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## Tackling discrimination on the grounds of sexual orientation and gender identity

### Report<sup>1</sup>

Committee on Equality and Non-Discrimination

Rapporteur: Mr Håkon HAUGLI, Norway, Socialist Group

### Summary

Since 2010, when both the Parliamentary Assembly and the Committee of Ministers adopted far-reaching texts on how to tackle discrimination on the grounds of sexual orientation and gender identity, important positive developments have occurred in some Council of Europe member States, including the introduction of specific legislative measures, action plans and strategies.

Despite this progress, however, prejudice against lesbian, gay, bisexual and transgender persons (LGBTs) is widespread in society. Discrimination against LGBTs remains a serious problem, as indicated by repeated infringements of the rights to freedom of expression and peaceful assembly, and the authorities' failure to provide protection against homophobic and transphobic violence. The introduction of legislation or draft legislation on the prohibition of so-called homosexual propaganda in countries such as Lithuania, the Republic of Moldova, the Russian Federation and Ukraine is at variance with these countries' legal obligations. It would also legitimise the prejudice against LGBTs which all too often is fuelled by inconsiderate discourse by politicians and other authoritative figures.

Council of Europe member States should take measures to prevent discrimination on the grounds of sexual orientation and gender identity, promote equality and tackle homophobia and transphobia. The Republic of Moldova, Poland and the Russian Federation should give full execution to the judgments of the European Court of Human Rights.

The Committee of Ministers should continue to strengthen its activities in this area with a view to ensuring the full implementation of its Recommendation CM/Rec(2010)5.

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1. Reference to committee: Doc. 13007, Reference 3906 of 1 October 2012.

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## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly welcomes the positive developments in tackling discrimination on the grounds of sexual orientation and gender identity which have occurred since the adoption of its [Resolution 1728 \(2010\)](#), such as the introduction, by different Council of Europe member States, of specific legislative measures, action plans and strategies to promote equality and tackle discrimination against lesbian, gay, bisexual and transgender persons (LGBTs) as well as to tackle homophobic and transphobic speech and violence.
2. Despite this progress, the Assembly regrets that prejudice, hostility and discrimination on the grounds of sexual orientation and gender identity remain a serious problem, affecting the lives of tens of millions of Europeans. They manifest themselves in hate speech, bullying and violence, often affecting young people. They also manifest themselves through the repeated infringement of the right of peaceful assembly for LGBTs.
3. The Assembly acknowledges that societal changes require time and occur unevenly within the same country, let alone between different countries. However, the Assembly also believes that politicians, through their example and discourse, as well as laws, through their binding nature, are powerful driving forces to promote changes in society and ensure that the respect for human rights is not only a legal obligation but also a shared value.
4. In this regard, the Assembly expresses concern vis-à-vis homophobic statements by politicians and other personalities in a position of authority, which, far from being manifestations of freedom of expression, amount to hate speech and incitement to hostility, discrimination and violence.
5. Furthermore, the Assembly expresses deep concern at the introduction, at local, regional and finally at national or federal level, of legislation or draft legislation on the prohibition of so-called homosexual propaganda, in a number of Council of Europe member States. These laws and draft laws, which are at variance with freedom of expression and the prohibition of discrimination on account of sexual orientation and gender identity, risk legitimising the prejudice and hostility which is present in society and fuelling a climate of hatred against LGBTs.
6. In the light of these considerations, reaffirming the continued validity of its [Resolution 1728 \(2010\)](#) on discrimination on the grounds of sexual orientation and gender identity, the Assembly calls on Council of Europe member States:
  - 6.1. as regards equality and non-discrimination, to:
    - 6.1.1. ensure the full protection of human rights for all those who are subject to their jurisdiction, including the prohibition of discrimination on the grounds of sexual orientation and gender identity;
    - 6.1.2. ensure that any new legal and policy instrument they adopt in the area of equality and non-discrimination explicitly includes sexual orientation and gender identity;
    - 6.1.3. introduce, without delay, civil legislation protecting against discrimination on grounds of sexual orientation and gender identity in all areas of life, including employment, education, health, access to goods and services, housing, access to social security and social advantages;
    - 6.1.4. devise and implement national action plans/strategies aimed at promoting equality and non-discrimination on the grounds of sexual orientation and gender identity;
    - 6.1.5. introduce clear regulations on public duty, mandating the public services to refrain from discriminating on the grounds of sexual orientation and gender identity;
    - 6.1.6. involve LGBT and human rights organisations in consultations on draft laws and policies concerning discrimination;
    - 6.1.7. adopt criminal legislation introducing sexual orientation and gender identity as grounds for prosecution of hate crimes;

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2. Draft resolution adopted unanimously by the committee on 24 May 2013.

- 6.1.8. introduce binding guidelines for law-enforcement officials to ensure that any alleged hate motive associated with a crime, including hate motives on grounds of sexual orientation and gender identity, is promptly, impartially, effectively and thoroughly investigated and duly taken into account in the prosecution and sentencing of those crimes;
- 6.2. as regards homophobia and transphobia, to:
  - 6.2.1. improve data collection on homophobic and transphobic crimes, as well as on discrimination on the grounds of sexual orientation and gender identity;
  - 6.2.2. organise public campaigns on equality and diversity, as well as against homophobia and transphobia;
  - 6.2.3. support or set up projects against homophobic and transphobic bullying in schools, with a special emphasis on prevention, addressed to and involving students, teachers and school staff;
  - 6.2.4. train police, judiciary and administration officials on homophobia, transphobia and the prohibition of discrimination on the grounds of sexual orientation and gender identity;
  - 6.2.5. set up complaint and support mechanisms for victims of homophobic and transphobic violence, such as hotlines and specific social services, equipped with specialised staff;
7. As regards specific situations of concern, the Assembly calls on:
  - 7.1. the authorities that exercise *de facto* control in the northern part of Cyprus to give full execution to the judgment of the European Court of Human Rights in the case of *Modinos v. Cyprus* and ensure the decriminalisation of consensual same-sex relations between adults, as in the Government-controlled areas of the Republic of Cyprus;
  - 7.2. the authorities of Poland to give full execution to the judgment of the European Court of Human Rights in the case of *Bączkowski and Others v. Poland*;
  - 7.3. the competent authorities of the Republic of Moldova to give full execution to the judgment of the European Court of Human Rights in the case of *Genderdoc-M v. Moldova*; to comply with judicial decisions quashing legislation on the prohibition of so-called homosexual propaganda; and to repeal it if they have not yet done so;
  - 7.4. the authorities of the Russian Federation to give full execution to the judgment of the European Court of Human Rights in the case of *Alekseyev v. Russia*;
  - 7.5. the Parliaments of Ukraine and the Russian Federation not to pursue the examination of the respective draft laws on the prohibition of so-called homosexual propaganda;
  - 7.6. the relevant local and regional authorities in the Russian Federation to repeal legislation on the prohibition of so-called homosexual propaganda.
8. As regards the role of public figures, including parliamentarians, politicians and other people in a position of authority, the Assembly:
  - 8.1. invites them to establish a relationship of dialogue and trust with the LGBT community, also by taking part in Pride marches and similar events;
  - 8.2. calls on them to refrain from homophobic and transphobic discourse and to publicly condemn it;
  - 8.3. proposes to organise awareness-raising activities aimed at parliamentarians on the prevention of homophobia and transphobia, as well as the promotion of Council of Europe standards in the area of non-discrimination on the grounds of sexual orientation and gender identity.

## B. Draft recommendation<sup>3</sup>

1. Following Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, the Council of Europe has strengthened its activities in this area. The Parliamentary Assembly affirms its full support for this course of action and encourages the Committee of Ministers to continue in this direction with a view to ensuring the full implementation of Recommendation CM/Rec(2010)5.
2. Recalling its Resolution ... (2013) on tackling discrimination on the grounds of sexual orientation and gender identity, the Assembly regrets that, despite significant improvements in the protection of human rights for lesbian, gay, bisexual and transgender persons (LGBTs) in some Council of Europe member States, violence, prejudice, hostility and discrimination against them remain a serious problem.
3. Furthermore, the Assembly expresses deep concern at the repeated infringement, in some Council of Europe member States, of the rights of freedom of assembly and freedom of expression in relation to LGBTs and at the clear setback in this area due to the introduction of laws and draft laws on the prohibition of so-called homosexual propaganda.
4. The Assembly considers that Council of Europe action in the area of discrimination on the grounds of sexual orientation and gender identity is highly important to ensure that the same human rights standards are applied in all Council of Europe member States and that the respect for diversity is a shared value without geographical or political divides.
5. In light of the above, the Assembly recommends that the Committee of Ministers:
  - 5.1. ensure regular follow-up of Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity and conduct periodic reviews of its implementation;
  - 5.2. ensure that its activities in the areas of youth, equality, human dignity and intercultural dialogue, including its religious dimension, mainstream the issue of non-discrimination on the grounds of sexual orientation and gender identity;
  - 5.3. intensify its work against homophobia and transphobia, with a particular emphasis on prevention in schools and sports;
  - 5.4. set up a model online training course on homophobia, transphobia and discrimination on the grounds of sexual orientation and gender identity for the police, prosecutors and the judiciary, which could subsequently be adapted at national level;
  - 5.5. explicitly include sexual orientation and gender identity as prohibited grounds of discrimination in all its future relevant conventions;
  - 5.6. consider the feasibility of joint action with the European Union Agency for Fundamental Rights (FRA) in order to ensure the collection of comparable Council of Europe-wide data and information on the situation of LGBTs;
  - 5.7. ensure that the judgments of the European Court of Human Rights, including those concerning discrimination on the grounds of sexual orientation and gender identity, are effectively implemented without delay, including through the adoption of general measures to prevent further violations.

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3. Draft recommendation adopted unanimously by the committee on 24 May 2013.

## C. Explanatory memorandum by Mr Haugli, rapporteur

### 1. Trends and divides

1. Amongst international organisations, the Council of Europe has taken a leading role in the fight against discrimination on the grounds of sexual orientation and gender identity. In 2010, the Committee of Ministers adopted a far-reaching recommendation on this matter.<sup>4</sup> In the same year, the Parliamentary Assembly adopted [Resolution 1728 \(2010\)](#) and [Recommendation 1915 \(2010\)](#) on discrimination on the basis of sexual orientation and gender identity. These texts represent, to date, the most advanced and detailed recommendations adopted by international organisations in this area.

2. In addition, both the former and the current Commissioner for Human Rights of the Council of Europe have played an outstanding role in raising the visibility of issues concerning lesbian, gay, bisexual and transgender persons (LGBTs) in the context of their activities and in promoting a change of attitudes as well as policy and legislation. The Secretary General of the Council of Europe himself, Thorbjørn Jagland, has taken a firm position against discrimination on the grounds of sexual orientation and gender identity.

3. Despite this clear political will and standard-setting effort on the part of the Council of Europe, the issue of discrimination on the grounds of sexual orientation and gender identity is still politically sensitive and "divisive" amongst Council of Europe member States.

4. Some examples drawn from the Council of Europe experience confirm this diverging approach: during the negotiations that led to the adoption of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, CETS No. 210), some member States objected to the inclusion of sexual orientation and gender identity as grounds for non-discrimination. Similarly, in 2012 the Conference of European Ministers responsible for Youth could not adopt conclusions because of the opposition of the Russian Federation to the inclusion of a reference to sexual orientation and gender identity, which was proposed by Sweden and supported by other member States.<sup>5</sup>

5. This divide is visible also when assessing national developments since 2010, the year of the two above-mentioned landmark Council of Europe texts. In a group of member States there has been significant progress, with the adoption of specific action plans/strategies to promote equality and tackle discrimination, recognition of rights for LGBTs in the areas of adoption, civil partnerships and marriage and the introduction of stronger measures against homophobic and transphobic speech and violence. However, in another group of States there has been a lack of progress or even a deterioration, especially in the area of freedom of expression, assembly and association.

6. It would be simplistic, however, to present the situation as black and white, as totally good in some countries and totally bad in others. Attitudes towards LGBT people, within the same country, are very diversified. The protection of LGBT people against discrimination depends on societal attitudes but also on the existence of adequate laws, policies and political will to implement them, which vary considerably even within the same country.

7. Violence against LGBTs is a problem everywhere in Europe. With the effects of the economic crisis in full sway, and the ensuing radicalisation and strengthening of extremist groups, there has been an increase in acts of verbal or physical abuse against minorities, including LGBT people, in many Council of Europe member States. This may be partly due to the fact that more victims are prepared to report it to the police, or that data collection is improving. But the fact remains that the phenomenon is worrying.

### 2. Aim, approach and working methods for my work

8. I consider Assembly [Resolution 1728 \(2010\)](#) on discrimination on the grounds of sexual orientation and gender identity as the starting point of my work. I totally subscribe to the analysis presented by its rapporteur, Mr Andreas Gross (Switzerland, SOC) and I do not intend to duplicate his work. In the present report, I intend to assess the main developments that have occurred in Council of Europe member States in the area of discrimination on the grounds of sexual orientation and gender identity since the adoption of

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4. Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity.

5. [http://english.pravda.ru/russia/politics/28-09-2012/122300-russia\\_gay\\_rights-0/](http://english.pravda.ru/russia/politics/28-09-2012/122300-russia_gay_rights-0/).

**Resolution 1728 (2010).** My aim is capturing the general trend (progress or setback) as well as addressing specific issues of concern arising in some countries. My recommendations are meant to complement and expand on **Resolution 1728 (2010)**, and not to replace it.

9. I will be consistent with the Yogyakarta Principles on the application of human rights law in relation to sexual orientation and gender identity.<sup>6</sup> These principles were laid down by a group of legal experts in 2007 with the aim of identifying and describing the obligation of States to respect and protect the human rights of all persons regardless of their sexual orientation. Along these lines, I have no intention to suggest that LGBT people should enjoy a special or new category of rights. On the contrary, my aim is to shed light on the discrimination that LGBT people face and which prevents them from enjoying human rights that should belong to all.

10. For the preparation of this report, I have met representatives from civil society, particularly human rights activists from Albania, Hungary, Lithuania, the Russian Federation, Serbia and Ukraine, as well as representatives from Amnesty International, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and the Norwegian Helsinki Committee. In September 2012, I met with LGBT Focal Points, government representatives from various European countries. In Brussels, I had a very interesting meeting with the European Parliament's LGBT-Intergroup. In Strasbourg, I had the opportunity to meet the Ambassador of the Republic of Moldova to the Council of Europe, Ms Tatiana Parvu, and members of several Turkish human rights organisations working on the situation of LGBT people (January 2013). I conducted a fact-finding visit to Hungary (27 February-1 March 2013) and another one to Ukraine (15-16 May 2013).

11. The Conference on "Freedom of expression for LGBT people", which the Committee on Equality and Non-Discrimination organised in Warsaw in March 2013, in co-operation with the Sejm, proved to be essential to collect information and refine my opinion on where Europe stands in relation to the protection of human rights for LGBTs without discrimination.

12. The choice of Poland for this event was particularly meaningful. Poland is a country in which the majority of the population is catholic and which has experienced a totalitarian regime in a similar way as its neighbours. Poland is a good example of how things can change: as recently as 2005, the then Mayor of Warsaw refused to authorise a demonstration for LGBT rights; today freedom of expression, association and assembly are guaranteed, legislation on civil unions is being discussed, LGBTs are active in politics and a conference such as the one that the committee organised could take place in the premises of parliament. As my colleague, Robert Biedron, said: "This would have been unthinkable a few years ago." Then again, as I mentioned in the introduction, the situation is never black and white: just a few days before the conference, a reputable politician, former President Lech Walesa, was widely reported in the media as making negative statements against the presence of LGBTs in politics and labelling homosexuality as contrary to traditional Polish values.<sup>7</sup>

### **3. Scope of the report**

13. I have decided to focus this report on freedom of expression and assembly as well as on the prevention of and protection against homophobia and transphobia. Several considerations have led me to this decision: these are key human rights which respond to basic human needs: the need to express oneself and the need to be protected against violence; regrettably, these are also areas in which recently there have been worrying developments, which I feel should be addressed as a matter of urgency in a number of Council of Europe member States.

14. Transgender persons are included in this report, and the problem of transphobia is mentioned on several occasions. However, I feel that the specific situation of transgender persons is so complex that it requires a separate report. Therefore, I have proposed that a motion on this matter is tabled on behalf of the committee.

### **4. Decriminalisation: an unfinished mission**

15. Criminalisation of same-sex relations between consenting adults has been for decades the main stumbling block in the way of the protection of human rights for LGBTs. Prohibition of same-sex consensual acts between adults survived in several legal systems until relatively recent times. While such prohibition was

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6. [www.unhcr.org/refworld/category,REFERENCE,ICJRISTS,,48244e602,O.html](http://www.unhcr.org/refworld/category,REFERENCE,ICJRISTS,,48244e602,O.html).

7. <http://edition.cnn.com/2013/03/05/world/europe/poland-walesa-anti-gay>.

abolished in most cases during the first half of the 20th century, some countries amended their criminal laws as late as the 1970s, as is the case for my own country, Norway. Others, particularly in central and eastern Europe, kept the prohibition until the late 1990s or early 2000s.

16. The Council of Europe played an important role in the process of decriminalisation, as this measure was requested of countries applying for membership. In the case of Armenia and Romania, the Parliamentary Assembly asked candidate States to amend their criminal law accordingly.<sup>8</sup>

17. Nowadays, the only area in Europe in which criminalisation is still applied is the northern part of Cyprus: as recently as 2012, there have been arrests on the basis of Section 171 of the criminal code, under which same-sex consensual acts can be punished with up to five years' imprisonment. This provision of the Cypriot criminal code was repealed by Cyprus following a judgment of the European Court of Human Rights ("the Court") which found it in breach to Article 8 of the European Convention on Human Rights (ETS No. 5, "the Convention") (right to private life).<sup>9</sup> In spite of this, it has continued to be applied in the northern part of the country, in which the Cypriot authorities cannot exercise effective control.

18. In October 2011, I submitted a Written Question to the Committee of Ministers on "Criminalisation of homosexuality in the northern part of Cyprus", asking what the Committee of Ministers intended to do to ensure that Turkey, which *de facto* exercises control on this part of the island, repeals Section 171.<sup>10</sup> I regret to point out that, on 13 June 2012, due to lack of consensus, the Ministers' Deputies found it impossible to adopt a reply to my question.

19. In an exchange of letters that ensued, the elected representatives of the Turkish Cypriot community at the Parliamentary Assembly, Mr Mehmet Çağlar and Mr Ahmet Eti, explained that their community is largely supportive of amendments to the criminal code ensuring equal rights for everyone, irrespective of their sexual orientation and gender identity. They confirmed this position during the meeting of the Committee on Equality and Non-Discrimination in Warsaw in March 2013. In the meantime, last year, an application was filed against Turkey before the European Court of Human Rights, with the support of the Human Dignity Trust, challenging the criminalisation of same-sex relations in the northern part of Cyprus.<sup>11</sup> I consider that the decriminalisation is long overdue and that it is high time for a change.

## **5. Sexual orientation and gender identity as prohibited grounds of discrimination in national and international law**

20. Decriminalisation is a precondition for but not a guarantee of the enjoyment of human rights by LGBT people. One of the main instruments required to achieve this objective is embedding in the legal framework a specific reference to sexual orientation and gender identity as a prohibited ground of discrimination.

21. Historically, there has been a two-fold evolution: while the oldest constitutions and pieces of legislation do not explicitly mention sexual orientation and gender identity, national courts have progressively interpreted open-ended non-discrimination provisions as including them implicitly. Secondly, the most recent legal instruments mention explicitly sexual orientation and gender identity; sometimes this is even the case at constitutional level, such as for Sweden and Portugal.

22. However, this pattern has not been consistently followed. In the Republic of Moldova, for instance, new anti-discrimination legislation was introduced in 2012, as part of the National Action Plan on Human Rights, following a long process of consultation with civil society and international organisations, including the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR). Despite this positive development, I regret that sexual orientation is explicitly mentioned as a prohibited ground of discrimination only in relation to employment. Of course it will be of key importance how anti-discrimination legislation in this country will be implemented and what further measures will be taken in the execution of the Action Plan.

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8. Assembly [Opinion 176 \(1993\)](#) on the application by Romania for membership of the Council of Europe and [Opinion 221 \(2000\)](#) on Armenia's application for membership of the Council of Europe.

9. Case of *Modinos v. Cyprus*, Application No. 15070/89, judgment of 22 April 1993.

10. Written question No. 608 to the Committee of Ministers, [Doc. 12782](#).

11. [www.pinknews.co.uk/2012/02/07/northern-cyprus-anti-gay-law-to-be-challenged/](http://www.pinknews.co.uk/2012/02/07/northern-cyprus-anti-gay-law-to-be-challenged/).

23. In Hungary, the constitution which was adopted in April 2011 and entered into force on 1 January 2012 does not explicitly include sexual orientation and gender identity amongst the prohibited grounds of discrimination (Article XIV). Although the list of grounds in Article XV is open-ended and therefore may implicitly include sexual orientation and gender identity, the European Commission for Democracy through Law (Venice Commission) criticised the exclusion, saying that it “might create the impression that discrimination on this ground is not considered to be reprehensible”.<sup>12</sup> The European Parliament expressed similar concerns.<sup>13</sup>

24. In Ukraine, adopting a comprehensive anti-discrimination law is part of the conditions that the European Union has set for the conclusion of an association agreement. However, the explicit inclusion of sexual orientation among the grounds of prohibited discrimination meets with opposition in parliament.

25. The same pattern from the implicit to the explicit inclusion of sexual orientation and gender identity and sexual orientation as a prohibited discrimination ground can be found in international instruments. Although it is not explicitly mentioned in the main United Nations Human Rights instruments, all the treaty bodies set up by these instruments have held that sexual orientation and gender identity be included amongst the prohibited grounds of discrimination (see the table below). Similarly, while the 1951 Geneva Convention on the status of refugees does not explicitly mention sexual orientation and gender identity, there is consolidated case law confirming that LGBTs represent “a particular social group” falling under the refugee definition, and that sexual orientation and gender identity are grounds of persecution liable to engage the convention.

<b>United Nations instrument</b>	<b>Interpretation clarifying the inclusion of sexual orientation and gender identity as a prohibited ground of discrimination</b>
International Covenant on Civil and Political Rights (1966)	In <i>Toonen v. Australia</i> (1992), the Human Rights Committee held that the reference to “sex” (ICCPR, Article 2) and the right to privacy (ICCPR, Article 17) include sexual orientation
International Covenant on Economic, Social and Cultural Rights (1966)	Committee on Economic, Social and Cultural Rights, General Comment No. 20 – Non-Discrimination in Economic, Social and Cultural Rights, United Nations document E/C.12/GC/20 (2009)
Convention on the Elimination of Discrimination against Women (1979)	Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (19 October 2010)
Convention against Torture (1984)	Committee against Torture, General Comment No. 2, Implementation of Article 2 by States Parties (24 January 2008)
Convention on the Rights of the Child (1989)	Committee on the Rights of the Child, General Comment No. 4 (2003) on Adolescent health and development in the context of the Convention on the Rights of the Child

26. Sexual orientation and gender identity are not explicitly mentioned as prohibited grounds of discrimination in Article 14 of the European Convention on Human Rights. However, the Court has held that the term “and other status” includes sexual orientation and transsexuality. Likewise, Protocol No. 12 to the Convention (ETS No. 177) prohibits discrimination in the enjoyment of all rights set forth by law. Its explanatory report clarifies that the grounds of discrimination in Protocol No. 12 are the same as those in the European Convention on Human Rights.

27. In 1997, Article 13 of the Treaty of Amsterdam empowered the European Union to combat discrimination on a number of grounds including sexual orientation.<sup>14</sup> In 2000, the Charter of Fundamental Rights of the European Union was the first international instrument to explicitly include sexual orientation as a prohibited ground of non-discrimination.<sup>15</sup> As regards gender identity, following a ruling of the Court of Justice of the

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12. Opinion n° 621/2011, [www.venice.coe.int/webforms/documents/CDL-AD\(2011\)016-E.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx).

13. European Parliament Resolution of 5 July 2011 on the Revised Hungarian Constitution.

14. “Without prejudice to the other provisions of this treaty and within the limits of the powers that conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” This article was later repeated with wider effect in Article 10 of the Lisbon Treaty: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

15. “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited” (Article 21.1).

European Union,<sup>16</sup> people intending to undergo or having undergone gender reassignment are protected from discrimination in access to goods and services and employment. For the sake of completeness, I should mention that in the European Union secondary law, there are other instruments offering protection against discrimination on the grounds of sexual orientation and gender identity in specific areas. One is the directive on equal treatment in employment and occupation;<sup>17</sup> another one is the directive on asylum of 13 December 2011 which, thanks to the amendments proposed by the European Parliament, includes several passages to ensure that sexual orientation and gender identity are duly taken into account in the context of the recognition of refugee status.<sup>18</sup>

28. The first Council of Europe convention explicitly referring to sexual orientation was the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention, CETS No. 201) in 2007. The Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011 was the first to refer to both sexual orientation and gender identity. I hope that this is the beginning of a trend which will be continued in the future.

## 6. Freedom of assembly

29. The right to conduct peaceful demonstrations is a core human right. For the LGBT community, it has a special significance: for too long in the history of our societies, and often still now, LGBTs have hidden their sexual orientation and gender identity; they have been invisible, or have chosen to be invisible to be able to conduct a normal life, away from stereotyping, prejudice and harassment. Pride marches provide an invaluable opportunity to build a sense of community, celebrate diversity and show the general public that there is nothing shameful or secretive about one's sexual orientation and gender identity, even if they are not the same as those of the majority.

30. The first Pride marches were held in the United States in 1970, to commemorate the Stonewall riots in New York the previous year and raise awareness against widespread discrimination and stereotyping. The following year, London, Paris, Stockholm and West Berlin were the first European capitals to host such events. To put things in context, at that time, western European countries had just decriminalised or were in the process of decriminalising consensual homosexual relations.

31. Since then, Pride marches have been organised in an increasing number of countries, primarily in America and western Europe. Since the fall of the Berlin Wall, Pride marches have been organised also in other European countries. Unfortunately, however, the exercise of freedom of assembly has been repeatedly infringed in some of them, because of the authorities' refusal to authorise the events, the authorities' open or veiled obstructionism (which is often manifested in the diversion of the demonstrations to non-central areas or the lack of response to an authorisation request), or the authorities' failure to provide adequate protection to demonstrators against homophobic violence.

32. The 2011 report on "Discrimination on grounds of sexual orientation and gender identity in Europe" by the Council of Europe Commissioner for Human Rights indicated that Pride parades and other LGBT events had been banned since 2004 in several member States, including Latvia, Lithuania, "the former Yugoslav Republic of Macedonia" and the Russian Federation. Pride marches have also been banned on several occasions in Belgrade and Kiev.

33. During my visit to Kiev, I was impressed by the activism and determination of non-governmental organisations and civil society representatives. The local branches of international non-governmental organisations (INGOs) such as Amnesty International and the Heinrich Böll Foundation were working side by side with LGBT organisations to make sure that a Pride march finally would take place in Kiev in 2013, in safe conditions. While negotiating with the police and the relevant authorities for this to happen, they asked for the support of international counterparts and expect the participation of numerous representatives of foreign human rights organisations. The participation of international personalities and representatives of the diplomatic corps in Kiev would further contribute to the success of this important event. Unfortunately, no political party, trade union or other organisation at domestic level seemed to support the LGBT movement in

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16. *P v. S. and Cornwall County Council* (1996).

17. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

18. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

Ukraine on this occasion, nor in general. After leaving Kiev, I was informed that 61 members of parliament signed a petition urging the Mayor of Kiev to ban the Pride parade. Subsequently, the city's authorities decided to apply for a judicial ban of all public demonstration on the weekend of 24 May 2013, which was granted.<sup>19</sup>

34. What happened in Georgia is also a matter for concern: on 17 May 2013, some NGOs had organised a march in Tbilisi to mark International Day against Homophobia (IDAHO). This was violently disrupted by a large group of aggressive counterdemonstrators, many of whom were Orthodox priests. The police failed to provide adequate protection and participants in the IDAHO demonstration had to be evacuated by bus. Several people were injured.<sup>20</sup>

35. The backbone of the case law of the European Court of Human Rights in relation to freedom of assembly in relation to the prohibition of discrimination on the grounds of sexual orientation and gender identity is represented by three cases: *Bączkowski v. Poland* (2007), *Alekseyev v. Russia* (2010) and *Genderdoc-M v. Moldova* (2012). The three cases present many similarities, including the reasons provided to refuse authorisation, which included concerns about the safety of demonstrators and that the marches would represent a threat to public morals.

36. As Sir Nicolas Bratza, former President of the Court, explained during the Warsaw conference (referring to the *Alekseyev* case):

*"The Court found that any measures which interfered with freedom of assembly and expression, other than in the cases of incitement to violence or rejection of democratic principles, did a disservice to – and even endangered – democracy, even where the views expressed appeared shocking and unacceptable to the authorities. The Court was wholly unconvinced of the genuineness or validity of the reasons given for banning the assemblies.*

*As to the alleged concerns for the safety of the participants and the prevention of disorder, the Court emphasised that it was the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully and that, despite the petitions which the Government claimed to have received threatening counter-demonstrations and violence if the processions went ahead, the Government had failed to carry out any adequate assessment of the risk (if any) to safety and public order.*

*As to the alleged threat to public morals, which the Court found to be the primary reason for the ban, the Court was unable to accept the Government's claim that the processions would have caused the level of controversy claimed, finding no evidence to suggest that the participants would indulge in sexually provocative behaviour or attack religious views. It also rejected the argument, which reflected the Mayor's view, that it was necessary to confine every mention of homosexuality to the private sphere and force gay men and lesbians out of the public eye, thereby implying that homosexuality was a result of conscious and antisocial choice."*

37. The three above-mentioned cases concern central and eastern European countries. It would be wrong, however, to assume that there is an East-West divide in the understanding of freedom of assembly, that the situation is uniform throughout a given country or that changes are not possible. I have already mentioned that in Poland the situation has progressed in the right direction since the *Bączkowski* case. But there are other positive examples: in 2011, in Split (Croatia), Pride participants were targeted by homophobic attacks; in June 2012 the event took place without incident and saw the participation of hundreds of people, including several members of the government. In the capital, Zagreb, similar marches have been held regularly and peacefully for a decade.<sup>21</sup> In Budapest, the annual Pride parade, which used to be a peaceful, successful event for the entire city, has been the target of homophobic attacks from neo-Nazi groups since 2007. On those occasions, police forces protected participants. I was particularly reassured by the fact that the police representatives I met during my visit to Hungary reassured me of their commitment to continue to do so.

38. More recently, on 17 May 2013, hundreds of people gathered in the centre of Tirana for a public event called "Diversity Fair", one of a series of events bringing together representatives of the Albanian Government and of the police, the Ombudsman, the Commissioner for Protection from Discrimination, members of the international community in Albania, representatives of the media and human rights non-governmental

19. [www.interfax.co.uk/ukraine-news/court-bans-gay-pride-parade-in-kyiv-on-may-25/](http://www.interfax.co.uk/ukraine-news/court-bans-gay-pride-parade-in-kyiv-on-may-25/).

20. [www.ferl.org/content/georgia-gay-rights-protests/24988972.html](http://www.ferl.org/content/georgia-gay-rights-protests/24988972.html).

21. Associated Press, "Croatian gay pride event passes without incident": <http://news.yahoo.com/croatian-gay-pride-event-passes-without-incident-172422664.html>.

organisations (NGOs). In May 2013, the Baltic Pride in Riga took place peacefully. The demonstration was authorised by the authorities and there were no violent incidents. On 19 May 2013, a demonstration against discrimination on the grounds of sexual orientation and gender identity was held in Chisinau, with the participation of the Moldovan civil society and representatives of the international community. The authorities guaranteed public order and the safety of participants, in spite of attempts by some groups to disrupt the demonstration. This was the first authorised march of this kind in the Republic of Moldova.

## 7. Freedom of expression and the prohibition of so-called homosexual propaganda

39. Local and regional authorities in several countries have introduced legislation prohibiting so-called homosexual propaganda and similar pieces of legislation are or will soon be discussed by parliaments. The declared goal is to protect children and the religious beliefs of the majority of the population. The promoters of such legislation consider homosexuality as deviant behaviour and contrary to religious precepts; mentioning or showing the existence of an LGBT community would be an offence to moral and religious values and affect the well-being of children.

### 7.1. Examples

40. In Lithuania, a proposal was put forward to introduce a provision on "Protection of constitutional moral values" into the Administrative Code. This would sanction the "public denigration of constitutional moral values and the principles of family stipulated in the Constitution and the organisation of events contradicting social morality" with a fine of between 1 000 and 3 000 litas. This legislative proposal was rejected by the Legal Affairs Committee and parliament, but was submitted again. It was approved by parliament in May 2013. This provision may be used to prohibit a range of activities such as campaigning on human rights issues related to sexual orientation and gender identity and providing sexual health information. It may also prevent Pride marches and similar events from taking place in the country.

41. In the Republic of Moldova, in 2012, the local councils of several cities and towns adopted measures to forbid any kind of promotion of LGBT rights. Such measures were motivated with religious reasons and fear of an "epidemic of homosexuality". According to information provided to me by the Moldovan authorities, these local measures have been found to be in contravention of Moldovan law and quashed by the courts. I look forward to receiving more precise information on whether all the measures concerned have been quashed and whether the court decisions are effectively enforced.

42. In the Russian Federation, since 2006, legislation banning "public actions aimed at propaganda of homosexuality, lesbianism, bisexuality and transgenderism amongst minors" has been introduced in several regions. The term "propaganda" is either not clearly defined or not defined at all, thus allowing for arbitrary interpretation. Some of these regional laws also prohibit "propaganda of paedophilia amongst minors", establishing an unacceptable, misleading link between homosexuality and sexual abuse of children.

43. As a result of these regional laws, 17 people have been arrested in St Petersburg, and one has been prosecuted and condemned to pay a fine. There have also been prosecutions in Arkhangelsk and Ryazan.<sup>22</sup> These laws have also been used to prohibit public events in support of LGBT rights in Arkhangelsk<sup>23</sup>, Kostroma<sup>24</sup> and St Petersburg.<sup>25</sup> Their legality has been challenged before the Constitutional Court (in the case of Ryazan) and before the Supreme Court (in the case of Arkhangelsk, Kostroma, Samara and St Petersburg). All these challenges have been dismissed.<sup>26</sup>

44. In March 2012, a bill banning "public activity aimed at propaganda of homosexuality amongst minors"<sup>27</sup> was introduced at federal level and is currently being examined by the Russian Parliament.

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22. Communication from NGOs (Russian LGBT Human Rights Project GayRussia.Ru and North-West Advocacy Center (NWAC)) (30 August 2012) in the case of *Alekseyev v. the Russian Federation* (Application No. 4916/07).

23. Ibid.

24. Communication from NGOs (Russian LGBT Human Rights Project GayRussia.Ru and North-West Advocacy Center (NWAC)) (13 September 2012) in the case of *Alekseyev v. the Russian Federation*.

25. Communication from NGOs ("Coming Out" – St Petersburg LGBT Organisation and ILGA-Europe) (5 September 2012) in the case of *Alekseyev v. the Russian Federation*.

26. Communications from the Russian Federation concerning the case of *Alekseyev v. Russian Federation* – Rule 8.2.a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements dated 29 August 2012 and 28 January 2013.

45. At the Parliament of Ukraine, a similar bill passed its first reading in October 2012. Draft Law No. 0945<sup>28</sup> on "Introduction of Changes to Certain Legislative Acts of Ukraine (regarding protection of children's rights in the safe information sphere)" aimed to amend five laws, on protection of public morals, on the regulation of print, broadcasting and publishing media, and the Criminal Code. The proposed amendments were meant to introduce criminal liability for "propaganda of homosexuality", on the model of the existing criminal offence of "promotion of violence and cruelty among children", with sanctions ranging from heavy fines to up to five years' imprisonment. Parliamentary elections were held in Ukraine later on the same month, which interrupted the examination of the draft.

46. A second bill (No. 1155) 'on prohibition of propaganda of same-sex relationships aimed at children' was introduced in the Parliament of Ukraine in December 2012. It defines "propaganda of homosexuality" as "intentional activity, which aims to and is expressed in dissemination of any positive information about same-sex sexual relations that could negatively affect ... development of the child, including forming a misconception of traditional and non-traditional marriage relations being equal, and in the future impact his or her choice of sexual orientation". The bill also extends the definition of propaganda to any public activities that disseminate positive information about homosexuality, such as rallies, parades, demonstrations about LGBT rights, discussions, or optional classes that contain positive information about homosexuality. It would also ban the media from disseminating positive information about homosexuality. Sanctions include imprisonment. The law was approved by a committee of the Ukrainian Parliament in early April 2013.<sup>29</sup>

47. During my visit to Ukraine, I had the opportunity to meet the author of bill No. 1155, Mr Vadym Kolesnichenko, from the Party of the Regions. He told me that he was committed to human rights and recognised the positive impact that European bodies had had on his country in this field. He appreciated the opportunity of engaging in a dialogue on his proposal and explained that his only aim was to protect the healthy psychological development of children. During my visit, however, I was also informed that the Ukrainian Ombudsman and the Ministry of Justice had criticised the bill, as they found it at variance with the general principles of criminal law on two main grounds: the description of the behaviour is too vague and the sanctions foreseen are not proportionate with the social danger. These concerns echo my own.

## **7.2. Concerns**

48. Freedom of expression is a fundamental right and a pillar of any democratic society. Limitations to this right must respond to strict criteria, as laid down in the European Convention on Human Rights. On December 2012 in Paris, the Committee on Equality and Non-Discrimination decided to ask the Venice Commission for an opinion 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 the Republic of Moldova, the Russian Federation and Ukraine. On 11 December 2012, President Gianni Buquicchio replied that the Venice Commission would prepare this opinion.

49. Given that an authoritative body such as the Venice Commission will soon give its expert opinion on the (draft) laws in question, for the time being I will refrain from giving my own detailed analysis. Nonetheless, I would like to raise some major *prima facie* concerns.

### **7.2.1. Discretionary application**

50. The scope of so-called anti-propaganda law is so vague and leaves so much discretion to the law-enforcement agencies that even declaring one's own homosexuality, talking about family matters in public or putting a rainbow flag outside one's window could be considered as a breach of the law.

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27. "Lower House mulls state control of 'homosexual behavior'", RT, 6 December 2012:  
<http://rt.com/politics/gay-propaganda-ban-duma-416/>.

28. Formerly, Law No. 8711.

29. Human Rights Watch, Letter to the President of the European Council and the President of the European Commission on the eve of the EU-Ukraine Summit, 21 February 2013; and Briefing Note on homosexuality anti-propaganda laws in Ukraine, ILGA-Europe, 22 April 2013.

#### *7.2.2. Protection of children*

51. Of course the protection of children should be a priority in all our policies and laws. Article 3 of the United Nations Convention on the Rights of the Child makes it 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.

52. Children should be protected against influences that may be unsuitably harmful to their development. This would clearly include the distribution of materials of a violent or sexually explicit nature. However, the so-called homosexual propaganda laws assume that protecting children from knowing about the very existence of homosexuality would be conducive to the attainment of their healthy morals, and spiritual and psychological development. Personally, I do not think that the principle of the best interest of the child requires children to be shielded from such information. On the contrary, as medical research indicates that most children begin experiencing feelings of sexual attraction some time during late childhood or early adolescence, it would be important for their balanced development to know that there are different sexual orientations and that nobody should be stigmatised on this account. In fact, these laws may harm the very people it is constructed to protect: young people, particularly young LGBT people.

53. A similar line of reasoning was confirmed by the European Court of Human Rights in the case *Alexeyev v. Russia*, in which the Court noted that there is no scientific evidence that open public debate about sexual minorities had an adverse effect on children and that the Russian authorities were “unable to provide justification” for forcing “gay men and lesbians out of the public eye”. I referred to this judgment in my recent written question to the Committee of Ministers on rights of the child and freedom of expression for LGBT persons in Russia.<sup>30</sup>

54. The Committee of Ministers recommendation of 2010 also underlines the importance of objective information on sexual orientation and gender identity being provided in the education system. Its explanatory memorandum underlines that sexual orientation is also regarded as a prohibited ground of discrimination by the United Nations Committee on the Rights of the Child.

#### *7.2.3. Repercussions on freedom of expression in general*

55. While the prohibition of so-called homosexual propaganda infringes upon freedom of expression for LGBT people, the risks that such legislation poses go beyond the group directly targeted: even writers and journalists reporting on public events on LGBT rights might, under these rules, be prosecuted.

#### *7.2.4. Climate of hostility*

56. Furthermore, this kind of legislation reflects and strengthens a climate of prejudice and hostility against LGBTs, which could lead to an increase in violence against them, as well as their isolation. Such a climate of prejudice and hostility, although already present in society, is often fuelled by inflammatory speech by politicians and other persons in a position of authority. It is interesting, for instance, to recall that, in its decision in the *Alekseyev* case, the European Court of Human Rights “placed reliance on the expressed views of the Mayor, and the undeniable link between his statements and the ban, as confirming its view that the main reason for the ban was the authorities’ disapproval of the demonstrations, which they considered to promote homosexuality”.<sup>31</sup>

57. While in Kiev, I was repeatedly told that a change of mentality was necessary in Ukraine for LGBT people to be fully respected and included in society, but this could not happen overnight. I particularly appreciated the indication coming from Ms Hanna Herman, prominent member of parliament and adviser to the President of Ukraine, who suggested that information and awareness-raising campaigns should be conducted in the country on the themes of diversity and respect for LGBT people. I can only subscribe to her proposal, adding that respect should be promoted in relation to all categories and social groups. I wish to underline that legal provisions prohibiting so-called homosexual propaganda would represent a stumbling block in this important evolution of mentalities.

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30. Doc. 12908.

31. Sir Nicolas Bratza’s intervention at the Warsaw conference, 19 March 2013.

## 8. Public responsibilities

58. A great responsibility in ensuring the exercise of freedom of assembly and expression without discrimination lies with mayors. I am therefore particularly pleased that the Congress of Regional and Local Authorities of the Council of Europe has appointed a rapporteur on the rights of LGBT people, Ms Yoomi Renström from Sweden. I look forward to hearing her recommendations and I encourage her to play an active role in promoting best practices in this area, as well as better knowledge of Council of Europe standards amongst local authorities.

59. Public authorities do not only have legal obligations to ensure the exercise of freedom of assembly and expression without undue interference; they also have a political responsibility to establish a “relationship of communication and trust with the LGBT community”. I particularly appreciated these words, pronounced by Ms Calliope Spanou, the Greek Ombudsperson, at the Warsaw conference. She explained that, in order to contribute to building this relationship, the Greek Ombudsperson’s office has participated in all the Athens Pride marches since 2007, the first public authority in Greece to do so. I invite local authorities and public officials to take on board this good practice.

60. The role of politicians is not only limited to ensuring and promoting the respect of some specific freedoms and rights, but extends to human rights in general. As legislators, parliamentarians have the duty to ensure that legislation which they propose or approve is consistent with human rights values and standards. In addition, for the respect of such values and standards, they have the duty to refrain from homophobic discourse and the responsibility to publicly condemn it. I particularly appreciated that in Albania, Prime Minister Sali Berisha reacted to negative remarks made by Deputy Defence Minister Ekrem Spahiu and defined them as unacceptable.

61. LGBT politicians should be visible and outspoken in promoting equality and non-discrimination also on the grounds of sexual orientation and gender identity. However, the protection of human rights for LGBT persons should not be the exclusive responsibility of LGBT politicians: this is a human rights issue that should be of common concern for all, also irrespective of political divides.

62. During the Warsaw Conference, the Co-Chair of the LGBT-Intergroup of the European Parliament, Ms Ulrike Lunacek, underlined the important role of this forum as a pressure group. The Intergroup currently counts 153 MEPs, who are committed to advancing LGBT rights in the context of the European Union legislative process and take common positions on issues that may have an impact on the rights of LGBTs.

## 9. Hate speech

63. Infringements of freedom of expression of LGBTs are not infrequent, and this group is not adequately protected against hate speech and incitement to hostility, violence and discrimination. This lack of adequate protection is also due to legal loopholes, as there is no universally accepted definition of the expression “hate speech”.

64. Article 20.2 of the International Covenant on Civil and Political Rights (1966) reads as follows: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. A wording of this kind is not included in the European Convention on Human Rights. However, Article 10 on freedom of expression is not an absolute right. Restrictions are possible, in particular when speech or other expressions incite “to xenophobia anti-Semitism and the like, as such speech is incompatible with the values proclaimed and guaranteed by the Convention”.<sup>32</sup>

65. So far, the European Court of Human Rights has dealt with only one case specifically concerning hate speech and sexual orientation. In *Vejdeland and Others v. Sweden*,<sup>33</sup> the applicants had been convicted for distributing in a secondary school leaflets in which homosexuality was described as a deviant sexual proclivity, having a morally destructive effect on the substance of society and being responsible for the development of HIV and AIDS. The Court deemed that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts; and that discrimination based on sexual orientation was as serious as discrimination based on “race, origin or colour”. The Court concluded that there had been no

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32. Commissioner for Human Rights, Discrimination on grounds of sexual orientation and gender identity in Europe, p. 7.  
 33. Application No. 1813/07, judgment of 9 February 2012 (final on 9 May 2012).

violation of Article 10, as the interference with the applicants' exercise of their right to freedom of expression had reasonably been regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others.

66. Sweden is one of the few countries which explicitly include homophobic speech in the notion of hate crime. Other countries include the United Kingdom, where legislation on hate crimes was amended in 2010 to take homophobia into account. In January 2012, five men were arrested under these rules for distributing homophobic leaflets with violent content.<sup>34</sup> In 2012, the Maltese Parliament unanimously approved the amendments to the criminal code necessary to introduce tougher penalties for crimes motivated by gender, gender identity, sexual orientation, ethnicity and religious or political beliefs.<sup>35</sup>

67. Both Recommendation CM/Rec(2010)5 of the Committee of Ministers and Assembly [Resolution 1728 \(2010\)](#) call on Council of Europe member States to take appropriate measures to combat hate speech. I think that, in addition to awareness-raising and information campaigns, it would be important to introduce a clear reference to the incitement to hostility and violence against LGBTs in national laws on hate speech.

68. In this regard, I would like to recall that, during the Warsaw conference, Ms Barbora Bukovska from Article 19 underlined that while homophobic and transphobic hate speech should be sanctioned by the law, criminal penalties should be considered only as a last resort.

69. As regards the European Union, since 2008, a framework decision foresees specific, higher penalties for racist and xenophobic speech and crime. In March 2013, the European Parliament adopted a resolution on strengthening the fight against racism, xenophobia and hate crime, in which it called on the European Commission to add homophobia and transphobia to the list of EU-sanctioned hate speech and violence.<sup>36</sup>

## **10. Prevention of homophobic and transphobic violence**

70. Across Europe, bullying on the basis of actual or perceived gender identity or sexual orientation is a serious problem, aggravated by underreporting, lack of precise data, and lack of comprehensive prevention strategies.

71. On 17 May 2013, the European Union's Agency for Fundamental Rights (FRA) published the most comprehensive survey in Europe on discrimination on the grounds of sexual orientation and gender identity. This survey was conducted in the period 2010-2012 in the 27 EU member States and Croatia, on the basis of 93 000 replies to an online questionnaire. This is an extract of its main findings:

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34. [www.telegraph.co.uk/news/uknews/law-and-order/9004998/Muslims-posted-nasty-and-frightening-anti-gay-leaflets-demanding-homosexuals-turn-or-burn.html](http://www.telegraph.co.uk/news/uknews/law-and-order/9004998/Muslims-posted-nasty-and-frightening-anti-gay-leaflets-demanding-homosexuals-turn-or-burn.html).

35. [www.icare.to/articleHC.php?id=39387&lang=en](http://www.icare.to/articleHC.php?id=39387&lang=en).

36. [www.europarl.europa.eu/document/activities/cont/201303/20130319ATT63491/20130319ATT63491EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201303/20130319ATT63491/20130319ATT63491EN.pdf).

## Extracts from the 2012 FRA LGBT survey

<b>Hate speech by politicians</b>	On average, nearly half of all respondents considered offensive language about LGBT people by politicians to be widespread and ranging from 93% of all respondents in Lithuania to 9% of all respondents in the Netherlands.
<b>Violence or threat of violence</b>	<p>58% of the respondents said that the last incident of physical/ sexual or threat of violence in the 12 months preceding the survey happened partly or completely because they were perceived to be LGBTs. Moreover, half of all respondents avoid certain places or locations for fear of being assaulted, threatened or harassed because of being LGBT.</p> <p>A quarter (26%) of all respondents indicated that they had been physically or sexually attacked or threatened with violence for any reason at home or elsewhere in the last five years. In addition, one in 10 (10%) of all respondents said that they had been attacked or threatened with violence for any reason in the 12 months before the survey.</p> <p>Respondents whose gender did not "match" their sex assigned at birth were twice as likely as those whose gender was in line with societal expectations to say that they had experienced hate-motivated violence in the year preceding the survey.</p> <p>Less than one in five of the most recent incidents of hate-motivated violence which had happened to respondents in the last 12 months (17%) were brought to the attention of the police.</p>
<b>Hiding one's sexual orientation and gender identity</b>	<p>The overwhelming majority of all respondents – 2 out of 3 (67%) – said they often or always hid their LGBT identity at school. Only 4% respondents were consistently open about being LGBT when they were at school.</p> <p>Nearly two thirds (63%) of all respondents do not reveal their sexual orientation or gender identity to most people in their private and professional lives.</p>
<b>Discrimination</b>	<p>Respondents were more likely to say they had personally felt discriminated against in the year preceding the survey because of being LGBT in employment than in any other area of social life covered by the survey. One in five (19%) of those respondents who had been employed in the year preceding the survey said that they had felt discriminated against at the workplace in the past year because of being LGBT.</p> <p>Transgender respondents consistently indicated that they experience an environment that is less tolerant towards them than that experienced by lesbian, gay and bisexual respondents.</p>

72. I think it would be useful for the Council of Europe to work hand in hand with the FRA and assess the feasibility of collecting data on the 19 Council of Europe member States which are not covered by the FRA survey, with the same methodology. This would make it possible to have comparable data for all Council of Europe member States.

73. Additional surveys and research are conducted at national level. In 2012, for instance, a survey carried out by the NGO Stonewall, in co-operation with the University of Cambridge, on over 1 600 school students in the United Kingdom revealed that over 55% of lesbian, gay and bisexual young people experienced homophobic bullying at school. In addition, 96% of gay pupils were subjected to homophobic remarks and expressions.<sup>37</sup>

74. In another piece of research focusing on the workplace, "Living together", Stonewall found that from 2007 to 2012, in the United Kingdom, 2.4 million people of working age had witnessed verbal homophobic bullying; and a total of 800 000 had witnessed physical bullying.<sup>38</sup>

75. Research shows that LGBT young people are more prone to suicide than the general population of the same age: the risk is estimated to be three to four times higher. This issue was investigated in Norway as early as 2000, where the "Agenda for suicide prevention" of the Norwegian Board of Health (Statens Helsetilsyn), listed young lesbians and gays among the high risk groups (however, no specific strategies were proposed to reduce the risk).<sup>39</sup> The suicide rate amongst transgender persons is particularly high.

37. The School Report – *The experiences of gay young people in Britain's schools in 2012*, Stonewall/University of Cambridge 2012: [www.stonewall.org.uk/documents/school\\_report\\_2012%282%29.pdf](http://www.stonewall.org.uk/documents/school_report_2012%282%29.pdf).

38. Information provided at the Warsaw Conference by Ms Jasmine O'Connor, Stonewall.

39. <http://rhpeo.net/ijhp-articles/e-proceedings/nordic97/44.htm>.

76. Whether directly linked to suicides or not, homophobic and transphobic violence should be addressed and an LGBT perspective must become part of the anti-bullying strategies currently in place in many European countries

77. Stonewall has been working with the education sector in the United Kingdom since 2005, in close co-operation with local authorities and central government as well as directly with schools. On the strength of this experience, at the Conference in Warsaw, Ms Jasmine O'Connor mentioned some key elements for a successful outcome: involving everybody in the programmes, be they children, students, teachers or other school staff; distributing appropriate training material and resources; training school staff on how to respond to homophobia and transphobia, challenging when it happens; integrating sexual orientation in the curriculum; highlight positive gay role models; involving school inspectors, ensuring that they take into account what bullying-prevention measures schools are taking.

78. As Ms O'Connor said, "a concerted and consistent approach brings results". The schools in the Stonewall programme report a drop in homophobic bullying: the percentage of students who report having been subjected to bullying (55%) is down from 65% in 2007; and twice as many gay pupils, 50% up from 25% over the same period, report that their schools disapprove of homophobia.

## 11. Action plans/strategies

79. In recent years, some Council of Europe member States have introduced specific action plans/strategies aimed at tackling discrimination against LGBTs and fighting homophobia and transphobia.

80. In 2008, the Norwegian Government introduced a cross-departmental action plan for LGBTs which has been taken into account when drafting subsequent plans.<sup>40</sup> In 2010, the United Kingdom Government published the Equality Strategy "Building a Fairer Britain" and adopted two action plans, one relating to the situation of LGB (lesbian, gay and bisexual) people and one on advancing transgender equality. These plans provide measures aimed at fighting discrimination against LGBT people in all environments, from school to the workplace, and in support of LGBT families and the civil society. The British Government also committed itself to promoting LGBT equality beyond national borders, and to ensure implementation in the United Kingdom of Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity.<sup>41</sup> In January 2013, Belgium introduced an inter-federal Action plan on homophobic and transphobic violence.<sup>42</sup>

81. Currently, the Council of Europe is co-operating with the governments of six member States (Albania, Italy, Latvia, Montenegro, Poland and Serbia) to support their efforts to develop an effective, cross-sectorial LGBT policy, strengthen human rights for LGBT people and tackle discrimination on the basis of sexual orientation or gender identity. In four of these member States, action plans/strategies have been finalised. The project, which is run by a specific LGBT Issues Unit, will run until the end of 2013, with an overall duration of 28 months.

82. I have prepared a table to describe the Inter-ministerial Action Plan which was launched by France in 2012. I consider it as a model that should inspire action by other Council of Europe member States.<sup>43</sup>

### Key points of the 2012 Action Plan in France

Area	Objective/target areas	Specific measures
Violence	Improvement of data collection	
	Improvement of the registration of complaints	Ensuring that in the forms available to the police, there are specific questions relating to the motive and its link to the sexual orientation or gender identity of the victim (since this is an aggravating factor in the context of judicial proceedings)
	Training the police, other law enforcement officials and health personnel	

40. [www.regjeringen.no/upload/BLD/Handlingsplaner/Hpl\\_lhbt\\_september\\_2008.pdf](http://www.regjeringen.no/upload/BLD/Handlingsplaner/Hpl_lhbt_september_2008.pdf).

41. [www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/lgbt-work-plan?view=Binary](http://www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/lgbt-work-plan?view=Binary).

42. [www.milquet.belgium.be/fr/pr%C3%A9sentation-du-plan-d%E2%80%99action-interf%C3%A9d%C3%A9lutte-contre-les-discriminations-homophobes-et](http://www.milquet.belgium.be/fr/pr%C3%A9sentation-du-plan-d%E2%80%99action-interf%C3%A9d%C3%A9lutte-contre-les-discriminations-homophobes-et).

43. [http://femmes.gouv.fr/wp-content/uploads/2012/11/violence\\_v5+\\_06-2011.pdf](http://femmes.gouv.fr/wp-content/uploads/2012/11/violence_v5+_06-2011.pdf).

Area	Objective/target areas	Specific measures
	Setting up an information campaign on the rights of the victims of homophobic and transphobic violence	
	Strengthening the effectiveness of criminal law	Special attention to be given to homophobic and transphobic crimes in detention; preparation of teaching and training tools to be used in the context of "rehabilitation" programmes for perpetrators; recourse to compulsory "rehabilitation" for perpetrators in lieu of detention.
Youth	Sexual education to be re-introduced in schools. It will include information on homosexuality	
	Better monitoring and prevention of homophobic and transphobic violence in schools	Special work to be done on the prevention of suicides amongst young LGBTs; organisation of an information campaign in schools.
	Strengthening of the existing Charter against homophobia in sports, which has already been signed by all the French sports federations.	
	Starting reflection on how to address homophobic stereotyping via the television, in co-operation with the main television channels	
Discrimination in everyday life	Work on homophobic discrimination at work	Work inspectors to take homophobia into account
	Equality for public administration staff	Leave rights currently recognised for those who get married will be extended to people who contract civil partnerships
	Elderly people	Health staff to receive training against homophobia
	Transgender people	Simplification of administrative procedures; France to support international efforts to remove transsexuality from the list of mental illnesses of the World Health Organization
International action	Achieving universal decriminalisation of homosexuality	
	Ensuring the full respect of human rights for LGBTs	
	In the context of the recognition of refugee status for LGBTs who are persecuted in their countries on account of their sexual orientation and gender identity.	

## 12. Right to family life

83. It is fair to highlight that while various concerns can be raised as regards freedom of expression and assembly, and protection against homophobia and transphobia, major steps have been taken by a number of Council of Europe member States to guarantee that LGBT people are not discriminated against as regards their right to form a family. This was done either by establishing new forms of recognised partnerships or by opening civil marriage to same-sex couples.

84. In November 2012, Spain's Constitutional Court upheld the legality of same-sex marriage. An appeal contending that in the Spanish Constitution marriage meant only the union of a man and woman had been filed in 2005, shortly after the law was passed. The Court voted 8-3 to dismiss this appeal.

85. In June 2012, Denmark replaced its civil partnership regulations by a new same-sex marriage law.

86. In France, a bill to introduce same-sex marriage and adoption received parliamentary support in 2013. Large-scale public demonstrations were organised both by supporters and opponents of the proposal, which showed a great divide in society. It is worth mentioning that "marriage for all" was an important element of President Hollande's successful electoral programme.

87. Following a public consultation on how to implement civil marriage for same-sex couples (also called "equal marriage") in England and Wales, the Conservative Government proposed a bill in early 2013, which passed in the House of Commons with a large majority.

88. Steps to recognise same-sex partnerships are being taken also in other countries. For instance, the Prime Minister of Croatia, Zoran Milanović, has expressed support for a law proposal of this kind on several occasions, including when he addressed the Parliamentary Assembly. Recently, Ireland's Deputy Prime Minister also expressed his view that times are ripe to allow same-sex couples to marry in his country.<sup>44</sup> In April 2013, an Irish Constitutional Convention supported proposals for same-sex marriage by an overwhelming majority.<sup>45</sup>

89. LGBT *de facto* families, including those with children, face difficult situations when the partnership on which they are based has no legal recognition, for instance as regards ownership rights, separation, alimony and inheritance. During the Warsaw conference, Ms Polina Savchenko, Acting Director of a grass-root organisation based in St Petersburg, explained very well how the climate of hostility and prejudice against LGBTs exposes also their children to the risk of stigmatisation, violence and human rights violations.

90. In my opinion, general consensus should be reached on the principle that children with LGBT parents should not be denied any rights or be discriminated against on the basis of their parents' sexual orientation or gender identity. I also very much welcome the recent decision by the European Court of Human Rights in which it ruled that the impossibility of second-parent adoption in a same-sex relationship in Austria was discriminatory in comparison with the situation of unmarried different-sex couples.<sup>46</sup>

### 13. Ongoing multilateral efforts

91. Before concluding this report, I would like to briefly mention the activities that the Council of Europe is currently conducting in the area of discrimination on the grounds of sexual orientation and gender identity, and which testify of the commitment of the Organisation to the respect of human rights for all.

- In October 2011, the Council of Europe created an LGBT Issues Unit under the Directorate of Human Rights and Antidiscrimination. Its main objectives are to implement Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, in particular through the LGBT Project, to mainstream the issue within and outside the Council of Europe and to organise events and activities related to the situation of LGBT people in Europe.
- A review of the implementation of Recommendation CM/Rec(2010)5 was adopted in March 2013 by the Steering Committee for Human Rights (CDDH). Thirty-nine member States replied to a questionnaire focusing on progress made in implementing the recommendation. The CDDH has formulated recommendations to the Committee of Ministers for further action by the Council of Europe.
- The European Commission against Racism and Intolerance (ECRI), the Council of Europe's body which monitors racism, xenophobia, anti-Semitism, intolerance as well as discrimination on grounds such as ethnic origin, citizenship, colour, religion and language in all 47 member States, has decided to deal with homophobic and transphobic violence and hate speech in the new country reports that it will issue in the next five years as part of its 5th cycle;
- On 17 May 2013, the No Hate Speech Movement – the youth campaign of the Council of Europe for human rights online – launched its first European Action Day on International Day against Homophobia. The initiative aims to combat and raise awareness about online homophobic and transphobic hate speech.<sup>47</sup>

92. The increased Council of Europe attention to the issue of discrimination on the grounds of sexual orientation and gender identity runs parallel with the increased awareness at international level that this is a major human rights violation and increased political resolve to tackle it.

44. "Irish deputy Prime Minister calls for same-sex marriage referendum", BBC, 13 November 2012: [www.bbc.co.uk/news/world-europe-20310701](http://www.bbc.co.uk/news/world-europe-20310701).

45. "Constitutional Convention backs extension of marriage rights to same-sex couples", *Irish Times*, 14 April 2013: [www.irishtimes.com/search/search-7.1213540?tag\\_company=Marriage%20Equality&article=true](http://www.irishtimes.com/search/search-7.1213540?tag_company=Marriage%20Equality&article=true).

46. <http://human-rights-convention.org/2013/02/19/european-court-of-human-rights-judgment-against-austria/>.

47. [www.nohatespeechmovement.org/](http://www.nohatespeechmovement.org/).

93. In 2011, for the first time, the United Nations Human Rights Council considered a report by the High Commissioner, Ms Navi Pillay, which documented widespread human rights violations against LGBTs worldwide, including hate crime, criminalisation of homosexuality and discrimination.<sup>48</sup>

94. In March 2013, the French Government organised a conference on the discrimination and violence experienced by LGBTs in Europe and how to combat such abuse.<sup>49</sup> The conference was part of a global consultation process conducted in several continents. A world conference bringing together the main conclusions was held in Oslo on 15 and 16 April 2013. Finally, on 17 May – International Day against Homophobia – the Dutch Government organised a major event on LGBTs, which coincided with the launch of the above-mentioned FRA survey.

#### **14. Conclusions and recommendations**

95. An overview of developments which have occurred in Council of Europe member States since the adoption of Assembly [Resolution 1728 \(2010\)](#) shows a diversified picture. In some countries, there has been significant progress and a clear political commitment to address discrimination on the grounds of sexual orientation and gender identity. This has led to the introduction of action plans and strategies to promote equality and tackle discrimination, homophobia and transphobia, the recognition or strengthening of rights for LGBTs in the areas of adoption, civil partnership and marriage, and the introduction of stronger measures against homophobic and transphobic speech and violence.

96. At the same time, however, in some Council of Europe member States there has been a worrying setback as regards the respect of freedom of assembly and expression, with the introduction of legislation or draft legislation on the prohibition of homosexual propaganda. This recent development adds itself to the repeated infringement of the right to hold peaceful demonstrations, in particular Pride marches, and the authorities' failure to adequately protect the demonstrators. What is also worrying in this context is that some politicians and other personalities in a position of authority are adamant and outspoken in their hostility towards LGBTs and hold the kind of discourse which borders on homophobic hate speech.

97. In this report, I have tried to highlight that the issue of non-discrimination on the grounds of sexual orientation and gender identity has been evolving for several decades. In United Nations and Council of Europe human rights instruments, this issue is coming out of the open-ended formula "and other status" to become an explicit ground of discrimination in its own right. A similar path is being followed at national level. There is an increasing awareness, in society and at political level, that discrimination on account of sexual orientation and gender identity is a major problem, a major human rights issue which must be addressed openly and urgently. But societal changes take time.

98. In my introduction, I said that the issue of discrimination on the grounds of sexual orientation and gender identity has proved to be "divisive" amongst Council of Europe member States. In reality, there is much commonality: all Council of Europe member States share the same heritage of prejudice and hostility against LGBTs; and they all share the same human rights obligations, namely those set out in the European Convention on Human Rights. What could at first sight appear as a divide – between some States moving forward and others lagging behind or slipping back – is rather a different speed in the course of a historical process.

99. It is the responsibility of the Parliamentary Assembly, and the Council of Europe as a whole, to accompany this process and to avoid that prejudice and hostility against LGBTs are legitimised by political discourse and crystallised in national legislation.

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48. [www.un.org/apps/news/story.asp?NewsID=40743](http://www.un.org/apps/news/story.asp?NewsID=40743). The report can be found at: [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-41\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-41_en.pdf).

49. [www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/droits-de-l-homme/actualites-et-evenements-sur-le-actualites-2013-sur-le-theme-des/article/conference-sur-les-droits-des](http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/droits-de-l-homme/actualites-et-evenements-sur-le-actualites-2013-sur-le-theme-des/article/conference-sur-les-droits-des).

## Appendix – ILGA-Europe Rainbow Map, May 2013

