

# **SUBMISSION TO THE STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH) OF THE COUNCIL OF EUROPE**

THE IMPLEMENTATION OF RECOMMENDATION  
CM/REC(2010) 5 OF THE COMMITTEE OF  
MINISTERS TO MEMBER STATES ON  
MEASURES TO COMBAT DISCRIMINATION ON  
GROUNDS OF SEXUAL ORIENTATION OR  
GENDER IDENTITY

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## INTRODUCTION

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

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

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

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

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

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

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

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

Hate crimes<sup>2</sup> perpetrated on the grounds of real or perceived sexual orientation or gender identity of the victims are a serious form of discrimination. According to human rights law, discrimination is a difference of treatment on prohibited grounds without an objective and reasonable justification.<sup>3</sup>

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

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

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

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

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

**Bulgaria's** Criminal Code does not include sexual orientation and gender identity among the lists of hate motives on the basis of which a crime can be perpetrated. In the rare cases where homophobic attacks are reported and prosecuted, the suspects are often charged with "hooligan" motives under Article 131(2) of the Criminal Code; hate motives are not taken

into account. Article 325 of the Criminal Code defines hooliganism as indecent acts, grossly violating the public order and expressing open disrespect for society.

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

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

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

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

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

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

In **Germany**, the Criminal Code does not include a clear definition of hate crime.<sup>13</sup> Since 2001, the police criminal registration and definition system includes the category of “politically motivated crimes” (KPM-D-PMK).<sup>14</sup> In this system, hate crime (with the two sub-categories: “xenophobic” and “anti-Semitic” crimes) constitutes a specific sub-category of politically motivated crimes.<sup>15</sup> These categories allow the collection of statistics relating to

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these forms of crime, though none of them is defined in the law. However, the German Criminal Code does not clearly define politically motivated crimes. According to section 46 *Strafgesetzbuch* (StGB), judges can take into account the circumstances in which a crime has been perpetrated in order to mitigate or aggravate the sentence. On this basis judges may take into account the hate motive when determining the penalty. The gaps in German criminal law raise concerns over the extent to which any alleged hate motive, including on grounds of sexual orientation and gender identity, can be thoroughly and effectively investigated and prosecuted.

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

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

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

**Homophobic and transphobic hate crimes are a serious form of discrimination against LGBTI individuals. Council of Europe member states have the duty to protect all individuals from discrimination, harassment and violence, regardless of their real or perceived sexual orientation or gender identity. Legislation tackling homophobic and transphobic hate crime should be adopted as well as other policy measures aimed at ensuring that any alleged homophobic and transphobic hate motive is thoroughly and effectively investigated and prosecuted and duly taken into account in the sentencing. Data on homophobic and transphobic hate crime should be collected by state authorities and measures aimed at providing support and redress to victims adopted.**

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



## 2. FREEDOM OF EXPRESSION AND PEACEFUL ASSEMBLY

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

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

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

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

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

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

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

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

who had been calling for a ban and who held a counter-demonstration on the same day when the pro-equality march was supposed to take place.

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

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

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

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

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

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

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

Any restriction on these rights should be prescribed by law, demonstrably proportionate and necessary to achieve a legitimate aim such as the protection of public safety, order, health or morals or the fundamental rights of the others. The European Court of Human Rights has

made clear that the right to freedom of expression guarantees the expression of ideas or thoughts which might offend, shock or disturb some sections of the population.<sup>27</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

#### 3.1 GENDER LEGAL RECOGNITION FOR TRANS PEOPLE<sup>34</sup>

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

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

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

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

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

These mandatory requirements strengthen the gender binary system and result in the violation of many human rights including the right to privacy and family life, the right to be free from ill and degrading treatment and the right to the highest attainable standards of health. Such procedures exercise a particularly constraining power on those who do not necessarily identify with the opposite gender to the one they were assigned at birth. A substantial share of transgender individuals identify themselves somewhere in the gender continuum between male and female or do not necessarily identify themselves with any specific gender. For instance, only around 68 per cent of the transgender women surveyed in Belgium felt either fully or mainly female. More than 23 per cent felt both male and female. According to the same study around 60 per cent of transgender men felt either fully or mainly male. The research concluded that a third of transgender people do not feel comfortable with the binary male/female identities.<sup>36</sup>

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

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

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

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

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

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

LGBTI people experience other forms of discrimination besides hate-based violence. Sometimes they are discriminated against and harassed at work or bullied at school because of their real or perceived sexual orientation or gender identity, or are subject to degrading treatment by state authorities. In Turkey, for example, gay men are targeted by military authorities and trans people by the police.<sup>43</sup>

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

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

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

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

## 5. HEALTH

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

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

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

One of the main issues that continue to have a profound effect on treatment of and attitudes to trans individuals is the pathologisation of their gender identities, which are still classified as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association (APA) and the World Health Organisation (WHO) International Classification of Diseases and Related Health Problems (ICD). Amnesty International calls for the removal of trans identities from the list of mental health disorders and for reclassification of relevant aspect of trans health care in a non-stigmatising manner to facilitate access to health care and ensure that specific trans health care is consistent with the recommendations of the World Professional Organisation for Transgender Health (WPATH).<sup>51</sup>

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

International human rights treaty bodies have for instance criticised non-medically necessary surgery on intersex children in **Germany**. In 2011 the United Nations Committee Against



Torture in the examination of Germany expressed its continued concern “*at cases where gonads have been removed and cosmetic surgeries of reproductive organs have been performed, implying lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians, where neither investigation, nor measures of redress have been introduced.*”<sup>53</sup>

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

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

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

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

## 6. NATIONAL HUMAN RIGHTS STRUCTURES

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

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

## 7. OTHER ISSUES

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

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

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

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

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

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

## CONCLUSIONS AND FOLLOW-UP

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

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

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

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

## APPENDIX

### 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.

## ENDNOTES

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

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

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

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

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

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

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

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

<sup>7</sup> Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011.

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

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

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

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

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

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

<sup>14</sup> Federal Ministry of the Interior, Lexikon, Meldesysteme "Politisch motivierte Kriminalität" (KPM - PMK) – definition, available at:

[http://www.bmi.bund.de/cIn\\_104/DE/Service/Glossar/Functions/glossar.html?nn=105094&lv2=296444&lv3=151906](http://www.bmi.bund.de/cIn_104/DE/Service/Glossar/Functions/glossar.html?nn=105094&lv2=296444&lv3=151906) (accessed 14 February 2013).

<sup>15</sup> Federal Ministry of the Interior (BMI), Erster Periodischer Sicherheitsbericht, Berlin, 2001, pag. 263, available at

[http://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/erster\\_periodischer\\_sicherheitsbericht\\_langfassung\\_de.pdf?\\_\\_blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/erster_periodischer_sicherheitsbericht_langfassung_de.pdf?__blob=publicationFile) (accessed 14 January 2013).

<sup>16</sup> Law N°654/1975 as amended by Law N°205/1993 and by law N°85/2006

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

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

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

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

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

<sup>22</sup> Paragraph 64. *Bączkowski and others v Poland*.

<sup>23</sup> Amnesty International, *Inadequate Protection: homophobic and transphobic hate crime in Croatia* (AI

Index: EUR 64/001/2011).

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

<sup>25</sup> *Genderdoc-M v Moldova* (Application no. 9106/06).

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

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

<sup>28</sup> General Comment No. 12: the right of the child to be heard

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

<sup>30</sup> Translation from Lithuanian is available at: <http://www.ighrc.org/binarydata/ATTACHMENT/file/000/000/319-1.pdf> (accessed 14 January 2013).

<sup>31</sup> Amnesty International, *Submission to the United Nations Human Rights Committee: Lithuania, For the 105th Session of the HRC (9-27 July 2012)* (AI index: EUR 53/002/2012), p.8.

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

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

<sup>34</sup> Amnesty International refers to transgender, or trans, people as individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex they were assigned at birth. Trans is a political umbrella term used to describe a wide range of identities, experiences, and people whose appearance seem to conflict with the binary gender norms of society, including transsexuals, transgender, travesti, gender queers, cross dressers, drag queens, drag kings, and many more.

<sup>35</sup> Council of Europe Commissioner of Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011, p.9.

<sup>36</sup> Joz Motmans, *Being transgender in Belgium. Mapping the social and legal situation of transgender people*. 2010.

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

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

<sup>39</sup> Cour de Cassation, B c France, arret 361.

<sup>40</sup> See for instance Inter-LGBT [http://www.acthe.fr/upload/ministerejustice\\_chgt\\_EC.pdf](http://www.acthe.fr/upload/ministerejustice_chgt_EC.pdf)

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

<sup>42</sup> *L. v Lithuania*, application no. 27527/03

<sup>43</sup> Not an illness nor a crime, p. 12-20

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

<sup>45</sup> Law of 10 May 2007 « tendant à lutter contre la discrimination entre les femmes et les homes ».

<sup>46</sup> Law of 10 May 2007 « tendant à lutter contre la discrimination entre les femmes et les homes ».

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

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

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

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

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

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

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

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

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

<sup>56</sup> *Schalk and Kopf v Austria*, Application no. 30141/04, para.94.

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