recommendation No. 12,<sup>96</sup> adapting them also to cover discrimination towards sports players or spectators on the grounds of their sexual orientation or gender identity.

Sports activities and facilities should be open to all, without discrimination on any grounds, including sexual orientation and gender identity. In this connection, states should encourage the drawing up and dissemination of codes of conduct on questions relating to sport and sexual orientation or gender identity for the attention of sports organisations and clubs. They should also encourage partnerships between associations representing lesbian, gay, bisexual and transgender persons and sports clubs, anti-discrimination campaigns in the sports world, and support sports clubs set up by lesbian, gay, bisexual and transgender persons themselves. As regards in particular transgender persons, states should take appropriate measures to put an end to their exclusion from sports activity or competitions,<sup>97</sup> to remove the obstacles encountered by transgender persons in participating in sports and to recognise their preferred gender, particularly in connection with dressing room access, in the interest of fair competition.

## **X. Right to seek asylum**

42. In its Recommendation 1470 (2000),<sup>98</sup> the Parliamentary Assembly criticised the fact that the majority of Council of Europe member states did not recognise persecution on grounds of sexual orientation as a valid ground for granting asylum. It also noted that homosexuals who have a well-founded fear of persecution resulting from their sexual preference are refugees under Article 1.A.2. of the 1951 Convention Relating to the Status of Refugees as members of “a particular social group”, and consequently should be granted refugee status. Recommendation Rec(2004)9 of the Committee of Ministers of 30 June 2004 provided a definition of the concept of “a particular social group” and established principles to determine whether a person is persecuted because of membership in a particular social

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96. European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, ETS No. 120, of 19 August 1985. European Sports Charter, Recommendation No. R (92) 13 rev. of the Committee of Ministers, adopted on 24 September 1992. ECRI’s General Policy Recommendation No. 12 on combating racism and racial discrimination in sport (adopted by ECRI on 19 December 2008).

97. On the lines of the Stockholm Declaration, adopted by the International Olympic Committee in May 2004, specifying the conditions under which a person may compete in a sports event in a gender different from their birth gender.

98. Recommendation 1470 (2000), adopted on 30 June 2000, on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe.

group.<sup>99</sup> In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law. However, interpretation of the 1951 convention's concept of membership of a particular social group should not impose upon states obligations to which they have not consented.

With regard to the procedure for examining an asylum request, training in the specific problems encountered by lesbian, gay, bisexual and transgender refugees or asylum seekers should be provided for staff responsible for processing these requests. An asylum request should not be turned down on the ground that the claimant can escape persecution in the country of origin by keeping his or her sexual orientation or gender identity secret.

43. The protection of the right to life and the prohibition of torture entail an obligation for member states not to deport a person to a state where he or she is likely to be subjected to treatment contrary to Articles 2 and 3 of the Convention.<sup>100</sup> According to Article 33 of the 1951 Convention Relating to the Status of Refugees "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his ... membership of a particular social group". If there is a risk that a person be subject to application of the death penalty, to torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity in their country of origin, member states should refrain from returning such persons and instead grant them the protection they seek. Where same-sex sexual relations are illegal in a particular society, the imposition of severe criminal penalties amounting to the risk outlined above could also be considered as a valid ground not to send a person to that country.

44. In accordance with their positive obligation to protect all persons deprived of their liberty (see paragraph 4 above), and in particular those who are particularly vulnerable, states should take the necessary measures to protect lesbian, gay, bisexual and transgender refugees or asylum seekers, from such abuses as bullying, humiliation, sexual assault, rape and other forms of harassment, and provide effective remedies to such events should they occur.

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99. Recommendation Rec(2004)9, adopted on 30 June 2004, on the concept of "membership of a particular social group" (MPSG) in the context of the 1951 Convention Relating to the Status of Refugees. It considers that a "particular social group" is a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state or the persecutors. Persecutory action towards a group may however be a relevant factor in determining the visibility of a group in a particular society". It also provides that "the concept of MPSG should be interpreted in a broad and inclusive manner in the light of the object and purpose of the 1951 Convention. However, interpretation of the concept of MPSG should not extend the scope of the Convention to impose upon states obligations to which they have not consented" and that "mere membership of a particular social group, as described above, will not normally be enough to substantiate a claim for refugee status. Each asylum claim must be considered individually with regard to the nexus between the MPSG and the existing risk of persecution. Furthermore, the factual circumstances in the country of origin need to be taken into account. There may, however, be special circumstances in individual cases where mere membership can be a sufficient ground for fearing persecution".

100. *Soering v. the United Kingdom*, judgment of 7 June 1989. The Court has already applied Rule 39 of the Rules of Court with regard to the deportation of persons alleging a risk of treatment contrary to Articles 2 and/or 3 of the Convention because of their sexual orientation if they are returned to their country of origin (in the case of deportations to Afghanistan, Pakistan or Iran, for example). These cases have not yet been heard on the merits.

States should also provide lesbian, gay, bisexual and transgender asylum seekers and refugees with appropriate assistance and information on their rights with respect in particular to their sexual orientation or gender identity, in a language they understand. The staff of administrative detention centres, police and medical staff, and voluntary organisations with access to such places, should receive appropriate training and information on issues regarding sexual orientation and gender identity.

## **XI. National human rights structures**

45. National human rights protection structures, which may include, but are not limited to, equality bodies and ombudsmen, should be given the broadest possible mandate for tackling problems of discrimination including on grounds of sexual orientation or gender identity as well as multiple discrimination, taking account of the “Paris principles” relating to the status and functioning of national institutions for the protection and promotion of human rights.<sup>101</sup>

## **XII. Multiple discrimination**

46. Human beings are not defined by one single criterion such as their gender, skin colour, language, national, ethnic or social origin, religion, age or sexual orientation, but are beings with diverse identities where a range of criteria interact with each other. Multiple discrimination can be said to occur when a person suffers discrimination based on his or her connection to at least two different protected discrimination grounds, or because of the specific combination of at least two such grounds. The latter situation is often also referred to as intersectional discrimination. An example of that is when a lesbian woman is treated less favourably than a heterosexual woman would be but also less favourably than a gay man.<sup>102</sup>

Sexual orientation and gender identity are factors which, in combination with one or more others such as race or sex, will increase the vulnerability of the persons concerned. States should therefore be aware of the reality of the phenomena of multiple or intersectional discrimination and be encouraged to take appropriate measures to provide effective protection against it.

They could, for example, seek to develop statistical tools that take account of experiences of multiple or intersectional discrimination, while respecting fundamental principles regarding the right to privacy. Furthermore, legal provisions prohibiting discrimination should be considered in cases of multiple or intersectional discrimination and national human rights structures, including equality bodies and ombudspersons, should be given the broadest possible mandate so that they can tackle problems of discrimination based on a range of grounds, including notably sexual orientation and gender identity.

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101. Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, known as the “Paris principles” set out in United Nations General Assembly Resolution 48/134 of 20 December 1993 (A/RES/48/134).

102. Danish Institute for Human Rights: “Tackling multiple discrimination – Practices, policies and laws”, report commissioned by the European Commission, September 2007. At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001, the United Nations General Assembly recognised the phenomenon of multiple discrimination (report, Declaration No. 2, Document A/CONF.189/12, p. 5).

# **Message from the Committee of Ministers to steering committees and other committees involved in intergovernmental co-operation at the Council of Europe on equal rights and dignity of lesbian, gay, bisexual and transgender persons**

*(Adopted by the Committee of Ministers on 2 July 2008 at the 1031st meeting of the Ministers' Deputies)*

The Committee of Ministers recalls that it is strongly attached to the principle of equal rights and dignity of all human beings, including lesbian, gay, bisexual and transgender persons. The Council of Europe's message of tolerance and non-discrimination applies to all European societies, and discrimination on grounds of sexual orientation or gender identity is not compatible with this message.

It notes that instances of discrimination on grounds of sexual orientation or gender identity as well as homophobia and intolerance towards transgender persons are regrettably still widespread in Europe.

Therefore, it invites all steering committees and other committees involved in intergovernmental co-operation at the Council of Europe to give, within their respective terms of reference, due attention in their current and future activities to the need for member states to avoid and remedy any discrimination on grounds of sexual orientation or gender identity and to make proposals for specific intergovernmental and other activities designed to strengthen, in law and in practice, the equal rights and dignity of lesbian, gay, bisexual and transgender persons and to combat discriminatory attitudes against them in society.

# **Recommendation No. R (97) 20 of the Committee of Ministers to member states on “hate speech”**

*(Adopted by the Committee of Ministers on 30 October 1997  
at the 607th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, particularly for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling the Declaration of the heads of state and government of the member states of the Council of Europe, adopted in Vienna on 9 October 1993;

Recalling that the Vienna Declaration highlighted grave concern about the present resurgence of racism, xenophobia and anti-Semitism and the development of a climate of intolerance, and contained an undertaking to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence and discrimination, as well as any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds;

Reaffirming its profound attachment to freedom of expression and information as expressed in the Declaration on the Freedom of Expression and Information of 29 April 1982;

Condemning, in line with the Vienna Declaration and the Declaration on Media in a Democratic Society, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7 and 8 December 1994), all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism;

Noting that such forms of expression may have a greater and more damaging impact when disseminated through the media;

Believing that the need to combat such forms of expression is even more urgent in situations of tension and in times of war and other forms of armed conflict;

Believing that it is necessary to lay down guidelines for the governments of the member states on how to address these forms of expression, while recognising that most media cannot be blamed for such forms of expression;

Bearing in mind Article 7, paragraph 1, of the European Convention on Trans-frontier Television and the case law of the organs of the European Convention on Human Rights under Articles 10 and 17 of the latter Convention;

Having regard to the United Nations Convention on the Elimination of All Forms of Racial Discrimination and Resolution (68) 30 of the Committee of Ministers on measures to be taken against incitement to racial, national and religious hatred;

Noting that not all member states have signed and ratified this convention and implemented it by means of national legislation;

Aware of the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression so as to avoid the risk of undermining democracy on the grounds of defending it;

Aware also of the need to respect fully the editorial independence and autonomy of the media,

Recommends that the governments of member states:

1. take appropriate steps to combat hate speech on the basis of the principles laid down in this recommendation;
2. ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes;
3. where they have not done so, sign, ratify and effectively implement in national law the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in accordance with Resolution (68) 30 of the Committee of Ministers on measures to be taken against incitement to racial, national and religious hatred;
4. review their domestic legislation and practice in order to ensure that they comply with the principles set out in the appendix to this recommendation.

### *Appendix to Recommendation No. R (97) 20*

#### **Scope**

The principles set out hereafter apply to hate speech, in particular hate speech disseminated through the media.

For the purposes of the application of these principles, the term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

#### **Principle 1**

The governments of the member states, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.

#### **Principle 2**

The governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.

To this end, governments of member states should examine ways and means to:

- stimulate and co-ordinate research on the effectiveness of existing legislation and legal practice;
- review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks;
- develop a co-ordinated prosecution policy based on national guidelines respecting the principles set out in this recommendation;
- add community service orders to the range of possible penal sanctions;
- enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction;
- provide the public and media professionals with information on legal provisions which apply to hate speech.

### **Principle 3**

The governments of the member states should ensure that in the legal framework referred to in Principle 2, interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

### **Principle 4**

National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.

### **Principle 5**

National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect's right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality.

## **Principle 6**

National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, analyse and explain specific instances of hate speech and the underlying phenomenon in general as well as the right of the public to receive such information and ideas.

To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.

## **Principle 7**

In furtherance of Principle 6, national law and practice should take account of the fact that:

- reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10, paragraph 1, of the European Convention on Human Rights and may only be interfered with under the conditions set out in paragraph 2 of that provision;
- the standards applied by national authorities for assessing the necessity of restricting freedom of expression must be in conformity with the principles embodied in Article 10, as established in the case law of the Convention's organs, having regard, *inter alia*, to the manner, content, context and purpose of the reporting;
- respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.

# **Recommendation 1915 (2010) of the Parliamentary Assembly – Discrimination on the basis of sexual orientation and gender identity**

*(Adopted by the Assembly on 29 April 2010)*

1. Referring to its Resolution 1728 (2010), the Parliamentary Assembly commends the Committee of Ministers for its recommendation on measures to combat discrimination based on sexual orientation or gender identity (CM/Rec(2010)5).
2. The Assembly considers that the Council of Europe has the duty to promote a clear message of respect and non-discrimination. In addition, the Council of Europe is particularly well placed to develop human rights standards, offer expertise and advice and serve as a forum for discussion on issues related to discrimination on the basis of sexual orientation and gender identity.
3. Consequently, the Assembly recommends that the Committee of Ministers:
  - 3.1. monitor the implementation of its recent recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity;
  - 3.2. define further Council of Europe action in this field, in particular:
    - 3.2.1. instruct a relevant Council of Europe body to review and address issues related to discrimination on the basis of sexual orientation and gender identity in member states, and provide it with the necessary resources to carry out this task;
    - 3.2.2. further mainstream issues relating to discrimination on the basis of sexual orientation and gender identity in its activities, and disseminate the case law of the European Court of Human Rights on sexual orientation and gender identity, including through publications and training materials;
    - 3.2.3. in the framework of its work on children and violence, address in particular the issue of homophobic and transphobic bullying at school;
    - 3.2.4. further develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of lesbian, gay, bisexual and transgender people and, in particular, organise a campaign to combat discrimination on the basis of sexual orientation and gender identity;
  - 3.3. instruct the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to include in the future Council of Europe convention the severest and most widespread forms of violence against women, in accordance with Assembly Recommendation 1847 (2008) on combating violence against women: towards a Council of Europe convention, and to recognise that lesbian, bisexual and transgender women face an increased risk of gender-based violence (in particular rape, sexual violence and harassment, as well as forced marriages) and provide protection commensurate with this increased risk.

# **Resolution 1728 (2010) of the Parliamentary Assembly – Discrimination on the basis of sexual orientation and gender identity**

*(Adopted by the Assembly on 29 April 2010)*

1. The Parliamentary Assembly recalls that sexual orientation, which includes heterosexuality, bisexuality and homosexuality, is a profound part of the identity of each and every human being. The Assembly also recalls that homosexuality has been decriminalised in all member states of the Council of Europe. Gender identity refers to each person's deeply felt internal and individual experience of gender. A transgender person is someone whose gender identity does not correspond to the gender he or she was assigned at birth.
2. Under international law, all human beings are born free and equal in dignity and rights. Sexual orientation and gender identity are recognised as prohibited grounds for discrimination. According to the European Court of Human Rights, a difference in treatment is discriminatory if it has no objective and reasonable justification. Since sexual orientation is a most intimate aspect of an individual's private life, the Court considers that only particularly serious reasons may justify differences in treatment based on sexual orientation. In its 1999 judgment in *Lustig-Prean and Beckett v. the United Kingdom*, it emphasised that negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for discrimination, any more than similar negative attitudes towards those of a different sex, origin or colour.
3. Nevertheless, lesbian, gay, bisexual and transgender (LGBT) people, as well as human rights defenders working for the rights of LGBT people, face deeply rooted prejudices, hostility and widespread discrimination all over Europe. The lack of knowledge and understanding about sexual orientation and gender identity is a challenge to be addressed in most Council of Europe member states since it results in an extensive range of human rights violations, affecting the lives of millions of people. Major concerns include physical and verbal violence (hate crimes and hate speech), undue restrictions on freedom of expression, freedom of assembly and association, violations of the right to respect for private and family life, violations of rights to education, work and health, as well as regular stigmatisation. As a consequence, many LGBT people across Europe live in fear and have to conceal their sexual orientation or gender identity.
4. Transgender persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender. One consequence is the relatively high suicide rate among transgender people.
5. Discrimination on the basis of sexual orientation and gender identity can be magnified on the basis of sex and gender, with lesbian, bisexual and transgender women, in particular, running an increased risk of violence. The LGBT community itself is also not immune to sex discrimination.

6. The Assembly is particularly concerned by the violation of the rights to freedom of assembly and freedom of expression for LGBT persons in a number of Council of Europe member states since these rights are pillars of democracy. This has been illustrated by the banning or attempted banning of peaceful rallies or demonstrations of LGBT persons and their supporters and the overt or tacit support some politicians have given to violent counter-demonstrations.
7. Hate speech by certain political, religious and other civil society leaders, and hate speech in the media and on the Internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance. The boundary between hate speech inciting to crime and freedom of expression is to be determined in accordance with the case law of the European Court of Human Rights.
8. Homophobia and transphobia have particularly serious consequences for young LGBT people. They face widespread bullying, sometimes unhelpful or hostile teachers and curricula which either ignore LGBT issues or perpetuate homophobic or transphobic attitudes. A combination of discriminatory attitudes in society and rejection by the family can be very damaging for the mental health of young LGBT people, as evidenced by suicide rates which are much higher than those in the wider youth population.
9. It is important not to criticise the perceived or declared sexual orientation of young people, particularly of those aged under 18 still attending school, and to recognise that any exploitation of their perceived or declared sexual identity, or any humiliation or degrading treatment on that basis, can be both wrong in itself and potentially harmful to the well-being and personal growth of these young people both at that stage and later in life.
10. The denial of rights to de facto “LGBT families” in many member states must also be addressed, including through the legal recognition and protection of these families.
11. On the other hand, the Assembly welcomes the fact that, in some cases, political and judicial authorities have taken a number of measures against discrimination affecting LGBT persons.
12. In this context, the Assembly welcomes the work of the Committee of Ministers, which adopted Recommendation CM/Rec(2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity on 31 March 2010, the high priority given by the Council of Europe Commissioner for Human Rights to this issue and the recent reports of the European Union Fundamental Rights Agency on homophobia and discrimination on grounds of sexual orientation in European Union member states.
13. Recalling its Recommendations 1474 (2000) on the situation of lesbians and gays in Council of Europe member states and 1117 (1989) on the condition of transsexuals, the Assembly again condemns the various forms of discrimination suffered by LGBT people in Council of Europe member states. LGBT people should not have to fear being stigmatised and victimised, either in the public or private spheres.
14. The Assembly considers that the Council of Europe has the duty to promote a clear message of respect and non-discrimination so that everybody can live in dignity in all its member states.

15. The eradication of homophobia and transphobia also requires political will in member states to implement a consistent human rights approach and to embark on a wide range of initiatives. In this respect, the Assembly stresses the specific responsibility of parliamentarians in initiating and supporting changes in legislation and policies in Council of Europe member states.
16. Consequently, the Assembly calls on member states to address these issues and in particular to:
  - 16.1. ensure that the fundamental rights of LGBT people, including freedom of expression and freedom of assembly and association, are respected, in line with international human rights standards;
  - 16.2. provide legal remedies to victims and put an end to impunity for those who violate the fundamental rights of LGBT people, in particular their right to life and security;
  - 16.3. recognise that lesbian, bisexual and transgender women face an increased risk of gender-based violence (in particular rape, sexual violence and harassment, as well as forced marriages) and provide protection commensurate with the increased risk;
  - 16.4. condemn hate speech and discriminatory statements and effectively protect LGBT people from such statements while respecting the right to freedom of expression, in accordance with the European Convention on Human Rights and the case law of the European Court of Human Rights;
  - 16.5. adopt and implement anti-discrimination legislation which includes sexual orientation and gender identity among the prohibited grounds for discrimination, as well as sanctions for infringements;
  - 16.6. revoke legislative provisions which are not in conformity with the case law of the European Court of Human Rights;
  - 16.7. ensure that discrimination on the basis of sexual orientation and gender identity can be effectively reported to judicial and non-judicial bodies and ensure that national human rights structures and equality bodies effectively address these issues;
  - 16.8. sign and ratify Protocol No. 12 to the European Convention on Human Rights (ETS No. 177) providing for a general prohibition of discrimination;
  - 16.9. ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000, by providing for:
    - 16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;
    - 16.9.2. “next of kin” status;
    - 16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;
    - 16.9.4. recognition of provisions with similar effects adopted by other member states;
  - 16.10. provide the possibility for joint parental responsibility of each partner’s children, bearing in mind the interests of the children;
  - 16.11. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:
    - 16.11.1. safety;

- 16.11.2. official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy;
  - 16.11.3. access to gender reassignment treatment and equal treatment in health care areas;
  - 16.11.4. equal access to work, goods, services, housing and other facilities, without prejudice;
  - 16.11.5. relationship recognition, in accordance with the case law of the European Court of Human Rights;
  - 16.12. introduce or develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of LGBT persons, in particular for public officials, the judiciary, law-enforcement bodies and the armed forces, as well as educational establishments, the media, the medical profession and sporting circles;
  - 16.13. promote research on discrimination on the basis of sexual orientation and gender identity, establish and/or maintain regular contacts with human rights defenders working on the rights of LGBT persons and consult them on issues relating to such discrimination;
  - 16.14. encourage dialogue between national human rights institutions, equality bodies, human rights defenders working for the rights of LGBT people and religious institutions, based on mutual respect, in order to facilitate public debates and reforms on issues concerning LGBT people;
  - 16.15. recognise persecution of LGBT persons as a ground for granting asylum and implement the 2008 Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity of the Office of the United Nations High Commissioner for Refugees;
  - 16.16. fully implement in their law and practice the recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity.
17. Member states may grant exemptions to religious institutions and organisations when such institutions and organisations are either engaging in religious activities or when legal requirements conflict with tenets of religious belief and doctrine, or would require such institutions and organisations to forfeit any portion of their religious autonomy, and if such exemptions are compatible with the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

# **Discrimination on the basis of sexual orientation and gender identity**

*Report by the Committee on Legal Affairs and Human Rights  
of the Parliamentary Assembly*

*Rapporteur: Mr Andreas Gross, Switzerland, Socialist Group*

## **Summary**

The Committee on Legal Affairs and Human Rights points out that sexual orientation – be it heterosexuality, bisexuality or homosexuality – is a profound part of the identity of each one of us. Under international law nobody should be treated differently because of their sexual orientation. Yet, lesbian, gay, bisexual and transgender people across Europe still face deep-rooted prejudice and widespread discrimination. This can range from physical violence – including, in the worst cases, killings – through to hate crimes, gags on expression, bans on demonstrations, state intrusion into private life and unfair treatment at school or in the workplace.

Transgender people are refused gender reassignment treatment or told they cannot register their new gender, contributing to high rates of suicide in this group.

These human rights violations must end, as well as incitement to commit them from public figures, according to the committee. Meanwhile, Council of Europe member states are called on to ensure legal recognition of same-sex partnerships, providing notably for “next of kin” status and the possibility to jointly parent each others’ children.

Dialogue between all bodies, based on mutual respect, is essential in order to improve mutual understanding, combat attitudes of prejudice and facilitate public debates and reforms on issues concerning lesbian, gay, bisexual and transgender people.

## **A. Draft resolution**

1. The Parliamentary Assembly recalls that sexual orientation, which covers heterosexuality, bisexuality and homosexuality, is a profound part of the identity of each and every human being. The Assembly also recalls that homosexuality has been decriminalised in all member states of the Council of Europe. Gender identity refers to each person’s deeply felt internal and individual experience of gender. A transgender person is someone whose gender identity does not correspond to the gender he or she was assigned at birth.
2. Under international law, all human beings are born free and equal in dignity and rights. Sexual orientation and gender identity are recognised as a prohibited ground of discrimination. According to the European Court of Human Rights (the Court), a difference in treatment is discriminatory if it has no objective and reasonable justification. Since sexual orientation is a most intimate aspect of an individual’s private life, the Court considers that only particularly serious reasons may justify differences in treatment based on sexual orientation. In its 1999 judgment in *Lustig-Prean and Beckett v. the United Kingdom*, it empha-

sised that negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification, any more than similar negative attitudes towards those of a different sex, race, origin or colour.

3. Nevertheless, lesbian, gay, bisexual and transgender (LGBT) persons, as well as human rights defenders working for the rights of LGBT persons, face deeply rooted prejudices, hostility and widespread discrimination all over Europe. The lack of knowledge and understanding about sexual orientation and gender identity is a challenge to be addressed in most Council of Europe member states, since it results in an extensive range of human rights violations, affecting the lives of millions of people. Major concerns include physical and verbal violence (hate crimes and hate speech), undue restrictions on freedom of expression, freedom of assembly and association, violations of the right to respect for private and family life, violations of rights to education, work and health, as well as regular stigmatisation. As a consequence, many LGBT persons across Europe live in fear and have to conceal their sexual orientation or gender identity.
4. Transgender persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender. One consequence is the relatively high suicide rate among transgender persons.
5. Discrimination on the basis of sexual orientation and gender identity can be magnified on the basis of sex and gender, with lesbian, bisexual and transgender women, in particular, running an increased risk of violence. The LGBT community itself is also not immune to sex discrimination.
6. The Assembly is particularly concerned by the violation of the rights to freedom of assembly and freedom of expression for LGBT persons in a number of Council of Europe member states since these rights are pillars of democracy. This has been illustrated by the banning or attempted banning of peaceful rallies or demonstrations of LGBT persons and their supporters and the overt or tacit support some politicians have given to violent counter-demonstrations.
7. Hate speech by certain political, religious and other civil society leaders, and hate speech in the media and on the Internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance. The boundary between hate speech inciting to crime and freedom of expression is to be determined in accordance with the case law of the Court.
8. Homophobia and transphobia have particularly serious consequences for young LGBT people. They face widespread bullying, sometimes unhelpful or hostile teachers, and curricula which either ignore LGBT issues or propagate homophobic or transphobic attitudes. A combination of discriminatory attitudes in society and rejection by the family can be very damaging for the mental health of young LGBT people, as evidenced by suicide rates which are much higher than those in the wider youth population.
9. The denial of rights to de facto “LGBT families” in many member states must also be addressed, including through the legal recognition and protection of these families.

10. On the other hand, the Assembly welcomes the fact that, in some cases, political and judicial authorities have taken a number of measures against discrimination affecting LGBT persons.
11. In this context, the Assembly welcomes the work of the Committee of Ministers, which is preparing a recommendation on measures to combat discrimination on grounds of sexual orientation and gender identity, to ensure respect for human rights of LGBT persons and to promote tolerance towards them, the high priority given by the Council of Europe Commissioner for Human Rights to this issue, as well as the recent reports of the European Union Fundamental Rights Agency on homophobia and discrimination on grounds of sexual orientation in European Union member states.
12. Recalling its Recommendations 1474 (2000) on the situation of lesbians and gays in Council of Europe member states and 1117 (1989) on the conditions of transsexuals, the Assembly again condemns the various forms of discrimination suffered by LGBT people in Council of Europe member states. LGBT people should not have to fear being stigmatised and victimised, either in the public or private spheres.
13. The Assembly considers that the Council of Europe has the duty to promote a clear message of respect and non-discrimination so that everybody can live in dignity in all its member states.
14. The eradication of homophobia and transphobia also requires political will in member states to implement a consistent human rights approach and to embark on a wide range of initiatives. In this respect, the Assembly stresses the specific responsibility of parliamentarians in initiating and supporting changes in legislation and policies in Council of Europe member states.
15. Consequently, the Assembly calls on member states to address these issues and in particular to:
  - 15.1. ensure that the fundamental rights of LGBT people, including freedom of expression and freedom of assembly and association, are respected, in line with international human rights standards;
  - 15.2. provide legal remedies to victims and put an end to impunity for those who violate fundamental rights of LGBT people, in particular their right to life and security;
  - 15.3. recognise that lesbian, bisexual and transgender women face an increased risk of gender-based violence (in particular rape, sexual violence and harassment, as well as forced marriages) and provide protection commensurate with the increased risk;
  - 15.4. condemn hate speech and discriminatory statements and effectively protect LGBT persons from such statements while respecting the right to freedom of expression, in accordance with the European Convention on Human Rights and the case law of the Court;
  - 15.5. adopt and implement anti-discrimination legislation which includes sexual orientation and gender identity among the prohibited grounds for discrimination, as well as sanctions for infringements;
  - 15.6. revoke legislative provisions which are not in conformity with the case law of the Court;
  - 15.7. ensure that discrimination on the basis of sexual orientation and gender identity can be effectively reported to judicial and non-judicial bodies and ensure that national human rights structures and equality bodies effectively address these issues;

- 15.8. sign and ratify Protocol No. 12 to the European Convention on Human Rights providing for a general prohibition of discrimination;
  - 15.9. ensure legal recognition of same-sex partnerships, as already recommended by the Assembly in 2000, by providing for:
    - 15.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;
    - 15.9.2. “next of kin” status;
    - 15.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;
    - 15.9.4. recognition of provisions with similar effects adopted by other member states;
  - 15.10. provide the possibility for joint parental responsibility of each partner’s children;
  - 15.11. ensure that laws relating to the adoption of unrelated children by single persons are applied without distinctions based on sexual orientation, in accordance with the 2008 *E.B. v. France* judgment of the Court;
  - 15.12. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:
    - 15.12.1. safety;
    - 15.12.2. documents that reflect an individual’s preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy;
    - 15.12.3. access to gender reassignment treatment and equal treatment in health care areas;
    - 15.12.4. equal access to work, goods, services, housing and other facilities, without prejudice;
    - 15.12.5. relationship recognition, in accordance with the case law of the Court;
  - 15.13. introduce or develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of LGBT persons, in particular for public officials, the judiciary, law-enforcement bodies and the armed forces, as well as schools, the media, the medical profession and sporting circles;
  - 15.14. promote research on discrimination on the basis of sexual orientation and gender identity, establish and/or maintain regular contacts with human rights defenders working on the rights of LGBT persons and consult them on issues relating to such discrimination;
  - 15.15. encourage dialogue between national human rights institutions, equality bodies, human rights defenders working on the rights of LGBT persons and religious institutions, based on mutual respect, in order to facilitate public debates and reforms on issues concerning LGBT persons;
  - 15.16. recognise persecution of LGBT persons as a ground for granting asylum and implement the 2008 Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity of the Office of the United Nations High Commissioner for Refugees.
16. Member states may grant exemptions to religious institutions and organisations only when such institutions and organisations are engaging in religious

activities, if such exemptions are compatible with the European Convention on Human Rights, as interpreted by the Court.

## **B. Draft recommendation**

1. Referring to its Resolution ... (2010), the Parliamentary Assembly commends the Committee of Ministers for its decision of 2 July 2008 to prepare a recommendation on measures to combat discrimination based on sexual orientation or gender identity.
2. The Assembly considers that the Council of Europe has indeed the duty to promote a clear message of respect and non-discrimination. In addition, the Council of Europe is particularly well placed to develop human rights standards, offer expertise and advice and serve as a forum for discussion on issues related to discrimination on the basis of sexual orientation and gender identity.
3. Consequently, the Assembly recommends that the Committee of Ministers:
  - 3.1. adopt the recommendation currently under preparation on measures to combat discrimination on grounds of sexual orientation and gender identity, to ensure respect for human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them and subsequently monitor its implementation;
  - 3.2. define further Council of Europe action in this field, in particular:
    - 3.2.1. instruct a relevant Council of Europe body to review and address issues related to discrimination on the basis of sexual orientation and gender identity in member states, and provide the necessary resources to this body to carry out this task;
    - 3.2.2. further mainstream issues relating to discrimination on the basis of sexual orientation and gender identity in its activities, and disseminate the case law of the Court on sexual orientation and gender identity, including through publications and training materials;
    - 3.2.3. in the framework of its work on children and violence, address in particular the issue of homophobic and transphobic bullying at school;
    - 3.2.4. further develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of lesbian, gay, bisexual and transgender persons and, in particular, organise a campaign to combat discrimination on the basis of sexual orientation and gender identity.
  - 3.3. instruct the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to include in the future Council of Europe convention the severest and most widespread forms of violence against women, in accordance with Assembly Recommendation 1847 (2008), and to recognise that lesbian, bisexual and transgender women face an increased risk of gender-based violence (in particular rape, sexual violence and harassment, as well as forced marriages) and provide appropriate protection commensurate with this increased risk.

## C. Explanatory memorandum by Mr Gross, rapporteur

### I. Introduction

#### *i. Scope of the report*

1. On 16 September 2005, I was appointed rapporteur of the Committee on Legal Affairs and Human Rights on the issue of “Legal recognition of same-sex partnerships in Europe”, on the basis of a motion for a recommendation (Doc. 10640) tabled by Mr Jurgens and others. In 2006, a new motion for a resolution concerning “Freedom of assembly and expression for lesbian, gay, bisexual and transgender persons in Council of Europe member states” (Doc. 10832) was referred to the committee, to be taken into account in my report on legal recognition of same-sex partnerships in Europe.
2. In January 2008, a third motion for a recommendation (Doc. 11423) on “Discrimination on the basis of sexual orientation and gender identity” was referred to the Committee on Legal Affairs and Human Rights for report. In April 2008, the Assembly considered that this motion should be merged into the report since it covered both subjects I was working on.
3. Consequently, it was decided to take the motion which has the broadest focus, i.e. that on discrimination on the basis of sexual orientation and gender identity, as the new framework for this report, to modify the title of the report accordingly and to focus, *inter alia*, on the issues of freedom of assembly and expression for lesbian, gay, bisexual and transgender persons and legal recognition of same-sex partnerships in Europe in this new framework.

#### *ii. Terminology*

4. The following terminology will be used in this report:
  - “Sexual orientation” refers to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or of the same gender or of more than one gender.<sup>103</sup> Sexual orientation is a profound part of the identity of each and every human being and covers heterosexuality, bisexuality and homosexuality. The latter has been decriminalised in all member states of the Council of Europe;
  - “Gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;<sup>104</sup>
  - The term “transgender people” (or just “trans people”) includes those people who have a gender identity which is different from the gender assigned at birth and those people who wish to portray their gender identity in a different way to the gender assigned at birth; it includes those people who feel they have to, or

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103. See the “Principles on the application of international law in relation to issues of sexual orientation and gender identity” (“the Yogyakarta Principles”), introduced in November 2006, as well as the report of the European Union Agency for Fundamental Rights on homophobia and discrimination on grounds of sexual orientation in the European Union member states.

104. *Idem*. See also TransGender Europe (TGEU) website: [tgeu.org/](http://tgeu.org/).

prefer or choose to, whether by clothing, accessories, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth;

- A transsexual is a person who prefers another gender than his/her birth gender and feels the need to undergo physical alterations to the body to express this feeling, such as hormone treatment and/or surgery;
- The term “LGBT persons” is used to describe those who identify as lesbian, gay, bisexual or transgender. It does not suggest that there is a single “LGBT” identity;<sup>105</sup>
- Homophobia is the irrational fear of, and aversion to, homosexuality and to lesbian, gay and bisexual (LGB) people based on prejudice;<sup>106</sup>
- Transphobia can be described as an irrational fear of gender non-conformity or gender transgression.

### *iii. Preparation of the report*

*Under the mandates covering freedom of assembly and expression for lesbian, gay, bisexual and transgender persons and legal recognition of same-sex partnerships in Europe*

5. In the framework of the preparation of this report, I visited Spain (May 2006) and Latvia (October 2007), presented to the committee an introductory memorandum on “Legal recognition of same-sex partnerships in Europe” in June 2007 and, in March 2008, an information memorandum on “Freedom of assembly and expression for lesbian, gay, bisexual and transgender persons in Council of Europe member states and legal recognition of same-sex partnerships in Europe”.<sup>107</sup>
6. Given the strong reactions and opposition raised by this subject in a number of countries, in January 2008, I proposed to the committee to hold an exchange of views with experts on these issues, in order to identify factors that have ensured (positive) changes in attitudes and legislation in a number of countries, as well as difficulties encountered in these fields. This exchange of views was held on 7 March 2008 with the participation of the following experts:<sup>108</sup>
  - Mr Jeffrey Weeks, Professor of Sociology, Director of Research, London South Bank University;
  - Mr Louis-Georges Tin, French academic, Founder of IDAHO (International Day against Homophobia);
  - Ms Joke Swiebel, former member of the European Parliament and Chairperson of the Parliament’s Gay and Lesbian Intergroup;

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105. The term “sexual minority” is sometimes used as a convenient short term particularly when the terms “lesbian, gay, bisexual and transgender” are less understood. However, it is not used in this report since it is not relevant in a human rights context focusing on equality and non-discrimination. Indeed, LGBT persons are not demanding minority rights or special rights. They simply need to enjoy the same human rights as all other individuals.

106. See the report of the European Union Agency for Fundamental Rights.

107. Documents AS/Jur(2007)30 and AS/Jur(2008)11, the latter was declassified by the committee on 7 March 2008.

108. See the minutes of the hearing in Document AS/Jur(2008)22, declassified by the committee on 7 March 2008.

- Mr Maxim Anmeghichean, Programmes Director, International Lesbian and Gay Association (ILGA Europe);
- Mr Dennis van der Veur, Adviser, Office of the Council of Europe Commissioner for Human Rights.

*Under the present mandate concerning discrimination on the basis of sexual orientation and gender identity*

7. Since my mandate was extended to the broader issue of discrimination on the basis of sexual orientation and gender identity, the committee held a second exchange of views with experts to complement the first hearing held in 2008, by focusing, *inter alia*, on the human rights law standards relating to these issues and by covering gender identity issues. This hearing took place on 24 March 2009 in Berlin, with the participation of the following experts:
  - Mr Hans Ytterberg, Director General, Ministry for Integration and Gender Equality, Chairperson of the Council of Europe (intergovernmental) Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT), former Swedish Ombudsperson against discrimination on the basis of sexual orientation;
  - Ms Julia Ehrh, TransGender Europe (TGEU) (Berlin);
  - Professor Igor Kon, Chief Researcher, Institute of Ethnology and Anthropology, Russian Academy of Sciences (Moscow);
  - Mr Ioannis Dimitrakopoulos, Head of Department Equality and Citizen's Rights, European Union Agency for Fundamental Rights;
  - Mr Dennis van der Veur, Adviser, Office of the Council of Europe Commissioner for Human Rights.
8. I also carried out visits to Poland (November 2008) and Lithuania (April 2009). Unfortunately, my visit to Moldova, foreseen in May 2009, had to be cancelled due to the political situation in the country.

*iv. Aim of the report*

9. It is important to stress that this report is not meant to be a monitoring report, as it does not aim at evaluating situations in particular countries. The report will strive to present the issues at stake, the reasons behind diversity in Council of Europe member states in this respect and factors that have already ensured or could contribute to positive changes in attitudes towards LGBT persons and equality legislation in a number of countries. In other words, I intend to focus on the process which can lead to a human rights compatible approach to LGBT persons and to stress that the Council of Europe has the duty to promote a clear message of tolerance, respect and non-discrimination.
10. In addition, given the very many prejudices and the lack of knowledge surrounding the issues involved, I consider that this report has a strong "awareness-raising" dimension. It should also give members of the Parliamentary Assembly and the public at large the opportunity to have open and direct discussions on these subjects in the light of relevant international human rights law standards.

## II. Discrimination on the basis of sexual orientation and gender identity

### *i. Widespread discrimination in Council of Europe member states*

11. Homosexuality has been decriminalised in all member states of the Council of Europe. Nevertheless, homophobic and transphobic attitudes are deeply rooted in most Council of Europe member states, with the consequence that LGBT people, as well as human rights defenders working for the rights of LGBT persons, face strong prejudices, hostility and widespread discrimination all over Europe. Discrimination can manifest itself in the legal, political and/or social fields and takes place not just in the public sphere, but, particularly concerns young people, also within the family.
12. The lack of knowledge and understanding about sexual orientation and gender identity is a challenge to be addressed in most Council of Europe member states since it results in an extensive range of human rights violations affecting the lives of millions of people. Major concerns include physical and verbal violence (hate crimes and hate speech), undue restrictions on freedom of expression, freedom of assembly and association, violations of the right to respect for private and family life, violations of rights to education, work and health, as well as regular stigmatisation.
13. Homophobia and transphobia have particularly serious consequences for young LGBT people: widespread bullying, sometimes unhelpful or hostile teachers, and curricula which either ignore LGBT issues or propagate homophobic or transphobic attitudes. As the Assembly has already noted, a combination of discriminatory attitudes in society and rejection by the family can be very damaging for the mental health of young LGBT people, as evidenced by much higher suicide rates than those in the wider youth population.<sup>109</sup>
14. A report published in 2009 by the European Union Agency for Fundamental Rights (FRA) on homophobia and discrimination on grounds of sexual orientation (see also Part III below) gives a useful analysis of the situation in this respect in European Union member states. It concludes that discrimination and harassment against LGBT persons are widespread throughout the Union. The report also notes that hate speech by public figures is a particularly worrying phenomenon. A key feature of homophobic and transphobic crime is, like in other forms of hate crime, under-reporting. Also, according to the FRA, the most worrying examples in media depict LGBT persons as perverts or associate homosexuality with paedophilia. Transgender people face even more negative attitudes than LGB people.
15. Non-governmental organisations also report widespread discrimination in non-European Union member states (see in particular Part IV below). According to NGOs, when there is little sign of LGBT people in a country, this is merely a blatant indication of their difficult situation.
16. Given the lack of precise data on discrimination on the basis of sexual orientation and gender identity in Council of Europe member states which are not European Union member states, the Council of Europe Commissioner for Human Rights has launched the proposal to complete the study prepared by the

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<sup>109</sup> See the Assembly report on “child and teenage suicide in Europe: a serious public health issue”, Doc. 11547, paragraph 22.

European Union (covering member countries) in order to cover Council of Europe member states which are not members of the Union.

17. Transgender persons face a cycle of discrimination and deprivation in many Council of Europe member states due both to discriminatory attitudes and to obstacles to obtaining gender reassignment treatment and legal recognition. One consequence is relatively high suicide rates.
18. Indeed, people whose gender representation, gender identity or gender role differs from those which are socially accepted face discrimination, ridicule, harassment or even physical violence. As a consequence many transgender people barely, if at all, participate in social and public life, while many others who do participate are so traumatised and frightened by the hostility they face that they are unable to live their life in dignity. When represented, their image in the media, curricula and arts is made up of misconceptions, ignorance and lack of knowledge.
19. Discrimination against transgender persons occurs especially in the health sector and on the labour market and such persons are very vulnerable to hate crimes. It would appear that many people, including doctors and teachers, simply do not know what this is and associate the phenomenon with prostitution in exotic locations.
20. The effects of discrimination are compounded by difficulties in obtaining the medical interventions needed to realise their gender identity and in gaining legal recognition of it. These difficulties can greatly inhibit the enjoyment of other rights, particularly the right to work, leaving many transgender people facing poverty, and in some member states, little alternative to engaging in sex work. This extreme social exclusion brings with it serious health risks, and great vulnerability to abuse at the hands of the police and criminals.
21. On 10 March 2009, a prominent transgender human rights activist, leading figure of Lambda Istanbul, was stabbed and killed. This is the second recent killing of a member of the organisation. Between January and May 2009 five transgender people were reported murdered in Turkey. This is part of a continuing pattern: for example, 15 gay men and transgender people were reported murdered between January and October 2007.<sup>110</sup> NGOs have denounced this continuing climate of violence based on gender identity in Turkey. Investigating violence against LGBT people, prosecuting suspects, and passing effective legislation to ensure equality are all crucial in order to put an end to such killings.
22. Apart from respect for their rights to life and security, changing name and gender is the key in transgender people's lives. However, this "entry" into society does not exist, or is made very difficult, in many Council of Europe member states, which violate the European Convention on Human Rights (right to privacy, Article 8, see case of *B. v. France*). Without name and gender recognition, transpeople are marked as transgender (this concerns ID cards, credit and bank cards, school and university degrees, etc.) which leads to stigmatisation in every aspect of life and makes participation in social life, travelling or finding a job virtually impossible. Consequently, there is a need:
  - to ensure their rights to life, security, physical integrity and dignity;
  - to include gender identity in anti-discrimination legislation;

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110. Human Rights Watch, May 2008, report entitled "We need a law for liberation – Turkey"; see also Lambda Istanbul, "Call for action", April 2009.

- to ensure that transgender people have the possibility to change name and gender;
  - to ensure that transgender people have access to the medical treatments which they need to realise their preferred identity, funded on the same basis as other necessary medical treatment.
23. Accordingly, the NGO TransGender Europe has identified eight key human rights for transgender people:
1. the right to safety in public and in private;
  2. an equal right to obtain and retain work, without prejudice;
  3. the right to documents and papers that reflect the reality of those living in their preferred gender role, including:
    - a. the right to change one’s name, including to one of the opposite gender (in countries where names are “gendered”) without medical treatment as a prerequisite;
    - b. the right to change gender in all one’s public documents without medical treatment as a prerequisite;
  4. the right to be recognised for all legal purposes in the preferred gender role without medical treatment as a prerequisite;
  5. the right to have access to gender reassignment treatment of acceptable quality;
  6. the right to be treated equally in all other health-care areas, without prejudice;
  7. the right to equal access to goods, services, housing and other facilities, without prejudice;
  8. the right to relationship recognition, including marriage, and a right to found and support a family.
24. Two recent judgments of the Court concerning transgender persons could be mentioned in this context: one concerning Switzerland and the other Lithuania, one of the countries I visited. In January 2009, the Court condemned Switzerland (*Schlumpf v. Switzerland*, Application No. 29002/06) in a case concerning the refusal of an insurance company to pay for gender-reassignment surgery. In its judgment the Court noted in particular the importance of questions concerning one of the most intimate aspects of private life, namely a person’s gender identity, for the balancing of the general interest with the interests of the individual. Concerning the Lithuanian case (*L. v. Lithuania*, judgment final on 31 March 2008), the Court found that a legislative gap on gender reassignment of transsexuals “had left the applicant in a situation of distressing uncertainty as to his private life and the recognition of his true identity”. As concerns this legislative gap, I was informed when in Lithuania that the authorities had no intention of adopting any legislation on gender reassignment of transsexuals, despite the 2008 judgement of the Court condemning Lithuania. This legislation is needed to implement the right foreseen by the new Civil Code since 2003. I hope that some courageous colleagues in the Lithuanian Parliament will take this up and initiate legislation in line with the judgment of the Court.
25. On a more positive note, one should mention that in May 2009, France announced that transsexuality would no longer be considered as a psychiatric condition.

26. Behind much of the discrimination faced by LGBT people is a refusal by some leading politicians, opinion leaders and religious leaders to accept that LGBT people are entitled to the same human rights as other human beings. This underpins a high degree of homophobic and transphobic discourse in the public sphere in some member states, and gives legitimacy to those state actors – police, prison officers, public prosecutors, judiciary, local authority officials, even ombudspersons – who fail to uphold, or even attack, the rights of LGBT people.
27. LGBT people are sometimes perceived as a “threat” to the rest of society. On the occasion of my fact-finding visit to Latvia, some politicians referred to homosexuality and to Pride marches as a “spreading plague” and a “problem imported from abroad” and denied it was a human rights issue. Fortunately, these views were strongly opposed by some other parliamentarians I met.
28. In a large number of Council of Europe member states, LGBT persons are not protected under anti-discrimination or hate crime legislation as sexual orientation and gender identity are not explicitly mentioned as grounds for discrimination. In addition, LGBT persons sometimes face a lack of appropriate response from law-enforcement officials.
29. This has particularly serious consequences for LGBT activists who are primarily targeted. But others (politicians, lawyers, trade unionists, etc.) are sometimes targeted if they help promote LGBT rights or are themselves “accused” of being homosexual in order to discredit them. This is particularly true where the issues involve freedom of expression, association, and assembly, with authorities banning LGBT Pride marches and events in a number of countries and in some cases also restricting or seeking to restrict freedom of association and public or media discussion of homosexuality. In Latvia, LGBT rights activists have seen their personal information published on websites. Consequently, too often, as I could see in some countries I visited, too few people, even among mainstream human rights defenders, stand up against homophobia and transphobia.
30. Political and religious leaders sometimes claim that societies are not ready to accept homosexuality. Yet as was stressed during the hearing held in March 2008 it would appear that these same leaders are sometimes themselves the source of intolerance in society. Their statements, by fuelling hatred and violence, can sometimes even endanger the lives of LGBT persons. People who discriminate also often invoke “morality” or justifications based on public order, freedom of thought, conscience and religion. The Court provides a crucial reference in respect of these issues. It considers in particular that differences in treatment based on sexual orientation require particularly serious reasons by way of justification (see below). In addition, I consider that parliamentarians have the duty to inform people properly about these issues, to improve human rights protection and in particular to protect more vulnerable people.
31. As stressed by the Council of Europe Secretary General on the occasion of the International Day against Homophobia, on 17 May 2009, “it is heads of some political parties that I am really worried about. It is unacceptable that some people in positions of official or moral authority in Europe still behave as if the European Convention on Human Rights does not apply to homosexuals”.

32. In Lithuania, in April 2009, I called on the authorities not to adopt a proposed amendment to the Law on the Protection of Minors against the Detrimental Effect of Public Information which would prohibit “agitation for homosexuality and bisexuality” as regards children. This amendment was intended to put information on homosexuality on a par with issues such as portrayal of physical or psychological violence or vandalism, and to prohibit the discussion of homosexuality in schools and ban any reference to it in public information that could be viewed by children. Amnesty International stressed in June 2009 that the amendment would violate human rights and reinforce homophobia, and was part of a “growing climate of intimidation and discrimination in Lithuania against LGBT people.”<sup>111</sup> It was later adopted but was subsequently vetoed by the (outgoing) Lithuanian President in June 2009; however, the parliament rejected the presidential veto. Reportedly, in late July 2009, the new President of Lithuania considered that the law should be reviewed by human rights experts. I strongly support a revision of the law in accordance with human rights standards. Finally, in August 2009, I was informed that new draft amendments to the Penal Code and to the Administrative Code concerning homosexual relations are also raising serious concern. Again, I call on my colleagues in the Lithuanian Parliament to adopt legislation in accordance with human rights standards (see paragraph 40 below).<sup>112</sup>
33. The importance of addressing these issues should not be underestimated, as they concern tens of millions of Europeans whose rights enshrined in the European Convention on Human Rights are flouted because of their sexual orientation or gender identity.
34. On a more positive note, good practices such as meetings and hearings with LGBT persons and firm stances against discrimination are also found in some Council of Europe member states, as experts underlined at the 2009 hearing organised by the Committee on Legal Affairs and Human Rights (in that respect, see also the report of the FRA).
35. The FRA believes that combating fundamental rights violations effectively requires first a firm political commitment to the principles of equal treatment and non-discrimination and a firm stance against discrimination on grounds of sexual orientation and gender identity. The FRA considers that the standard-setting work of the Council of Europe, as well as the case law of the Court is of crucial importance in this context. Secondly, it requires good knowledge of the situation based on robust data. Equality authorities and other specialised bodies in many member states still need to develop data collection mechanisms and actively encourage LGBT people to come forward and lodge complaints about incidents of discrimination. Campaigns to inform everyone about diversity and non-discrimination are necessary. The FRA called on European Union political decision makers to further improve equality legislation and ensure accurate reporting, in order to improve the situation.

*ii. Homosexuality – Exposing the prejudices*

36. As indicated above, according to the FRA, the most worrying examples in media, as far as European Union member states are concerned, depict LGBT persons as perverts or associate homosexuality with paedophilia.

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111. Amnesty International: “... proposed law would violate human rights and reinforce homophobia”, 3 June 2009.

112. See also Written Declaration No. 428, (Doc. 11969).

37. The table below lists some of the most widespread prejudices about homosexuality and gives a concrete example of how one can confront these prejudices with specific arguments. Another table presenting human rights law responses appears in Part III below.
38. The position of the Court in some of its judgments concerning discrimination on the basis of sexual orientation and gender identity appears below.

MOST COMMON PREJUDICES	RESPONSE
“Homosexuality is an illness.”	The World Health Organization ruled nearly 20 years ago that homosexuality is not an illness. <sup>1</sup>
“Homosexuality is abnormal”, a “distortion of the personality.”	Mainstream scientific and medical opinion holds that homosexuality is a natural variant of human behaviour.*
* “Despite the persistence of stereotypes that portray lesbian, gay, and bisexual people as disturbed, several decades of research and clinical experience have led all mainstream medical and mental health organizations in this country to conclude that these orientations represent normal forms of human experience” (American Psychological Association <sup>2</sup> ).	
“Homosexuality is immoral.”	This is a subjective view usually based on religious dogma. In a democratic society it cannot be a basis for limiting the rights of others.
“Homosexuality is increasing.”	The number of lesbians, gays and bisexuals is not increasing. They are just becoming more visible.*
* The UK Government estimates that between 5 and 7% of the population is lesbian, gay or bisexual. With discrimination reducing, more are open about their sexual orientation, giving the impression that numbers are increasing.	
“Homosexuality is worsening the demographic crisis and threatening the future of the nation.”	Blaming a small minority for national demographic decline is manifestly illogical and serves only to distract from addressing its real causes.*
* There is no link between supporting the rights of lesbians, gays and bisexuals and demographic decline. Indeed, some of the countries in Europe that have been most successful in addressing demographic problems – the Nordic states <sup>3</sup> – have led the way in supporting the rights of lesbian, gay and bisexual people, while many of those which have been most repressive towards them have the most serious demographic problems.	

MOST COMMON PREJUDICES	RESPONSE
“Legal recognition of same-sex couples is a danger to the traditional family.”	Granting legal recognition to same-sex couples has no influence on whether heterosexuals marry or have children.*
* The “traditional family” (i.e. a married heterosexual couple with children) has been declining in many European countries because a growing proportion of heterosexuals are choosing not to marry, because of increasing divorce rates, and because more married heterosexuals are choosing not to have children. Granting legal recognition to same-sex couples will affect this trend only in so far as it will reduce the number of lesbians and gays who feel compelled to enter into heterosexual marriages, and the number of painful divorces that generally follow.	
“Propaganda can convert young people to homosexuality.”	There is no evidence to support this view.*
* If 1 600 years of persecution – including the death penalty, imprisonment, discrimination and social ostracism – have not been able to “convert” homosexuals into heterosexuals, mere information about homosexuality will certainly not influence the sexual orientation of heterosexual people, whatever their age. <sup>4</sup>	
“Homosexuals are a danger to children.”	Gay, lesbian and bisexual people are no more likely to be a threat to children than heterosexuals.*
* “The American Academy of Child and Adolescent Psychiatry finds that there is no evidence that lesbians and gay men, per se, represent any threat to the development of children or adolescents and condemns any restriction on employment or service based on sexual orientation in positions involving the delivery of services or treatment to children and adolescents.” <sup>5</sup>	

1. The World Health Organization removed homosexuality from its International Classification of Diseases in 1991.
2. [www.apa.org/topics/orientation.html#whatcauses](http://www.apa.org/topics/orientation.html#whatcauses).
3. Demographic challenges for social cohesion, Doc. 10923, Committee on Migration, Refugees and Population, 3 May 2006, paragraph 30: “[the Nordic countries] have best succeeded in creating a woman-friendly, child-friendly and family-friendly policy framework, thus also reaching relatively high fertility rates”.
4. The first legal prohibition on homosexuality in Europe was, reportedly, introduced in AD 390.
5. Policy Statement of the American Academy of Child and Adolescent Psychiatry, adopted in October 1992.

### III. Recognition that human rights principles apply to sexual orientation and gender identity

#### *i. The rights of LGBT people under international law*

39. Sexual orientation and gender identity are not explicitly mentioned as discrimination grounds in international human rights treaties, except, to some extent, in European Union treaties<sup>113</sup> but they are nevertheless covered. The 1948

113. Discrimination on grounds of sexual orientation is covered by Article 19 of the Lisbon Treaty and prohibited by the Employment Equality Directive (2000/78/EC) and by Article 21 of the European Union’s Charter of Fundamental Rights.

Universal Declaration of Human Rights and the case law of human rights treaties establish that human rights are universal and indivisible: they apply to everyone and no one should be excluded since all human beings are born free and equal in dignity and rights. Non-discrimination and equality are therefore fundamental components of international human rights law. Under the International Covenant on Economic Social and Cultural Rights, prohibited grounds of discrimination cover “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. In its General Comment No. 20 on Non-Discrimination adopted in May 2009, the United Nations Committee provided a list of “other grounds” prohibited which includes sexual orientation and gender identity. Article 14 of the European Convention on Human Rights prohibits any form of discrimination in the enjoyment of the rights and freedoms set forth in the Convention and its Protocol No. 12 contains a general prohibition of discrimination.

40. Consequently, experts invited to the hearing held in March 2008 stressed that LGBT persons are not demanding special rights. They simply need to enjoy the same human rights as all other individuals in Council of Europe member states, which are enshrined in international instruments, in particular in the European Convention on Human Rights, such as the right not to be tortured, freedom of expression, freedom of assembly, respect for private life, etc.
41. The case law of the Court, like that of the European Court of Justice, indeed provides a vital reference framework in respect of these issues. According to the Court, a difference in treatment is discriminatory if it has no objective and reasonable justification. Since sexual orientation is a most intimate aspect of an individual’s private life, the Court also considers that differences in treatment based on sexual orientation can only be justified by particularly serious reasons (see in particular the case of *Karner v. Austria*). Finally, this is not a matter of opinion: negative attitudes on the part of a heterosexual majority against a homosexual minority could not amount to sufficient justification, any more than similar negative attitudes towards those of a different race, origin or colour (see notably the case of *Lustig-Prean and Beckett v. the United Kingdom*). In significant rulings, the Court decided that:
  - consensual sexual relations in private, between adults of the same sex, must not be criminalised; see *Dudgeon v. the United Kingdom* (1981);
  - the age of consent for homosexual and heterosexual acts must be equal: see *S.L. v. Austria* (2003), in which the Court reiterated that “sexual orientation is a concept covered by Article 14”;
  - public authorities are not allowed to discriminate based on sexual orientation when it comes to custody of children, employment (armed forces) and the freedom of Assembly:
    - see *Lustig-Prean and Beckett v. the United Kingdom* (1999): ban on homosexuals in the armed forces;
    - see *Salgueiro da Silva Mouta v. Portugal* (1999): refusal to grant custody to a parent living in a homosexual relationship on the basis of the interest of the child;
    - see *Bączkowski and Others v. Poland* (2007): violation of the right of freedom of assembly and association for LGBT people;

- same rights/benefits must be granted to same-sex cohabiting partners as to different-sex cohabiting partners: see *Karner v. Austria* (2004): unequal tenancy rights of heterosexual and same-sex couples;
  - if single heterosexuals are allowed to adopt, single homosexuals must be allowed to adopt; see *E.B v. France* (2008): refusal to authorise an adoption application by a woman in a same-sex relationship on the basis of her sexual orientation;
  - legal recognition of acquired gender and transsexuals’ right to marry: see *Christine Goodwin v. the United Kingdom* (2002): denial of legal recognition of acquired gender and transsexuals’ right to marry;
  - the requirement to provide for the possibility for transgender persons to undergo medical treatments leading to full gender reassignment, and to make provision for the funding of such treatments on the basis that they are medically necessary: see *Van Kück v. Germany* (2003), refusal to order reimbursement of top-up costs of transsexual’s gender reassignment treatment; *L. v. Lithuania* (2008), legislative gap concerning full gender-reassignment surgery; and *Schlumpf v. Switzerland* (2009), refusal of an insurance company to pay for the gender-reassignment surgery.
42. A number of common prejudices regarding lesbian, gay and bisexual rights and the response of international human rights law appear below.

MOST COMMON PREJUDICES	RESPONSE
“Homosexuality is unacceptable to a large part of society, based on religious and social norms, and this justifies discrimination.”	The European Court of Human Rights has held that prejudiced attitudes on the part of the heterosexual majority towards the homosexual minority cannot be used to justify discrimination. <sup>1</sup>
“Restrictions against homosexuals are justified. They do not count as discrimination.”	The European Court of Human Rights has held that discrimination on the ground of sexual orientation is generally as unacceptable as discrimination on the ground of sex, race or religion. <sup>2</sup>
“Homosexuals are demanding special rights.”	The rights claimed are those guaranteed to all human beings under international human rights law, no more and no less.
“Granting rights to homosexuals takes away rights from others, particularly religious people.”	The only “right” taken away is the “right” to discriminate, which is not a human right. Narrow exceptions can be made if they are justifiable as necessary to protect religious freedom.
“Propaganda about homosexuality can be prevented because it is not the same as exercising one’s freedom of assembly or expression.”	The European Court of Human Rights has held that disapproval of “propaganda about homosexuality” is not a justification for denying freedom of assembly or expression. <sup>3</sup>

MOST COMMON PREJUDICES	RESPONSE
“Protection of young people requires discriminatory treatment.”	The European Court of Human Rights has rejected this justification, finding that male adolescents cannot be “recruited” into homosexuality through homosexual experience, and that sexual orientation is in most cases established before the age of puberty. <sup>4</sup>
“Protection of the traditional family justifies discrimination against same-sex couples.”	The European Court of Human Rights has held that governments must show why it is necessary to exclude same-sex couples from rights or benefits granted to traditional families in order to protect such families. <sup>5</sup>
“Homosexuals are not fit to bring up children.”	The European Court of Human Rights has ruled that lesbian or gay individuals must be treated in the same way as heterosexual individuals with regard to custody of a child, or eligibility to adopt a child. <sup>6</sup>

1. *Lustig-Prean and Beckett v. the United Kingdom* (1999), paragraph 90; *S.L. v. Austria* (2003), paragraph 44.
2. Sex (*S.L. v. Austria*), race (*Smith and Grady v. the United Kingdom*; *Lustig-Prean and Beckett v. the United Kingdom*) and religion (*Salgueiro da Silva Mouta v. Portugal*).
3. *Bączkowski v. Poland* (2008).
4. *S.L. v. Austria* (2003), paragraph 43.
5. *Karner v. Austria* (2003).
6. *Salgueiro da Silva Mouta v. Portugal* (1999), which concerned the right of a gay man to custody of his biological daughter; *B. v. France* (2008), which concerned the right of a lesbian woman to be considered as a potential adoptive parent.

43. As stressed by the Council of Europe Commissioner for Human Rights: “What is new, is that there is a stronger quest for these universal principles to be applied consistently. The idea is to make clear the obvious – that LGBT people have the same rights as others. The international standards do apply to them as well. In other words, discrimination against anyone on the grounds of sexual orientation or gender identity is a human rights violation”. At the committee hearing, Mr Ytterberg concluded by stressing that “equality in dignity and rights was a fundamental human right, not a negotiable concession”.
44. The introduction of the “Principles on the application of international law in relation to issues of sexual orientation and gender identity” (“the Yogyakarta Principles”), in November 2006, should be mentioned in this context. These principles were devised and adopted unanimously by a group of eminent human rights experts from various regions and with various backgrounds.<sup>114</sup> This is an important tool to identify the obligations of states to respect, protect and fulfil the human rights of all persons, regardless of their sexual orientation or gender identity. The principles also recall that human rights are serving human dignity.

114. For more detailed information and a comprehensive list of the principles, see: [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

45. When addressing the (intergovernmental) Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity, meeting at the Council of Europe in Strasbourg on 18 February 2009, Professor Michael O'Flaherty, Rapporteur for the Yogyakarta Principles, concluded with the message of an anonymous blogger commenting on the Yogyakarta Principles: "Yesterday, I was nobody/nothing. Today, having seen these Principles, I realise that under international human rights law I am officially human".
46. Nevertheless, attempts to introduce legislation prohibiting discrimination on the basis of sexual orientation and gender identity still often meet with opposition. For example, in early March 2009, a draft anti-discrimination law, prohibiting, *inter alia*, discrimination on the basis of gender identity or sexual orientation, which had been withdrawn in the Serbian Parliament, was re-submitted to the parliament and finally adopted. The responsibility of national parliaments in the field of anti-discrimination is crucial.<sup>115</sup> The Commissioner for Human Rights has consistently called for fully comprehensive anti-discrimination legislation in all Council of Europe member states.

*ii. The duty of the Council of Europe to promote a clear message of respect and non-discrimination*

47. "Never again!" The Council of Europe was born from this will to prevent history repeating itself at all costs. Consequently, it has the duty to provide effective safeguards for human rights, democracy and the rule of law and to promote a clear message of respect and non-discrimination. In this respect, one should not forget that homosexuals were also among the victims of the Nazis.
48. In practice, the Organisation has always fought for equality and diversity and the Council of Europe Parliamentary Assembly has, on several occasions, condemned discrimination in Europe based on sexual orientation and gender identity<sup>116</sup> (see also below).
49. The Commissioner for Human Rights (who has defined discrimination on the basis of sexual orientation and gender identity as one of his office's priority fields), the Congress of Local and Regional Authorities of the Council of Europe, as well as the Organisation's Secretary General have on several occasions addressed these issues and condemned homophobia and transphobia.
50. In its replies to Parliamentary Assembly and Congress recommendations, and, more recently in its replies to written questions by Assembly members, the Council of Europe Committee of Ministers has also recalled the principles of equal enjoyment of human rights regardless of any grounds such as sexual orientation and gender identity and mainly touched upon issues of freedom of expression, assembly and association and homophobic speech. It has also

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115. See also Doc. 11743, "Discrimination against sexual orientation", Written Question No. 555 to the Committee of Ministers, concerning Monaco.

116. See in particular Recommendation 1117 (1989) on the condition of transsexuals; Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe; Recommendation 1474 (2000) on the situation of gays and lesbians in Council of Europe member states; and Recommendation 1635 (2003) on lesbians and gays in sport.

reiterated that discrimination on grounds of sexual orientation is not compatible with the value of tolerance and the principle of equality, to which all member states are bound.<sup>117</sup>

51. In addition, in July 2008, the Committee of Ministers stressed the strong attachment of the Council of Europe to the principle of equal rights and dignity of all human beings, including LGBT persons. It recalled that the Council of Europe's standards on tolerance and non-discrimination apply to all European societies, and that discrimination on grounds of sexual orientation or gender identity is not compatible with these standards.
52. In this context, it was decided to prepare a recommendation of the Committee of Ministers (to member states) on measures to combat discrimination based on sexual orientation or gender identity. This work is in progress. The Committee of Ministers has also initiated work on the topic of various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity (see below).
53. Furthermore, the Committee of Ministers addressed a message to all committees involved in intergovernmental co-operation at the Council of Europe inviting them to give due attention in their activities to the need for member states to avoid and remedy any discrimination on grounds of sexual orientation or gender identity. These committees were also asked to make proposals for activities to strengthen the equal rights and dignity of lesbian, gay, bisexual and transgender persons and to combat discriminatory attitudes against them in society.

*iii. Recent developments in other international fora to combat discrimination based on sexual orientation or gender identity*

54. In December 2008, 66 states – of which 41 Council of Europe member states – endorsed a “Statement on human rights, sexual orientation and gender identity” made at the United Nations General Assembly, which condemned violations based on sexual orientation and gender identity, such as killings, torture, arbitrary arrests and deprivation of economic, social and cultural rights, including the right to health. In June 2008, the Organisation of American States also issued a Declaration on Human Rights, Sexual Orientation, and Gender Identity.
55. The first part of the above-mentioned report by the European Union Agency for Fundamental Rights on “homophobia and discrimination on grounds of sexual orientation in the European Union member states”, published in June 2008, comprises a comparative legal study. The second part, a comparative social study, was published on 31 March 2009. In July 2008, the European Commission proposed an anti-discrimination directive which would ensure equal protection against discrimination based on various grounds, including sexual orientation.

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117. See, *inter alia*, Committee of Ministers (CM) reply to Written Question No. 524 to the CM by Mrs Acketoft: “Ban on a Chişinău demonstration by homosexuals”, adopted on 7 November 2007, CM reply to Written Question No. 567 to the CM by Mr Jensen: “Homosexual rights in Russia”, adopted on 23 September 2009; and CM reply to Written Question No. 568 to the CM by Mr Jensen: “Homosexual rights in Latvia”, adopted on 23 September 2009.

56. In January 2009, the European Parliament called on the European Commission to make sure that member states grant asylum to persons fleeing from persecution on the grounds of their sexual orientation in their country of origin, to take initiatives at the bilateral and multilateral level to stop the persecution of persons on the basis of their sexual orientation, and to launch a study on the situation of transgender people in the member states and candidate countries, with particular regard to the risk of harassment and violence.

#### **IV. Freedom of assembly and association and freedom of expression:<sup>118</sup> fundamental rights protected by the European Convention on Human Rights**

##### *i. Recent developments*

57. The right of LGBT persons to freedom of assembly/association and freedom of expression has met with widespread opposition in many Council of Europe member states, including several European Union member states. This opposition has manifested itself in a number of ways, particularly the banning of marches, the use of intolerant or derogatory language by leading politicians and religious representatives, violent attacks on demonstrators (like in Latvia in 2005, in Russia in 2007, in Moldova in May 2008 and in Hungary in July 2008), and failure by the police to provide adequate protection. In 2008, in Bosnia and Herzegovina, many publications called for the organisers of the Sarajevo Queer Festival to be “lynched and stoned” and eight people were injured at the opening of the festival. In Lithuania, in 2007, the Vilnius authorities even refused to give permission to a European Union anti-discrimination truck to make its planned stop in Vilnius, as part of the Year of Equal Opportunities for All.
58. In a number of Council of Europe member states – in Lithuania and Moldova, for example – LGBT organisations abandoned plans to hold Pride events in 2009. In Russia, the Gay Pride in Moscow was again banned in 2009. In May 2009, police violently dispersed demonstrators at the (banned) Slavic Pride March in Moscow and a number of activists were arrested as they protested against discrimination of LGBT people. In Russia also, in May 2009 activists in about 40 cities staged a so-called “Rainbow Flashmob” dedicated to the International Day against Homophobia. In St Petersburg, their motto was “We are no longer acting as if we do not exist”. In Ukraine, municipal authorities in Mykolayiv City banned the “Rainbow spring 2009” festival for the second year running.
59. In some cases, however, courts have eventually overturned bans by city authorities. For example, in Latvia, in May 2009, the ban on the Baltic Pride March was finally lifted and the event was successful and peaceful. In May 2008, an Istanbul court ordered the closure of Lambda Istanbul, an LGBT organisation. This decision was eventually overturned by the Supreme Court of Appeal in November 2008.
60. As stressed by the Congress in 2007, on the occasion of its debate on freedom of assembly and expression for lesbian, gay, bisexual and transgender persons, recent homophobic incidents in a number of member states have highlighted not only the systematic violation of the basic rights of the LGBT community but

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118. See the work of the Congress of Local and Regional Authorities on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons, Resolution 230 (2007), Recommendation 211 (2007) and Document CPL(13)9 Part 2, 15 January 2000.

have shown that in many cases the very authorities who have the positive obligation to protect their citizens against discrimination are actually endorsing and, in some cases, actively supporting or perpetrating this injustice. Nevertheless, in some European Union member states, LGBT organisations have celebrated pride events with the participation of government ministers, political parties and, in some cases, religious organisations. In Sweden, the Minister for European Union Affairs opened the 2008 Stockholm EuroPride, attracting more than 80 000 participants, among them the country's Lutheran Church.<sup>119</sup>

61. There is a clear need to reaffirm the existing standards in this respect and to urge the authorities concerned to implement them.

*ii. The standards*<sup>120</sup>

62. Freedom of expression and freedom of assembly and association are enshrined in the European Convention on Human Rights (Articles 10 and 11), which has been ratified by all Council of Europe member states. In addition, the Convention prohibits discrimination in the way that the rights enshrined therein are applied (Article 14). Consequently, the rights to freedom of expression and freedom of assembly must be enjoyed by all without discrimination. In other words, lesbian, gay, bisexual and transgender persons enjoy the same right to freedom of expression and to freedom of assembly as any other person within the jurisdiction of a Council of Europe member state.
63. Any restrictions on the exercise of the rights to freedom of expression and freedom of assembly must be prescribed by law and be necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others.
64. The authorities play a central role in upholding citizens' rights to freedom of assembly and expression. This includes the positive obligation for the state to provide effective protection and ensure respect for lesbian, gay, bisexual and transgender persons who wish to assemble and express themselves, even if their views are unpopular or are not shared by the majority of society.
65. As stressed by the Council of Europe Committee of Ministers in January 2008, "according to the established case law of the Court, peaceful demonstrations, be they in favour of the rights of lesbian, gay, bisexual and transgender persons or others, cannot be banned simply because of the existence of attitudes hostile to the demonstrators or to the causes they advocate. On the contrary, the state has a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. In a series of judgments, the Court has emphasised that discrimination based on sexual orientation is contrary to the Convention. All member states must observe the Convention when they apply national law, notably in the light of the case law of the Court".<sup>121</sup>

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119. See European Union FRA report, Part II, "The social situation".

120. The NGO Article 19 is preparing an advocacy manual highlighting principles and policies on the application of international freedom of expression standards and best practices in relation to sexual orientation and gender identity.

121. CM/Cong(2008)Rec211 final, CM reply to Congress Recommendation 211 (2007), 18 January 2008, paragraph 3. See also CM reply of 7 November 2007 to Written Question No. 524 by Mrs Acketoft: "Ban on a Chişinău demonstration by homosexuals", and CM reply of 6 February 2008 to Written Question No. 527 by Mr Huss: "Ban on a Moscow demonstration by lesbian, gay, bisexual and transgender persons in 2007". See also OSCE/ODIHR guidelines on freedom of peaceful assembly.

66. The Committee of Ministers<sup>122</sup> has also invited all member states to implement its Recommendations No. R (97) 20 on hate speech and No. R (97) 21 on the media and the promotion of a culture of tolerance in respect of lesbians, gays, bisexuals and transgender persons. The recommendation on hate speech asserts that public authorities and institutions have a “special responsibility to refrain from statements ..., speech ... and other forms of discrimination or hatred based on intolerance”, especially when it is disseminated through the media. Any legitimate interference with freedom of expression should be “narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria (and) subject to independent judicial control”.
67. In 2007, in the case of *Bączkowski and Others v. Poland*,<sup>123</sup> the Court delivered its first judgment specifically addressing the right to freedom of assembly of lesbian, gay, bisexual and transgender persons. It ruled that the prohibition by the Warsaw authorities of the 2005 Equality assemblies violated the Convention (Articles 11 and 14). The Court drew attention to the positive obligation of the state to secure the effective enjoyment of Convention rights, stressing that “this obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation”. In referring to a public statement by the then Mayor of Warsaw that he would refuse permission to hold the assemblies, the Court emphasised that the exercise of freedom of expression by elected politicians “entails particular responsibility”.

## V. Legal recognition of same-sex partnerships in Europe: contrasted situations in Europe

68. Under international law, the decision of legislatures to give same-sex couples access to marriage and/or a form of registered partnership, as well as the extension of privileges to such institutions, is left to the state’s margin of appreciation. Nevertheless, European Union countries have specific obligations: in order to comply with the prohibition against discrimination under European Union law, member states that provide a form of union to same-sex partnerships which is comparable to marriage must ensure that same-sex partners enjoy the same rights as married couples.

### *i. Evolution of legislation across Europe*

69. In present-day Europe, there is no consensus among Council of Europe member states and the situation varies considerably from one country to another as regards legal recognition of same-sex partnerships. In some countries, same-sex partners may enter into a civil marriage, whereas in others same-sex couples may, by registering their partnership and/or by drawing up an official cohabitation contract, obtain legal recognition and protection for most or some of the rights that are afforded to heterosexual married couples. In a number of Council of Europe member states, however, there is no statutory provision to this effect (see the table below). In addition, a number of countries – Poland, Lithuania, Ukraine and, more recently, Latvia – have prohibited same-sex marriage in the constitution by defining marriage as a union between a man and a woman.

122. See CM/Cong(2008)Rec211 final, CM reply to Congress Recommendation 211 (2007), 18 January 2008, paragraph 4.

123. No. 1543/06, judgment final on 24 September 2007.

70. Legal recognition of same-sex partnerships is an issue that causes feelings to run high, and there are differences of opinion both between member states and among the public in each member state. For some, same-sex partnerships are perceived as being “against human nature”, a “threat” to the traditional family and/or an offence to the “moral order”. At the same time, it has also to be acknowledged that failure to recognise same-sex partnerships results in discriminatory treatment in regard to some of the rights enshrined in the European Convention on Human Rights and often leaves those concerned in uncertain and distressing situations.
71. During the legal committee’s hearing held in 2008, experts considered that legal recognition of same-sex partnerships was an indicator of progress towards equality and full citizenship and of the level of social justice. Experts presented the example of the United Kingdom, which had initially been very hostile to the legal recognition of same-sex partnership but has then, since 2005, become one of the most liberal countries in the matter. Reportedly, key factors which facilitated changes in legislation and attitudes were:
- the level of development of the LGBT community;
  - the commitment of a political party or a coalition;
  - the role of faith-based organisations.
72. In the United Kingdom, the LGBT community had mainly called for the legal recognition of same-sex partnerships in the name of equal rights and responsibilities, the need to demonstrate their commitment to each other, and public recognition of that commitment.
73. Despite the lack of consensus, the number of states adopting some form of legally recognised same-sex partnership is growing. As recently stressed by the European Parliament, steps should be taken to “ensure that same-sex partners [enjoy] the same respect, dignity and protection as the rest of society”.<sup>124</sup> The Council of Europe Commissioner for Human Rights has also stated that legal recognition of same sex partnerships is needed and must be afforded in a non-discriminatory way with regard to all financial and proprietary benefits.<sup>125</sup>

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124. European Parliament resolution of 18 January 2006 on homophobia in Europe.

125. Commissioner for Human Rights, annual report 2006 and follow-up report on Slovenia, CommDH(2006)8.

## Overview of the situation in Council of Europe member states<sup>126</sup>

(years indicate entry into force of relevant legislation)

No legal recognition of same-sex partnerships	Some recognition of same-sex cohabitation, but no formal registration of partnership or marriage	Formal registration of a partnership open to same-sex and different-sex partners	Formal registration of a partnership only open to same-sex partners	Civil marriage open to same-sex partners
Albania Armenia Azerbaijan Bosnia and Herzegovina Bulgaria Cyprus Estonia Georgia Greece Italy Latvia Liechtenstein Lithuania Malta Moldova Monaco Montenegro Poland Romania Russian Federation San Marino Serbia Slovak Republic "The former Yugoslav Republic of Macedonia" Turkey Ukraine	Austria (1998) Croatia (2003) Portugal (2001)	<i>Status virtually equivalent to that of married couples:</i> Netherlands (1998)  <i>Status inferior to that of married couples:</i> Andorra (2005) Belgium (2000) France (1999) Luxembourg (2004)  <i>Pending legislation:</i> Ireland	<i>Status virtually equivalent to that of married couples:</i> Denmark (1989) Finland (2002) Germany (2001) Iceland (1996) United Kingdom (2005) Switzerland (2007)  <i>Status inferior to that of married couples:</i> Czech Republic (2006) Slovenia (2005) Hungary (2009)	Belgium (2003) Netherlands (2001) Spain (2005) Norway (2009) Sweden (2009) (NB: Canada, South Africa and some US states have also passed such legislation)

74. Registered partnerships may have virtually all the consequences of marriage – with the result that one can talk of a “virtual marriage” as in the United Kingdom – or only a limited number of those consequences.

126. For details of the situation in each Council of Europe member state, see the ILGA-Europe website: [www.ilga-europe.org](http://www.ilga-europe.org). See also “Sexual orientation discrimination in the EU: national laws and the Employment Equality Directive”, by Kees Waaldijk and Matteo Bonini-Baraldi, Asser Press, The Hague 2006 (see [www.emmeijers.nl/experts/](http://www.emmeijers.nl/experts/)), as well as the chronological overview of the main legislative steps in the process of legal recognition of homosexuality in 45 European countries, by Kees Waaldijk, and “All’s well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe”, by Ian Curry-Sumner, Antwerp/Oxford: 2005, Part 11. See also the report of the European Union Agency for Fundamental Rights.

ii. *The international dimension*<sup>127</sup>

75. In 2000, the Assembly urged member states to review their policies in the field of social rights and protection of migrants to ensure that homosexual partnerships and families are treated on the same basis as heterosexual partnerships and families and to take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples. More recently, on 14 January 2009, the European Parliament called on European Union member states who have adopted legislation on same-sex partnerships to recognise provisions with similar effects adopted by other member states; it also called on those member states to propose guidelines for mutual recognition of existing legislation between member states in order to guarantee that the right of free movement within the European Union for same-sex couples applies under conditions equal to those applicable to heterosexual couples. In addition, it called on those member states that have not yet done so, and in application of the principle of equality, to take legislative action to overcome the discrimination experienced by some couples on the grounds of their sexual orientation.

iii. *Pecuniary rights/obligations and parental rights/obligations*<sup>128</sup>

76. In Council of Europe member states, the assignment of certain pecuniary rights (benefits, such as pensions, bereavement benefits, tenancy rights, etc.) remains much less problematical than the granting of parental rights. Belgium is a telling case: whereas same-sex partners have been able to enter into civil marriages since 2003, their right to adopt children was not recognised until 2006.
77. In the case of *Karner v. Austria* (2004) concerning unequal tenancy rights of heterosexual and same-sex couples, the Court found that “particularly serious reasons” had to be provided if de facto same-sex couples were to be excluded from rights and obligations available to de facto different-sex couples.
78. At present, in two cases before the Court, applicants have put forward the argument that same-sex couples should be exempted from having to marry to qualify for a particular right or benefit.<sup>129</sup>
79. The existence of same-sex partnerships is a fact in all Council of Europe member states. As far as the concept of the family is concerned, one should stress that this concept has developed over time in many Council of Europe member states. The traditional idea of “the family” represented by the nuclear family: a married opposite-sex couple and their children, is becoming increasingly distant from the experienced reality of very many European families and their children. In many countries, such as Latvia, I was told, traditional families are not in the majority. There are many single-parent families, families without children and cases of children being brought up by their grandparents, as well as same-sex families (with or without children). There are now increasing

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127. On 19 November 2008, the Committee of Ministers of the Council of Europe adopted a resolution on non-discrimination under Article 3 of the Staff Regulations. The resolution aims at granting staff members in registered partnerships who cannot get married all the benefits currently enjoyed by their married colleagues.

128. This section is mainly based on information provided by experts at the hearings held in 2008 and 2009 and on the occasion of the conference/debate held in Strasbourg on 15 May 2009 on “LGBT families”.

129. *M.W. v. the United Kingdom* (No. 11313/02; inadmissible) and *Schalk and Kopf v. Austria* (No. 30141/04).

efforts at both the national and European levels to recognise alternative family forms and, in particular, to protect the rights of children being raised outside traditional marriage-based family units.

80. Moreover, it has to be borne in mind that some same-sex couples actually do have children (from prior opposite-sex relationships, through assisted conception, donor insemination, or through adoption). The families in question exist de facto and are often referred to as “LGBT families”. Again, this is a fact of society, which cannot just be ignored.
81. International and national laws often fail to recognise the reality of these children’s family relationships, potentially jeopardising their legal security. Since the Court has, so far, had little to say about the rights of children raised in LGBT families, it has largely been left to states to decide what legal recognition, if any, will be given to LGBT families and what protection children raised in these families will have. While most children raised in non-traditional families share a degree of legal vulnerability with respect to their family ties, for children in LGBT families, such vulnerability is almost invariably a fact of life: for example, in the majority of countries, there is still no legislative provision for recognising and protecting a child’s relationship with an LGBT “co-parent”.<sup>130</sup> Consequently, many children of LGBT parents are denied equal enjoyment of the family rights that international human rights law recognises for all children equally. The discrimination and disadvantage suffered by children in LGBT families can take various forms. In particular, these children may be denied their right to live with their parents and to have the integrity of their family life respected. In the absence of legal recognition, LGBT co-parents are denied the possibility of being involved in making important decisions, relating to, for example, the child’s medical treatment and education; it also impacts on the quality of social services that a child of LGBT parents receives. The situation of these children may become particularly dramatic in the case of death of the biological parent. This is clearly not consistent with the child’s best interests, which the United Nations Convention on the Rights of the Child states should be the primary consideration in all actions concerning them. Therefore, legal recognition of the situation of children born into or raised in LGBT families is essential. In many cases, the legislation would merely be legitimising a social reality. Ignoring this reality does not make the reality of their existence disappear but only denies those children the full enjoyment of their rights.<sup>131</sup>
82. Adoption of children by homosexual person(s) is undoubtedly one of the issues giving rise to the most doubts, opposition or clear hostility. The situation in Council of Europe member states regarding adoption varies. Even in countries where adoption is possible, there are different types of situation. In some countries, the legislator has introduced a distinction between adoption of unrelated children and adoption of the partner’s child: The Netherlands, Spain, Sweden, the United Kingdom, Belgium, Iceland and now also Denmark (law adopted on 17 March 2009) enable same-sex partners jointly to adopt unrelated children, while Germany and Norway permit a registered same-sex partner to adopt the partner’s child.

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130. Term used to refer to the non-biological parent of a child raised in an LGBT family.

131. For details, see “The rights of children raised in lesbian, gay, bi-sexual or transgender families: a European perspective” – ILGA-Europe, October 2008. See also the “Study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation”, Council of Europe (intergovernmental) Committee of Experts on Family Law, CJ-FA(2008)5.

83. Individual adoption by an unmarried person, whether homosexual or not, is, however, more widely possible, but this right often exists only on paper. In practice, people who make no secret of their homosexuality are frequently refused authorisation to adopt by the authorities, often on the grounds of the lack of a paternal/maternal role model conducive to the harmonious development of the adopted child. The Court recently handed down a judgment<sup>132</sup> on the matter in connection with the French authorities' refusal to grant approval to a homosexual woman. This woman alleged that she was refused authorisation to adopt on account of her sexual orientation and that she was discriminated against on the grounds of her homosexuality. The Court concluded that the decision of the French authorities violated the Convention (violation of the prohibition of discrimination and of the right to respect for private and family life).
84. It is often argued that granting parental rights could make homosexuality more acceptable, or more attractive even and that children raised in LGBT families would become homosexuals. At the committee's hearings held in 2008 and 2009, experts stressed that the percentage of children brought up by same-sex couples who also became homosexuals themselves is no higher and no lower than the percentage of children brought up by heterosexual couples.<sup>133</sup> On the other hand, children brought up by homosexual parents are usually more tolerant.
85. Moreover, as demonstrated by the Italian and Spanish examples, there is no cause-and-effect relationship between the legal recognition of same-sex partnerships and a country's birth rate, as is sometimes suggested. As indicated in the table above on prejudices, some of the countries in Europe that have been most successful in addressing demographic problems – the Nordic states – have led the way in supporting the rights of lesbian, gay and bisexual people, while many of those which have been most repressive towards them have the most serious demographic problems.
86. During my visits, I was also sometimes confronted with the argument that legal recognition of same-sex partnerships and/or granting parental rights is a danger to the "traditional families" (i.e. married heterosexual couples with children). But there is nothing to prevent both types of families to exist and develop in the same society or country. The "traditional family" (i.e. married heterosexual couples with children) has been declining in many European countries because a growing proportion of heterosexuals are choosing not to marry, because of increasing divorce rates, and because more married heterosexuals are choosing not to have children.
87. In 2004, the Assembly recommended that the Committee of Ministers apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents.<sup>134</sup> Also, as already mentioned above, in July 2008 the Council of Europe

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132. Grand Chamber judgment *E.B. v. France*, 22 January 2008.

133. Comprehensive research by the American Psychological Association found that children brought up by lesbian or gay parents experienced no adverse consequences with regard to their gender identity or sexual orientation. Studies of the social relationships of these children, both with regard to peer relations, and relations with adults, were consistent with typical patterns of development: see "Lesbian and gay parents and their children: summary of research findings" – American Psychological Association – 2005 – available at: [www.apa.org/pi/lgbc/publications/lgparenting.pdf](http://www.apa.org/pi/lgbc/publications/lgparenting.pdf).

134. Recommendation 1686 (2004) on the human mobility and the right to family reunion.

Committee of Ministers initiated work on the topic of various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity.

88. As rapporteur I consider that it is essential for children to be raised in a loving environment, which can certainly be ensured by “traditional” families as well as by “non-traditional” families. In addition, family rights of children in LGBT families should be fully respected. Consequently, the necessary legal framework should be put in place in order to ensure full respect for the family rights of children in LGBT families. This, in my view, necessarily requires legal recognition of same-sex partnerships, providing, at least, for joint parental responsibility of each partner’s children on a basis of equality with opposite-sex marriage, if not also the right of each partner to adopt the other partner’s children.

## **VI. Historical perspective and factors that can lead to a human rights compatible approach**

89. On the occasion of my fact-finding visits and during the hearings held by the Committee on Legal Affairs and Human Rights, experts stressed that a number of factors were key to fostering changes in attitudes and legislation and measures which could prevent or combat discrimination. Some of them also insisted on the need to look at the issue with an historical perspective, in order to illustrate the evolution of prejudices and discrimination present in a given society.

### *i. Some historical perspectives*

90. As stressed during the hearing held in 2008, there was a time (not long ago) when people with red hair and left-handed people were stigmatised, discriminated against on grounds which now appear to be “ridiculous”. Not long ago also, in a number of countries, children born out of wedlock and children whose parents were divorced or raised by a single parent were stigmatised, just as now, children raised in “LGBT families” are.
91. It is worth noting that the European Parliament defines homophobia as “an irrational fear of and aversion to homosexuality and to lesbian, gay, bisexual and transgender (LGBT) people based on prejudice and similar to racism, xenophobia, anti-semitism and sexism”<sup>135</sup>
92. Interestingly enough, in the framework of an extensive hate speech monitoring programme carried out in Latvia in 2006-07, homophobic statements by public figures were compared to Nazi statements against Jews and the publication of this monitoring report, reportedly, led to some improvements.
93. As stressed by the Secretary General of the Council of Europe in May 2009: “Everyone knows that homosexuals were arrested and sent to concentration camps by the Nazis, but it is less well known that after they were freed from the camps, many homosexuals were forced to serve out their terms of imprisonment. This may be shocking, but it was consistent with the deeply rooted discrimination against homosexuals in Europe at the time ... It was not until 1990 that the World Health Organization removed homosexuality from the list of mental illnesses and, until a few years ago, homosexuality was still a criminal offence in several countries.”

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135. European Parliament resolution on homophobia in Europe, 18 January 2006.

*ii. Factors fostering changes in legislation and attitudes*

94. It seems that a variety of factors – and sometimes a combination of them – can play a key role in the evolution of attitudes and legislation. Nevertheless, commitment to human rights and to the principles of non-discrimination is certainly the most decisive factor.

*a. Knowledge of the issues involved; commitment to human rights and to the principles of equal treatment and non-discrimination:*

- the role of NGOs and the level of development of the LGBT community;
- the capacity of LGBT people to organise themselves and to lobby mainstream parties and organisations;
- the information available and the role of the media;
- the monitoring of the human rights situation of LGBT persons;
- an open social and political climate and, in particular, the search for equality;
- the role of individuals (in particular the support provided by the political authorities);
- the level of understanding and factual objective knowledge of these issues, especially among politicians/legislators;
- the commitment of a political party or a coalition and the will for change;
- the understanding that legislation has to recognise social reality;
- the understanding of the human rights issues involved and the firm commitment to promote the dignity of all human beings, tolerance and respect;
- a firm opposition to discrimination against LGBT persons and the eradication of impunity for human rights violations targeting LGBT persons;
- education in the broadest sense;
- equality bodies and national human rights structures (ombudspersons) whose mandates/practice cover discrimination on the basis of sexual orientation and gender identity.

*b. Other factors involved in some cases*

- the role of churches, their level of “interventionism” on these issues and their influence;
- decentralisation, the role of local authorities and the support of public opinion;
- understanding diversity and its “traditional” nature;
- citizens’ participation and collective decision-making rights.

*c. The international dimension*

- the standards and values of international organisations, in particular those of the United Nations, the Council of Europe and the European Union, which underline that human rights and fundamental freedoms are universal;
- the case law of international judicial organs;
- the recognition of the international nature of the relevant issues (in particular, the recognition of same-sex partnerships from one country to another).

### *iii. Concrete examples*

- In Cyprus the decriminalisation of homosexuality followed a ruling of the Court.
- Spain, despite having a strong Catholic cultural heritage, has opened civil marriage to same-sex marriages. Key factors which facilitated changes in legislation and attitudes were, reportedly:
  - the commitment of a political party;
  - the involvement of the LGBT community;
  - the fact that a number of persons have distanced themselves from the Catholic Church<sup>136</sup> due to the position of some religious authorities during the Franco regime.
- In Switzerland, where society is rather conservative, changes in legislation towards the legal recognition of same-sex partnerships originated in the cantons and through popular initiatives and referendums.
- In the United Kingdom, reportedly (as indicated above), key factors which facilitated changes in legislation and attitudes were:
  - the level of development of the LGBT community;
  - the commitment of a political party or a coalition;
  - the role of faith-based institutions.

### *iv. The importance of dialogue*

95. On the occasion of the hearing held by the Committee on Legal Affairs and Human Rights in Berlin in March 2009, the question of religion and homosexuality was raised, in particular the question whether there was room for dialogue with religious institutions. At the request of members, I will briefly address this issue.
96. Attitudes of religious institutions towards LGBT persons and their rights vary considerably. According to the FRA report on homophobia and discrimination on grounds of sexual orientation and gender identity (the social situation), as far as European Union member states are concerned:
  - In many European Union member states, conservative religious institutions actively speak out against LGBT persons, usually arguing that being LGBT runs contrary to religious doctrine and should be opposed rather than encouraged. They may lobby against legislation that better protects LGBT persons and campaign against LGBT events;
  - At the same time, there are examples of religious institutions and organisations that have reached out to LGBT people. Some churches or parts of churches have welcomed LGBT persons as part of their communities and tried to diffuse intolerance based on religious beliefs. For example, in the Netherlands, by 1995, the synod of the Netherlands Reformed Church had already issued a statement that members of the church have equal rights, regardless of their sexual orientation or way of life. In Finland, reportedly, since 1999, the Kallio parish in

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136. In Poland, my interlocutors stressed the difference between Spain and Poland in that respect. They underlined that the Catholic Church in Poland was still perceived as a strong element of national identity, with high credibility due to its role in overcoming totalitarianism and, consequently, was still highly valued by the majority of the population.

Helsinki has embraced “rainbow people” and “rainbow masses” have been held in connection with Gay Pride events in several places. In Sweden, the Lutheran Church participated in the 2008 Pride events.

97. Some churches allow same-sex blessings. In Denmark, the Lutheran Church accepted blessing services for same-sex partnerships already in 1997. In the Anglican Church in the United Kingdom, the issues of same-sex blessings and the ordination of lesbians and gay priests have given rise to controversial debates and discussions.<sup>137</sup>
98. I consider that dialogue between all bodies (authorities, national human rights institutions, equality bodies, human rights defenders working on the rights of LGBT persons, and religious institutions), based on mutual respect, should be encouraged in order to improve mutual understanding and the human rights protection of LGBT people.

## VII. Conclusion

99. The lack of knowledge and understanding about sexual orientation and gender identity is a challenge to be addressed in most Council of Europe member states since it results in an extensive range of human rights violations.
100. The eradication of homophobia and transphobia requires political will in member states to implement a consistent human rights approach and to embark on a wide range of initiatives. Education in the broadest sense is crucial to bringing about changes. Parliamentarians have a specific responsibility in initiating and supporting changes in legislation, practice and policy in Council of Europe member states. The Council of Europe also has the duty to promote a clear message of respect and non-discrimination so that everybody can live in dignity and respect in all its member states.
101. Specific measures are needed to address the specific discrimination faced by transgender persons, and the obstacles to their ability to “live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>138</sup>
102. Dialogue between all bodies, based on mutual respect, is also essential in order to improve mutual understanding, combat attitudes of prejudice and facilitate public debates and reforms on issues concerning LGBT persons.

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137. For more details, see “Imagine there’s a heaven!?! The situation of lesbians and gays in the churches of Europe”, Randi O. Solberg (ed.), June 2005. See also “Let our voices be heard! Christian lesbians in Europe telling their stories”, published in Germany, 2004.

138. Judgment of the Court, *Christine Goodwin v. the United Kingdom* [Grand Chamber], No. 28957/95, paragraph 91.

## **Recommendation 1635 (2003) of the Parliamentary Assembly – Lesbians and gays in sport**

*(Adopted by the Standing Committee,  
acting on behalf of the Assembly, on 25 November 2003)*

1. The Parliamentary Assembly declared itself to be against discrimination in sport in Resolution 1092 (1996) on discrimination against women in sport and more particularly in the Olympic Games.
2. It recalls that the Olympic Charter states that “any form of discrimination with regard to a country or a person on grounds of race, religion, politics, sex or otherwise is incompatible with belonging to the Olympic Movement”.
3. Discrimination based on sexual orientation goes against the European Convention on Human Rights and its Protocol No. 12, Article 1, on the general prohibition of discrimination, and is not acceptable in Council of Europe member states.
4. Sport is a key factor in social integration and the European Sports Charter states that participation in sport should be open to all.
5. Gays and lesbians complain that they are at a disadvantage when it comes to participation in sports activities both in regular sports organisations and at school.
6. The Assembly believes that homophobia in sport, both among participants and in their relations with spectators, should be combated on the same grounds as racism and other forms of discrimination.
7. The Assembly therefore calls on member states to:
  - i. launch active campaigns against homophobia in sport and widen existing campaigns against xenophobia in sport to include homophobia;
  - ii. include homophobia and abusive language directed at gays and lesbians as grounds for accusation of discrimination and harassment on the basis of sexual orientation;
  - iii. make homophobic chanting at or around sports events a criminal offence, as is presently the case with racist chanting;
  - iv. involve NGOs from the gay and lesbian community in their sports campaigns and in all other necessary confidence-building steps.
8. The Assembly also calls on European sports organisations to:
  - i. make homophobic chanting and other homophobic abuse an offence against their constitutions, as is already the case for xenophobic and racist chanting and other abuse;
  - ii. call upon UEFA to adapt its Ten Point Plan for Professional Football Clubs so as to include action against homophobia;
  - iii. adopt or adapt practical guidelines for professional sports clubs to help them fight against all discrimination, including racism, xenophobia, gender discrimination and homophobia; launch active campaigns against homophobia in sport; and widen existing campaigns against xenophobia in sport to include homophobia.

9. The Assembly encourages the media to depict fairly and accurately the strength and competence of female and male athletes, whatever their sexual orientation, to refrain from using sexist language and gender stereotypes while covering sports events and to elaborate a code of conduct for sports commentators.
10. Finally, the Assembly recommends that the Committee of Ministers:
  - i. extend the grounds listed in Article 4 of the European Sports Charter to discrimination on the grounds of sexual orientation;
  - ii. address the issue of homophobia and discrimination in sport and education in the preparation of the 10th Conference of European Sports Ministers in 2004;
  - iii. call upon the National Ambassadors for Sport, Tolerance and Fair Play to include this element in their mission;
  - iv. consider including the issue of homophobia in the European Convention on Spectator Violence and Misbehaviour at Sport Events and in particular at Football Matches.

## **Committee of Ministers' reply to Recommendation 1635 (2003) – Lesbians and gays in sport**

*(Adopted by the Committee of Ministers on 17 November 2004 at the 904th meeting of the Ministers' Deputies)*

1. The Committee of Ministers has considered Parliamentary Assembly Recommendation 1635 (2003) on lesbians and gays in sport, and welcomes the Assembly's interest and engagement in the issue of discrimination on the basis of sexual orientation. The recommendation was forwarded to the governments of its member states. It was also sent to its Steering Committee for the Development of Sport (CDDS).
2. The Committee of Ministers shares the Assembly's view that homophobia in sport should be combated in the same way as racism and other forms of discrimination. It recognises that the issue of homophobia in sport is a matter of concern for sports policy makers and sports organisations as a means of promoting tolerance and of ensuring non-discrimination in sport (see Article 4.1 of the European Sports Charter, Recommendation No. R (92) 13 revised). The charter states that the access to sport facilities or to sport activities should be open to all without discrimination.
3. The Committee of Ministers shares the Assembly's view that sport is a key factor in social cohesion as set out in Recommendation No. R (99) 9 on the role of sport in fostering social cohesion. The Committee of Ministers considers that the main platform for further action in this area is at national level.
4. With regard to the Assembly's view regarding possible amendment of Article 4 of the European Sports Charter (paragraph 10.i), the Committee of Ministers does not consider it necessary to amend the European Sports Charter, as all points raised in the recommendation are covered by the revised charter.<sup>139</sup>
5. With regard to the Assembly's proposal to address the issue of homophobia and discrimination in the preparation of the 10th Conference of European Ministers responsible for Sport (Budapest, 14-15 October 2004), the main subject of this conference was "good governance in sport". The conclusions of the Conference on this subject are also applicable to this issue.
6. As regards the proposal to call upon National Ambassadors for Sport, Tolerance and Fair Play (paragraph 10.iii) to include this element in their mission, the Committee of Ministers points out that this network, set up by the CDDS and currently under the Standing Committee of the Convention on Spectator Violence, has organised a series of Round Tables on Sport, Tolerance and Fair Play to which the European Gay and Lesbian Sport Federation has been invited as an observer. Thus, the network of National Ambassadors for Sport Tolerance and Fair Play considers that its activities to promote tolerance include the fight against homophobia. The Committee of Ministers notes that this is the first step taken towards this end within the mission of the national ambassadors.

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139. See Recommendation No. R (92) 13 revised adopted by the Committee of Ministers on 16 May 2001.

7. As regards paragraph 10.iv of the recommendation, it was brought to the attention of the Standing Committee of the Convention on Spectator Violence at its 24th meeting at Porto on 10 and 11 June 2004, which has confirmed that all spectators, irrespective of age, gender, race, religion, disability or sexual orientation should be able to attend sporting events in safety, security and comfort without discrimination. The same principles of non-discrimination, in all its forms, including sexual orientation, apply also to players. As regards the proposals at paragraph 10.iv of the recommendation, the Standing Committee has considered that this issue is included in its programme on fighting discrimination, for example in its work on sport, tolerance and fair play.

## **Recommendation 1474 (2000) of the Parliamentary Assembly – Situation of gays and lesbians in Council of Europe member states**

*(Adopted by the Assembly on 26 September 2000)*

1. Nearly twenty years ago, in its Recommendation 924 (1981) on discrimination against homosexuals, the Assembly condemned the various forms of discrimination suffered by homosexuals in certain Council of Europe member states.
2. Nowadays, homosexuals are still all too often subjected to discrimination or violence, for example, at school or in the street. They are perceived as a threat to the rest of society, as though there were a danger of homosexuality spreading once it became recognised. Indeed, where there is little evidence of homosexuality in a country, this is merely a blatant indication of the oppression of homosexuals.
3. This form of homophobia is sometimes propagated by certain politicians or religious leaders, who use it to justify the continued existence of discriminatory laws and, above all, aggressive or contemptuous attitudes.
4. Under the accession procedure for new member states, the Assembly ensures that, as a prerequisite for membership, homosexual acts between consenting adults are no longer classified as a criminal offence.
5. The Assembly notes that homosexuality is still a criminal offence in some Council of Europe member states and that discrimination between homosexuals and heterosexuals exists in a great many others with regard to the age of consent.
6. The Assembly welcomes the fact that, as early as 1981, the European Court of Human Rights, in its *Dudgeon v. the United Kingdom* judgment held that the prohibition of sexual acts between consenting male adults infringed Article 8 of the European Convention on Human Rights, and that more recently, in 1999, it expressed its opposition to all discrimination of a sexual nature in its *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom* judgments.
7. The Assembly refers to its Opinion No. 216 (2000) on draft Protocol No. 12 to the European Convention on Human Rights, in which it recommended that the Committee of Ministers include sexual orientation among the prohibited grounds for discrimination, considering it to be one of the most odious forms of discrimination.
8. While laws on employment do not explicitly provide for restrictions concerning homosexuals, in practice homosexuals are sometimes excluded from employment and there are unjustified restrictions on their access to the armed forces.
9. The Assembly is pleased to note, however, that some countries have not only abolished all forms of discrimination but have also passed laws recognising homosexual partnerships, or recognising homosexuality as a ground for granting asylum where there is a risk of persecution on the basis of sexual orientation.

10. It is none the less aware that recognition of these rights is currently hampered by people's attitudes, which still need to change.
11. The Assembly therefore recommends that the Committee of Ministers:
  - i. add sexual orientation to the grounds for discrimination prohibited by the European Convention on Human Rights, as requested in the Assembly's Opinion No. 216 (2000);
  - ii. extend the terms of reference of the European Commission against Racism and Intolerance (ECRI) to cover homophobia founded on sexual orientation, and add to the staff of the European Commissioner for Human Rights an individual with special responsibility for questions of discrimination on grounds of sexual orientation;
  - iii. call upon member states:
    - a. to include sexual orientation among the prohibited grounds for discrimination in their national legislation;
    - b. to revoke all legislative provisions rendering homosexual acts between consenting adults liable to criminal prosecution;
    - c. to release with immediate effect anyone imprisoned for sexual acts between consenting homosexual adults;
    - d. to apply the same minimum age of consent for homosexual and heterosexual acts;
    - e. to take positive measures to combat homophobic attitudes, particularly in schools, the medical profession, the armed forces, the police, the judiciary and the Bar, as well as in sport, by means of basic and further education and training;
    - f. to co-ordinate efforts with a view to simultaneously launching a vast public information campaign in as many member states as possible;
    - g. to take disciplinary action against anyone discriminating against homosexuals;
    - h. to ensure equal treatment for homosexuals with regard to employment;
      - i. to adopt legislation which makes provision for registered partnerships;
      - j. to recognise persecution against homosexuals as a ground for granting asylum;
    - k. to include in existing fundamental rights protection and mediation structures, or establish an expert on, discrimination on grounds of sexual orientation.

## **Committee of Ministers' reply to Recommendation 1474 (2000) – Situation of gays and lesbians in Council of Europe member states**

*(Adopted by the Committee of Ministers on 19 September 2001  
at the 765th meeting of the Ministers' Deputies)*

1. The Committee of Ministers has carefully examined Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states. It agrees with the Parliamentary Assembly that, regrettably, discrimination and violence against homosexuals still occur. Differentiated treatment of homosexuals under the law and in practice still exists in member states as do contemptuous or intolerant attitudes towards them.
2. In preparing a reply to the recommendation, the Committee has requested the opinion of the European Commission against Racism and Intolerance (ECRI). ECRI adopted its opinion – to which the Committee of Ministers generally subscribes – at its 24th meeting in March 2001 (see appendix to this reply). With regard to the proposal concerning the Council of Europe Commissioner for Human Rights, the Commissioner, when consulted, considered that the problem of discrimination on grounds of sexual orientation was already fully covered by his mandate and sufficiently important to be an integral part of the work of his office as a whole rather than being reserved for a specific appointment.
3. The Committee of Ministers stresses the importance of covering all forms of discrimination within the framework of the Council of Europe's activities and underlines in this respect the relevance of the new Protocol No. 12 to the European Convention on Human Rights (general prohibition of discrimination). Clearly a broad range of legal instruments and activities have the potential to contribute to progress in combating discrimination against lesbians and gays. In this connection, it welcomes the ECRI's proposal concerning "a wide debate within the Council of Europe as to how the Organisation as a whole might best address the various areas of discrimination".
4. With reference to paragraph 11.i of Recommendation 1474, the Committee of Ministers does not propose to re-open the debate concerning the need to include sexual orientation amongst the grounds for discrimination explicitly mentioned in Protocol No. 12 (or in Article 14 of the Convention). It recalls that careful consideration has been given to this issue by the drafters of the protocol; reference can be made to the explanations given in paragraph 20 of the protocol's explanatory report. It would, however, like to draw attention to several cases in which the Court has adopted a strict scrutiny vis-à-vis distinctions based on grounds not explicitly mentioned in Article 14 (see, for example, the judgment in the case of *Gaygusuz v. Austria* of 11 January 1995, Reports 1996-IV) including distinctions based on sexual orientation (for example, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*).

5. The case law of the organs of the European Convention on Human Rights also provides a strong general incitement to all member states, beyond the specific obligation of contracting states to execute the judgments of the Court, to reform any discriminatory legislation or regulations and in this connection the Committee of Ministers refers not only to the cases mentioned in the recommendation but also, for example, to the cases of *Norris v. Ireland* or those of *Modinos v. Cyprus* and of *Stavros Marangos v. Cyprus*.
6. Progress remains to be made in member states' domestic law and practice, which must be kept under review to ensure best practice. In this regard the Committee of Ministers can mark its agreement with several of the injunctions addressed to member states in paragraph 11.iii of the recommendation. In this regard it underlines in particular the need, mentioned in sub-paragraph 11.iii.e, for ... measures in the areas of education and professional training to combat homophobic attitudes in certain specific circles. Homosexuality can still give rise to powerful cultural reactions in some societies or sectors thereof, but this is not a valid reason for governments or parliaments to remain passive. On the contrary, this fact only underlines the need to promote greater tolerance in matters of sexual orientation.
7. Finally, the Committee wishes to assure the Assembly that it will continue to follow the issue of discrimination based on sexual orientation with close attention.

## *Appendix*

### *ECRI Opinion on Parliamentary Assembly Recommendation 1474 (2000)*

1. ECRI examined with interest Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states. It agrees with the Parliamentary Assembly that homosexuals are still too often subjected to discrimination or violence, and that the discriminatory legislation which sometimes exists and the homophobic climate that often reigns in member states lead to aggressive or contemptuous attitudes towards them. Oppression of homosexuals provides an indication of the degree of intolerance that may prevail in a society.
2. ECRI has not discussed this issue in its work to date. ECRI has thus far perceived its task as being to combat racism, xenophobia, antisemitism and related intolerance. Its action covers all measures necessary to combat violence, discrimination and prejudice faced by persons or groups of persons, in particular on grounds of race, colour, language, religion, nationality and national or ethnic origin.
3. ECRI welcomes the adoption of Protocol 12 to the European Convention on Human Rights, which contains a general prohibition of discrimination and stresses the importance of covering, within the framework of the Council of Europe's activities, all forms of discrimination.
4. For this reason, ECRI would welcome a wide debate within the Council of Europe as to how the Organisation as a whole might best address the various areas of discrimination, and expresses its readiness to participate in such a debate.

5. ECRI recalls that its own resources are at present very limited and already insufficient for it to cover its current field of activities. It stresses therefore that any decision taken on how best to cover the issue of discrimination in a wider sense should be accompanied by the necessary financial and human resources.

# **Recommendation 1470 (2000) of the Parliamentary Assembly – Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe**

*(Adopted by the Assembly on 30 June 2000)*

1. The Assembly recalls and reaffirms its Recommendation 924 (1981) on discrimination against homosexuals, Recommendation 1236 (1994), on the right of asylum, and Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe.
2. The Assembly is concerned by the fact that immigration policies in most Council of Europe member states discriminate against lesbians and gays. In particular, the majority of them do not recognise persecution for sexual orientation as a valid ground for granting asylum, nor do they provide any form of residence rights to the foreign partner in a bi-national same-sex partnership.
3. Furthermore, the rules concerning family reunion and social benefits usually do not apply to same-sex partnerships.
4. The Assembly is aware of a number of documented cases of persecution of homosexuals in their countries of origin, including Council of Europe member states.
5. The Assembly is of the opinion that homosexuals who have a well-founded fear of persecution resulting from their sexual preference are refugees under Article 1.A.2. of the 1951 Convention Relating to the Status of Refugees as members of a particular social group, and consequently should be granted refugee status. The present practice in some Council of Europe member states to grant them leave to stay on humanitarian grounds may be detrimental to their human rights, and cannot of itself be considered as a satisfactory solution.
6. Moreover, the Assembly is aware that the failure of most member states to provide residence rights to the foreign partner in a bi-national partnership is the source of considerable suffering to many lesbian and gay couples who find themselves split up and forced to live in separate countries. It considers that immigration rules applying to couples should not differentiate between homosexual and heterosexual partnerships. Consequently, proof of partnership other than a marriage certificate should be allowed as a condition of eligibility for residence rights in the case of homosexual couples.
7. Therefore the Assembly recommends that the Committee of Ministers:
  - i. instruct its appropriate committees:
    - a. to hold exchanges of views and experience on these subjects;
    - b. to examine the question of recognition of homosexuals as members of a particular social group in the understanding of the 1951 Geneva Convention with a view to ensuring that persecution on grounds of homosexuality is recognised as a ground for asylum;
    - c. to develop guidelines for the treatment of homosexuals who are refugees or members of a bi-national partnership;

- d. to initiate the setting up of a European system for data collection, and for the documentation of abuses against homosexuals;
  - e. to co-operate with, and support, groups and associations defending the human rights of homosexuals in respect of asylum and immigration policies in Council of Europe member states.
- ii. urge the member states:
- a. to re-examine refugee status determination procedures and policies with a view to recognising as refugees those homosexuals whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Geneva Convention and the 1967 Protocol relating to the Status of Refugees;
  - b. to adopt criteria and guidelines dealing with homosexuals seeking asylum;
  - c. to ensure that the authorities responsible for the refugee status determination procedure are well informed about the overall situation in the countries of origin of applicants, in particular concerning the situation of homosexuals and their possible persecution by state and non-state agents;
  - d. to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnerships and families;
  - e. to take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples;
  - f. to encourage the establishment of non-governmental organisations to help homosexual refugees, migrants and bi-national couples to defend their rights;
  - g. to co-operate more closely with UNHCR and national non-governmental organisations, promote the networking of their activities, and urge them to systematically monitor the observance of the immigration and asylum rights of gays and lesbians;
  - h. to ensure that the training of immigration officers who come into contact with asylum seekers and bi-national same-sex couples includes attention to the specific situation of homosexuals and their partners.

# **Committee of Ministers' reply to Recommendation 1470 (2000) – Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe**

*(Adopted by the Committee of Ministers on 7 March 2001  
at the 744th meeting of the Ministers' Deputies)*

1. The Committee of Ministers has given careful consideration to Parliamentary Assembly Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe.
2. This recommendation has been duly brought to the attention of the member governments and the competent steering committees answerable to the Committee of Ministers.
3. The Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) and the European Committee on Migration (CDMG) have taken steps to give effect to the Assembly's request concerning the holding of exchanges of views and experience on this subject.
4. The CAHAR has included on its future agenda the question of "recognition of homosexuals as members of a particular social group [within the meaning] of the 1951 Geneva Convention with a view to ensuring that persecution on grounds of homosexuality is recognised as a ground for asylum", as formulated by the Assembly. In the course of its future work it will also consider the possibility of "develop[ing] guidelines for the treatment of homosexuals who are refugees", as proposed by the Assembly.
5. The CDMG has, for its part, asked the Committee of Experts on the Legal Status and Rights of Immigrants to consider the right of homosexual couples to family reunion.
6. The establishment of a European system for data collection and documentation of abuses against homosexuals and co-operation with groups and associations defending the human rights of homosexuals in respect of immigration policies do not fall within the remit of these committees.

# **Recommendation 1117 (1989) of the Parliamentary Assembly – The conditions of transsexuals**

*(Adopted by the Assembly on 29 September 1989)*

The Assembly,

1. Considering that transsexualism is a syndrome characterised by a dual personality, one physical, the other psychological, together with such a profound conviction of belonging to the other sex that the transsexual person is prompted to ask for the corresponding bodily “correction” to be made;
2. Considering that modern medical progress, and in particular recourse to sexual conversion surgery, enable transsexuals to be given the appearance and, to a great extent, the characteristics of the sex opposite to that which appears on their birth certificate;
3. Observing that this treatment is of a nature to bring the physical sex and the psychological sex into harmony with one another, and so give such persons a sexual identity which, moreover, constitutes a decisive feature of their personality;
4. Believing that account of the changes brought about should be taken in the transsexual’s civil status records by adding such details to the original record so as to update the data concerning sex in the birth certificate and identity papers, and by authorising a subsequent change of forename;
5. Considering that a refusal of such amendment of the civil status papers exposes persons in this situation to the risk of being obliged to reveal to numerous people the reasons for the discrepancy between their physical appearance and legal status
6. Noting that transsexualism raises relatively new and complex questions to which states are called upon to find answers compatible with respect for human rights;
7. Observing that, in the absence of specific rules, transsexuals are often the victims of discrimination and violation of their private life;
8. Considering, furthermore, that the legislation of many member states is seriously deficient in this area and does not permit transsexuals, particularly those who have undergone an operation, to have civil status amendments made to take account of their appearance, external morphology, psychology and social behaviour;
9. Considering the case law of the European Commission and Court of Human Rights;
10. Referring to the resolution which the European Parliament adopted on 12 September 1989, in which, among other things, it called on the Council of Europe to enact a convention for the protection of transsexuals,

11. Recommends that the Committee of Ministers draw up a recommendation inviting member states to introduce legislation whereby, in the case of irreversible transsexualism:
  - a. the reference to the sex of the person concerned is to be rectified in the register of births and in the identity papers;
  - b. a change of forename is to be authorised;
  - c. the person's private life is to be protected;
  - d. all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention on Human Rights.

## **Committee of Ministers' reply to Recommendation 1117 (1989) – The conditions of transsexuals**

*(Adopted by the Committee of Ministers on 17 February 1994  
at the 508th meeting of the Ministers' Deputies)*

The Committee of Ministers, having (twice) consulted the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Human Rights (CDDH) and having thoroughly considered Recommendation 1117 (1989), gives the following supplementary reply to the Parliamentary Assembly:

1. The Committee of Ministers shares the Assembly's view that transsexualism raises complex questions requiring solutions compatible with respect for fundamental rights. It declares its awareness of the serious problems faced by transsexuals, who are often victims of discrimination.

It notes, however, that uncertainty concerning the underlying nature of transsexualism has unfortunately not entirely disappeared, although attitudes have changed and science has progressed. It observes with satisfaction in this connection that the recent case law of the European Commission and Court of Human Rights has prompted encouraging developments in the judicial practice of certain member states regarding legal recognition of the new sexual identity of transsexuals.

It also stresses that the legal situations resulting from transsexualism, particularly as regards marriage and filiation, are proving very complex and necessitate detailed, comprehensive study (including legal recognition of their new sexual identity).

2. The Committee of Ministers notes the fact that decisions concerning the legal status of transsexuals are often still left to administrative or judicial authorities in the member states, although some states have already enacted specific legislation to enable transsexuals to undergo sex reassignment surgery and to have their new sexual identity recognised.

In this connection, the Committee of Ministers draws from the case law of the European Court the conclusion that the Court considers state practice and national case law allowing, *inter alia*, for changes in registers of births after sexual conversion surgery to be an essential element for judging whether or not the Convention has been violated. The Committee is also aware of the fact that the Court is conscious of the problems transsexuals face and considers it important to keep the need for appropriate legal measures under review.

The Committee of Ministers, while noting, like the European Court of Human Rights in the case of *B. v. France*, that there is no broad consensus on this matter among Council of Europe member states, considers that there is a trend towards recognition of post-operative transsexuals which manifests itself in, for example, the authorisation of changes on birth certificates.

3. The Committee of Ministers is therefore of the opinion that:
  - i. for a transsexual the transformation he or she seeks to achieve with the assistance of medical science is only completed when his or her newly acquired sexual identity is recognised by law;

- ii. this does no more than give legal effect to a fait accompli based on medical judgment and action which is irreversible;
  - iii. with a view to providing legal certainty both for the individual and society, and to giving the best possible guidelines to the judiciary and administrative authorities, minimum requirements for sex reassignment surgery and the legal recognition of the new sexual identity would be clearly preferable to approaches of an ad hoc nature.
4. The Committee of Ministers recalls that all member states should take account of the case law of the European Court with regard to the legal recognition of transsexuals, the emphasis the Court lays on the seriousness of the problems affecting transsexuals, and the importance of keeping under review the need for appropriate legal measures in this area.
  5. The Committee of Ministers considers, bearing in mind also the results of the 23rd Colloquy on European Law, that the legal situation of transsexuals is unsatisfactory and that information is urgently needed in this area. It therefore notes with satisfaction that the European Committee on Legal Co-operation (CDCJ) has amended the terms of reference of the Committee of Experts on Family Law (CJ-FA) to allow it to study the whole question of transsexuals in detail. The CJ-FA has thus been given the following terms of reference: "Study of questions concerning transsexuals in order to assist member States in dealing with legal problems concerning transsexuals and the preparation of a report containing criteria and possible means of solving these problems." In the light of this report, the CDCJ will make any appropriate proposals for the possible preparation of an international instrument on this question.

# **Recommendation 924 (1981) of the Parliamentary Assembly – Discrimination against homosexuals**

*(Adopted by the Assembly on 1 October 1981)*

The Assembly,

1. Recalling its firm commitment to the protection of human rights and to the abolition of all forms of discrimination;
2. Observing that, despite some efforts and new legislation in recent years directed towards eliminating discrimination against homosexuals, they continue to suffer from discrimination and even, at times, from oppression;
3. Believing that, in the pluralistic societies of today, in which of course traditional family life has its own place and value, practices such as the exclusion of persons on the grounds of their sexual preferences from certain jobs, the existence of acts of aggression against them or the keeping of records on those persons, are survivals of several centuries of prejudice;
4. Considering that in a few member states homosexual acts are still a criminal offence and often carry severe penalties;
5. Believing that all individuals, male or female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination;
6. Emphasising, however, that the state has a responsibility in areas of public concern such as the protection of children,
7. Recommends that the Committee of Ministers:
  - i. urge those member states where homosexual acts between consenting adults are liable to criminal prosecution, to abolish those laws and practices;
  - ii. urge member states to apply the same minimum age of consent for homosexual and heterosexual acts;
  - iii. call on the governments of the member states:
    - a. to order the destruction of existing special records on homosexuals and to abolish the practice of keeping records on homosexuals by the police or any other authority;
    - b. to assure equality of treatment, no more no less, for homosexuals with regard to employment, pay and job security, particularly in the public sector;
    - c. to ask for the cessation of all compulsory medical action or research designed to alter the sexual orientation of adults;
    - d. to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them;
    - e. to ask prison and other public authorities to be vigilant against the risk of rape, violence and sexual offences in prisons.

# **Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons**

*(Adopted by the Standing Committee of the Congress  
on 28 March 2007)*

1. True democracy requires the enjoyment of freedom of expression and assembly without interference by public authority, as enshrined in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 10 and 11);
2. The protection of these rights is essential for ensuring the accountability and responsiveness of governing authorities, and thus also critical to the protection of all other basic human rights;
3. Furthermore, the right to express and share one's identity with others is an integral part of tolerance – the principle of protecting society's diversity through a free exchange of ideas which can lead to an enrichment at the level of the individual and of society;
4. These freedoms naturally carry with them certain duties and responsibilities and as such, the state, regional or local authorities may impose restrictions, strictly only where these are prescribed by law, deemed necessary in a democratic society, and pursue the legitimate aims listed in the relevant regional and international human rights instruments;
5. Regrettably, recent homophobic incidents in a number of member states have highlighted not only the systematic violation of the basic rights of the lesbian, gay, bisexual and transgendered (LGBT) community but have shown that in many cases the very authorities who have the positive obligation to protect their citizens against discrimination are actually endorsing and in some cases actively supporting or perpetrating this injustice;
6. Given that freedom of expression and assembly is at the core of a democratic society, and that the role of local authorities in upholding these rights is fundamental, and in light of these recent events, the Congress of Local and Regional Authorities has drawn up an overview of the implementation of these rights at local level throughout Europe, together with the recommendations set out below;
7. The Congress recommends that the Committee of Ministers of the Council of Europe ask member states to ensure that:
  - a. they take a public stand against discrimination on the grounds of belonging to a sexual minority as well as appropriate steps to combat hate speech on the basis of the principles laid down in the Committee of Ministers Recommendation No. R (97) 20;
  - b. take note of and apply the forthcoming "Guidelines on Freedom of Peaceful Assembly" being drafted by the OSCE/ODIHR expert panel on freedom of assembly;

- c. they investigate with all the rigour at their disposal all cases of violence, or hate speech during LGBT or LGBT-related events to determine whether discrimination or homophobia may have played a role in the commission of a crime, and ensure prosecution of those responsible;
  - d. where necessary they take positive measures as required by the European Court of Human Rights, to guarantee effective freedom of assembly and expression across their national territory at state, local and regional level;
  - e. any civil, criminal or administrative law measures that interfere with freedom of expression or assembly are prescribed by law, serve a legitimate aim (as stated in the relevant regional and international instruments) and are no more restrictive than is necessary to achieve that aim;
  - f. LGBT groups are consulted when reforming any of the above measures to ensure the mutual benefit of all concerned and foster a spirit of co-operation rather than confrontation;
  - g. organisers of events on which restrictions have been placed or which have been banned have the right of access to an independent court or tribunal so that they may challenge these restrictions;
  - h. local authorities are kept informed of all new legislation and relevant case law pertaining to freedom of assembly and expression and anti-discrimination measures;
  - i. while the provision of financial or other support by local authorities to the organisers of LGBT events must be provided equally to all similar groups, there should no statutory bar to local authorities assisting or publicising LGBT events;
8. The Congress invites the Commissioner for Human Rights to work closely with its Committee on Social Cohesion with regard to questions of discrimination against members of the LGBT community, for example in the context of co-operation with ombudspersons.

# **Committee of Ministers' reply to Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe on freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons**

*(Adopted by the Committee of Ministers on 16 January 2008 at the 1015th meeting of the Ministers' Deputies)*

1. The Committee of Ministers has given careful consideration to Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe on freedom of assembly and expression for lesbians, gays, bisexuals and transgender persons. It has brought the recommendation to the attention of the governments of the member states and has forwarded it to the Council of Europe Commissioner for Human Rights for information as well as to the Steering Committee for Human Rights (CDDH), the Steering Committee on the Media and New Communication Services (CDMC) and the Steering Committee on Local and Regional Democracy (CDLR), for information and possible comments. The comments received are appended to this reply.
2. The Committee of Ministers underlines that tolerance is a universal value, inseparable from a principle which is also universal, that of the equal dignity of all human beings. The Council of Europe is promoting a clear message of tolerance and non-discrimination. In particular, the Committee of Ministers shares the Congress' concerns about the right to freedom of assembly and expression for lesbian, gay, bisexual and transgender persons (LGBT) in a number of Council of Europe member states. The right to freedom of expression, in particular to share and express one's identity, is fundamental to promoting diversity and tolerance in society. The Committee of Ministers refers to its Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance, which underlines the importance of professional media practice and responsibility in protecting various groups and individuals from negative stereotyping and in reflecting their positive contributions to society. It also recalls that pursuant to Article 10 of the European Convention on Human Rights, the state is the ultimate guarantor of the right of everyone to hold opinions and to receive and impart information and ideas without interference by public authorities.
3. Concerning freedom of assembly, the Committee of Ministers recalls that, while the Convention allows for restrictions on the exercise of the rights to freedom of expression and freedom of assembly, such restrictions must be prescribed by law and be necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others. According to the established case law of the European Court of Human Rights, peaceful demonstrations, be they in favour of the rights of LGBT persons or others, cannot be banned simply because of the existence of attitudes hostile to the demonstrators or to the causes they advocate. On the contrary, the state has a duty to take reasonable and appropriate measures to

enable lawful demonstrations to proceed peacefully. In a series of judgments, the Court has emphasised that any discrimination based on sexual orientation is contrary to the Convention.<sup>140</sup> All member states must observe the Convention when they apply national law, notably in the light of the case law of the Court.

4. Like the Congress, the Committee of Ministers believes that local authorities play a central role in upholding their citizens' rights to freedom of assembly and expression. It recalls that its Recommendation No. R (97) 20 on "hate speech" asserts that public authorities and institutions have a "special responsibility to refrain from statements ..., speech ... and other forms of discrimination or hatred based on intolerance" (Principle 1), especially when it is disseminated through the media. Any legitimate interference with freedom of expression should be "narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria (and) subject to independent judicial control" (Principle 3).<sup>141</sup> In this context the Committee of Ministers wishes to invite all member states to implement its Recommendation No. R (97) 20 on "hate speech" and Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance in respect of lesbians, gays, bisexuals and transgender persons.
5. Finally, the Committee of Ministers refers to its reply to Written Question No. 524 by Mrs Acketoft on the "Ban on a Chişinău demonstration by homosexuals" and to its intention to enhance Council of Europe action in this area.

### *Appendix to the reply*

#### *Comments of the Steering Committee on the Media and New Communication Services (CDMC)*

The Steering Committee on the Media and New Communication Services (CDMC) fully supports and shares the views and recommendations of the Congress of Local and Regional Authorities of the Council of Europe.

The CDMC is deeply concerned by the homophobic incidences in a number of member states against lesbians, gays, bisexuals and transgender persons. Irrespective of sexual orientation, it is of paramount importance that all human beings are treated equally with respect and dignity.

The rights and freedoms of all persons, including lesbians, gays, bisexuals and transgender persons, are vital for true democracy. The right to freedom of expression, in particular to share and express one's identity, is fundamental to promoting diversity and tolerance in society. In this regard, the media plays an important role

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140. Among other authorities, *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 2001; *L. and V. v. Austria*, judgment of 9 January 2003; *Karner v. Austria*, judgment of 24 July 2003; *B.B. v. the United Kingdom*, judgment of 10 February 2004.

141. See Recommendation No. R (97) 20 on "hate speech", which provides an excellent basis on which to ask member states to take a public stand against discrimination against sexual minorities in line with the principles of the recommendation (point 7.a), to investigate and, where necessary, prosecute criminal offences against or related to lesbians, gays, bisexuals and transgender persons (point 7.c) and to ensure that any legal interference with freedom of expression is, *inter alia*, no more restrictive than necessary (point 7.e).

in promoting understanding, social cohesion, cultural diversity and tolerance by enabling lesbians, gays, bisexuals and transgender persons to make their views heard.

In this context, the CDMC recalls Committee of Ministers' Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance, which underlines the importance of professional media practice and responsibility in protecting various groups and individuals from negative stereotyping and in reflecting their positive contributions to society.

The CDMC reasserts that, pursuant to Article 10 of the European Convention on Human Rights, the state is the ultimate guarantor of the right of everyone to hold opinions and to receive and impart information and ideas without interference by public authorities. This includes the positive obligation for the state to provide effective protection and ensure respect for lesbians, gays, bisexuals and transgender persons who wish to assemble and express themselves, even if their views are unpopular or are not shared by the majority of society.

The CDMC is extremely concerned by the “many cases” in member states where state authorities have endorsed and even supported or perpetuated discrimination against lesbians, gays, bisexuals and transgender persons. Such interference by public authorities runs contrary to Article 10 of the European Convention on Human Rights and the case law of the European Court of Human Rights.<sup>142, 143</sup>

The Committee of Ministers Recommendation No. R (97) 20 on “hate speech” asserts that public authorities and institutions have a “special responsibility to refrain from statements (...), speech (...) and other forms of discrimination or hatred based on intolerance” (Principle 1), especially when it is disseminated through the media. Any legitimate interference with freedom of expression should be “narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria (and) subject to independent judicial control” (Principle 3).

In this connection, the CDMC welcomes the Congress' reference to the Committee of Ministers Recommendation No. R (97) 20 on “hate speech” which provides an excellent basis on which to ask member states to take a public stand against discrimination against sexual minorities in line with the principles of the recommendation (point 7.a), to investigate and, where necessary, prosecute criminal offences against or related to lesbians, gays, bisexuals and transgender persons (point 7.c) and to ensure that any legal interference with freedom of expression is *inter alia* no more restrictive than necessary (point 7.e).

In the framework of the Congress' recommendations, the CDMC would suggest that member states are invited both to take note of and implement Committee of Ministers Recommendation No. R (97) 20 on “hate speech” and Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance in respect of lesbians, gays, bisexuals and transgender persons.

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142. *Özgür Gündem v. Turkey*, judgment of 16 March 2000; *Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988.

143. *Bączkowski and Others v. Poland*, judgment of 3 May 2007.

# **Resolution OING D (2008) RES1 of the Human Rights Grouping of the Conference of International Non- Governmental Organisations on human rights defenders working for the rights of lesbian, gay, bisexual and transgender persons**

*(Adopted on 23 January 2008)*

The Human Rights Grouping of the Council of Europe INGO Conference,

Recalling that all human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind;

Paying tribute to all human rights defenders, whatever their particular cause or role;

Recognising the role of human rights defenders working for the rights of lesbian, gay, bisexual and transgender persons (“LGBT human rights defenders”);

Concerned that in some Council of Europe member states they face intolerance, homophobic speech, violence and repeated attempts to deny them fundamental rights such as freedom of association, assembly and expression;

Disturbed that these expressions and actions are sometimes initiated or encouraged, whether directly or indirectly, by leading figures in society, particularly in politics or faith institutions;

Concerned that in some Council of Europe member states certain courts, public prosecutors and the police have on occasion failed to uphold their rights, or, worse, have worked to deny them;

Concerned that even some ombudspersons, equality institutions and human rights NGOs have been reluctant to support LGBT human rights defenders;

Welcoming the commitment of heads of state and government “to play a dynamic role” in protecting human rights defenders;

Appreciating the support of the Commissioner for Human Rights, the Secretary General and the Congress of Local and Regional Authorities through its report on freedom of assembly;

Noting the view expressed by the European Court of Human Rights in its Warsaw Equality March judgment that the positive obligation of states to secure the effective enjoyment of freedom of association and assembly “is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation”;

Calls upon member states

- I. to fulfil their obligation to secure the exercise of fundamental rights by LGBT human rights defenders, ensuring that there is the full support of the police, local authorities and other state institutions, and that public officials uphold these rights;

- II. to promote the fundamental rights of LGBT people regardless of any pressure, especially, on the basis of Article 9 of the European Convention on Human Rights, regarding such pressure from religious authorities;

The Committee of Ministers and the Parliamentary Assembly to take into consideration in the application of their systems of monitoring, the obligations undertaken by member states at the moment of accession to the council of Europe regarding the situation of human rights defenders; working for the rights of LGBT people;

The Committee of Ministers to take a lead in supporting LGBT human rights defenders, by ensuring that their needs are addressed in the work of the Council of Europe, including in any future actions to support human rights defenders, in existing programmes such as human rights in a multicultural society, and intercultural dialogue, in any successor to the “All Different, All Equal” campaign, and in the work of the intergovernmental steering committees on human rights and the media;

Politicians, faith leaders, the media and others in public life to respect the fundamental rights of LGBT people and their human rights defenders, and not only to refrain from the use of language inciting intolerance and violence, but rather to support these rights publicly, contributing to the development of a more favourable public opinion;

Ombudspersons, equality institutions and human rights NGOs to ensure the same support for LGBT human rights defenders as for those in any other field;

Those responsible for educational policy to include materials promoting understanding of the fundamental rights of LGBT people in curricula;

Members of the NGO Human Rights Grouping to work with their members to raise awareness of LGBT human rights defenders.

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