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## 1081 Meeting, 31 March 2010

4 Human rights

### 4.7 Steering Committee for Human Rights (CDDH) –

Draft Recommendation CM/Rec(2010)... of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity –  
Draft Explanatory Memorandum

Item prepared by the GR-H at its meeting of 23 March 2010

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### Draft Recommendation CM/Rec(2010)... of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity

#### DRAFT EXPLANATORY MEMORANDUM

The present explanatory memorandum was prepared by the Secretariat in cooperation with the Chairperson of the Committee of Experts on discrimination on grounds of sexual orientation and gender identity (DH-LGBT).

#### I. Introduction

Numerous texts have been adopted by various Council of Europe bodies on this question in the course of nearly thirty years. The Parliamentary Assembly (PACE) has adopted several recommendations to the Committee of Ministers since 1981 and a report on “Discrimination on the basis of sexual orientation and gender identity” is currently in preparation within the Committee on Legal Affairs and Human Rights. In March 2007 the Congress of Local and Regional Authorities of the Council of Europe adopted Recommendation 211 (2007) on freedom of assembly and expression by lesbians, gays, bisexuals and transgender persons. The Committee of Ministers itself has adopted replies to the aforementioned Parliamentary Assembly and Congress recommendations and, more recently, various replies to written questions from PACE members in which it reiterates the principle of equal enjoyment of human rights for all, regardless of personal characteristics such as sexual orientation and gender identity, and chiefly covering the issues of freedom of expression, assembly and association, and speech. The Secretary General and the Commissioner for Human Rights have made several public statements condemning homophobia and discrimination based on sexual orientation or gender identity in the member states of the Council of Europe. The Commissioner for Human Rights has also devoted part of his annual activity reports, particularly for 2006 and 2008, to the problem of discrimination against lesbian, gay, bisexual and transgender persons and prepared a number of theme-based documents.

In the European Convention on Human Rights system, although the list of grounds of discrimination prohibited by Article 14 of the Convention and its Protocol No. 12 (general prohibition of discrimination) does not expressly mention sexual orientation or gender identity, this list is open and there is nothing to prevent their inclusion, in practice, among the protected characteristics. The European Court of Human Rights (hereinafter “the Court”) has already recognised that Article 14 covers sexual orientation<sup>2</sup> and the explanatory report to Protocol No. 12 indicates that this instrument would provide protection against discrimination based on sexual orientation. While this was not expressly stated with regard to gender identity, it may reasonably be considered that it would also be covered by both Article 14 and Protocol No. 12. The Court **stated** that,

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<sup>1</sup> This document has been classified restricted until examination by the Committee of Ministers.

<sup>2</sup> See, *inter alia*, *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 2001, and *Karner v. Austria*, judgment of 24 July 2003. Internet : <http://www.coe.int/cm>

for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised<sup>3</sup>. The Court has furthermore held that the margin of appreciation left to the states in such cases, touching on one of the most intimate questions of private life, is narrow, and there must be particularly serious grounds to justify interference by the public authorities.<sup>4</sup> The proportionality test does not merely require that such interference be in principle suited for realising the aim sought: it must also be shown that it is necessary to achieve that aim<sup>5</sup>.

Other international organisations have also drawn up various texts.

Within the European Union, Article 13 of the Treaty instituting the European Community expressly includes sexual orientation in the list of grounds of discrimination, and Article 21(1) of the Charter of fundamental rights of the European Union contains a general anti-discrimination provision expressly mentioning "sexual orientation" in the list of prohibited grounds. The Council of the European Union has adopted a directive establishing a general framework for equal treatment in employment and occupation,<sup>6</sup> which explicitly covers sexual orientation and a proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in areas other than employment is now being examined. The Court of Justice of the European Communities (ECJ) has also had occasion to rule on a number of aspects of the issue of discrimination against lesbian, gay, bisexual and transgender persons,<sup>7</sup> particularly on the situation of transgender persons regarding access to employment and social security. According to the case-law of the Court, dismissing someone who intends to undergo or has undergone gender reassignment is considered to be discrimination based on sex under European community law.<sup>8</sup> Finally, the European Union Agency for Fundamental Rights (FRA) has published two reports entitled "Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity"<sup>9</sup>.

The Organisation for Security and Co-operation in Europe (OSCE/ODIHR) has recently published several reports and documents analysing certain aspects of issues of discrimination based on sexual orientation or gender identity in OSCE participating states: the 2006 and 2007 Annual Reports of the OSCE/ODIHR on "Hate crimes in the OSCE region: incidents and responses", which contain sections on intolerance towards lesbian, gay, bisexual and transgender persons; the OSCE report of 9 March 2009 on "Hate Crime Laws: A Practical Guide"; the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel of the OSCE/ODHIR,<sup>10</sup> the Report on "Human rights defenders in the OSCE region: challenges and good practices", April 2007-April 2008.<sup>11</sup>

Within the United Nations, a declaration, backed by 66 states,<sup>12</sup> was made within the framework of the United Nations General Assembly on 17 December 2008, condemning rights violations based on sexual orientation and gender identity, such as killings, torture, arbitrary arrests, deprivation of economic, social and cultural rights, including the right to health. This was the very first declaration on the subject within the General Assembly. The mechanisms of the United Nations covering human rights - the treaty bodies and the Human Rights Council - are ever more frequently called upon to deal with questions of discrimination based on

<sup>3</sup> See *Karner*, para. 37.

<sup>4</sup> See *Karner*, para. 41 and *Schlumpf*, para. 115.

<sup>5</sup> See *Karner*, para. 41.

<sup>6</sup> Council Directive 2000/78/EC of 27 November 2000.

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

<sup>8</sup> See *P v. S and Cornwall County Council*, para. 21 of the judgment.

<sup>9</sup> Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity (Part I – Legal analysis and Part II – The social situation), available in English on: <http://www.fra.europa.eu>

<sup>10</sup> Available in English only on <http://www.osce.org/item/30553.html>

<sup>11</sup> Available in English only on <http://www.osce.org/item/35711.html>

<sup>12</sup> Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", East Timor, the United Kingdom, Uruguay and Venezuela. The United States of America in March 2009 have also aligned themselves with that statement.

sexual orientation.<sup>13</sup> More generally speaking, concerns over discrimination based on sexual orientation are increasingly taken into account. One example is a guidance note on refugee claims relating to sexual orientation and gender identity<sup>14</sup> published by the United Nations High Commissioner for refugees (UNHCR) in November 2008, and the United Nations Economic and Social Council's Committee on Economic, Social and Cultural Rights has published general comments on non-discrimination in the exercise of economic, social and cultural rights set forth in Article 2 paragraph 2 of the International Covenant on Economic, Social and Cultural Rights, reiterating that sexual orientation and gender identity are some of the grounds for discrimination prohibited by the Covenant, in the "other status" category.<sup>15</sup> Also the UN Committee on the Rights of the Child has made it clear that the Convention on the Rights of the Child requires that contracting states take appropriate measures, including of legislative nature, which provide protection against discrimination of children on grounds of sexual orientation.<sup>16</sup> The Committee has also expressed concern that young homosexual and transsexual persons do not get access to the appropriate information, support and necessary protection to enable them to live their sexual orientation.<sup>17</sup>

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

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

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

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

At its 1048th meeting, on 16 February 2009, the Committee of Ministers approved the terms of reference thus entrusted to the Committee of Experts on discrimination on grounds of sexual orientation and gender identity (DH-LGBT), under the authority of the CDDH. The Committee of Experts met twice in order to prepare a draft recommendation. It decided that an appendix to the Recommendation should set out the principles deriving from existing European and other international instruments, with particular emphasis on the European Convention on Human Rights, in the light of European Court of Human Rights case-law. The CDDH approved the proposed text of the present recommendation at its 69th meeting (24-27 November 2009) and transmitted it to the Committee of Ministers, which adopted it on...

<sup>13</sup> In the case of *Toonen v. Australia* (Communication No 488/1992, U.N. Doc. CCPR/C/50/D/488/1992(1994)), the Human Rights Committee expressly recognised that the rights of gay and lesbian persons were protected under the United Nations human rights system, pointing out that Article 26 of the International Covenant on Civil and Political Rights (ICCPR) covered "sexual orientation" under the notion of "sex" mentioned in that provision. In the cases of *Young v. Australia* (Communication No 941/2000, U.N. Doc. CCPR/C/78/D/941/2000(2003)) and *X v. Colombia* (Communication No. 1361/2005, U.N. Doc. CCPR/C/89/D/1361/2005 (2007)) this position has been again confirmed in relation to discrimination against a surviving same-sex partner's right to survivor's pension benefits.

<sup>14</sup> Available in English only, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, November 2008, <http://www.unhcr.org/refworld/topic,4565c22547,,48abd5660,0.html>

<sup>15</sup> See the Committee on Economic, Social and Cultural Rights document, para. 32: [http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20\\_fr.doc](http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20_fr.doc)

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

<sup>17</sup> Concluding observations of the Committee on the Rights of the Child re. the United Kingdom, 9 October 2002, document CRC/C/15/Add. 188.

## II. Comments

### **General considerations**

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

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

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

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

In this connection, the European Court of Human Rights, in its judgments in the *Dudgeon v. the United Kingdom*<sup>18</sup> and *Norris v. Ireland*<sup>19</sup> cases, held that the maintenance in force of legislation prohibiting homosexual acts in private constituted a continuing interference with the applicant's right to respect for his private life (which included his sexual life) even where the law in question would no longer result in prosecution. The previously existing European Commission of Human Rights, in its report on the case of *Sutherland v. the United Kingdom*,<sup>20</sup> stated that even though the applicant had not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life. In its reply to Recommendation 211 (2007) of the Congress of Local and Regional Authorities, the Committee of Ministers furthermore pointed out that "in a series of judgments,"<sup>21</sup> the Court has emphasised that any discrimination based on sexual orientation is contrary to the Convention. All member states must observe the Convention when they apply national law, notably in the light of the case-law of the Court".<sup>22</sup>

<sup>18</sup> *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A No. 45, p. 21, para. 41. This was the first case in which the Commission and the Court took a stance against the existence of laws making homosexuality illegal.

<sup>19</sup> *Norris v. Ireland*, judgment of 26 October 1988, Series A No. 142, p. 18, para. 38.

<sup>20</sup> *Sutherland v. the United Kingdom*, No. 25186/94, Commission report of 1 July 1997, not published, which criticises the existence of legislation establishing a higher minimum age of consent to male homosexual, and heterosexual, acts.

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

<sup>22</sup> Reply adopted by the Committee of Ministers on 16 January 2008 at the 1015th meeting of the Ministers' Deputies - CM/Cong(2008)Rec211 final.

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

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

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

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

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

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

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

1 - 2. Hate crimes are crimes committed on grounds of the victim’s actual or assumed membership of a certain group, most commonly defined by race, religion, sexual orientation, gender identity, nationality, ethnicity, disability etc.<sup>23</sup> For the purpose of this recommendation, the term “*hate-motivated incident*” is used to encompass any incident or act – whether defined by national legislation as criminal or not – against people or property that involves a target selected because of its real or perceived connection or membership of a group. The term is broad enough to cover a range of manifestations of intolerance from low-level incidents motivated by bias to criminal acts.<sup>24</sup> “Hate crimes” and other “hate motivated incidents” are very upsetting for the victims and the community to which they belong, and it is all the more striking that, from the victim’s point of view, what matters most is having suffered such a crime because of an immutable fundamental aspect of their identity.<sup>25</sup> But they also threaten the very basis of democratic societies and the rule of law, in that they constitute an attack on the fundamental principle of equality in dignity and rights of all human beings, as inscribed in Article 1 of the Universal Declaration of Human Rights of the United Nations. Lesbian, gay, bisexual and transgender persons are the target of many such crimes or incidents. According to the OSCE/ODIHR report “*Hate Crimes in the OSCE Region: Incidents and Responses*”,<sup>26</sup> homophobic crimes or incidents are often characterised by a high degree of cruelty and brutality, often involving severe beatings, torture, mutilation, castration or even sexual assault, and may result in death. They may also take the form of damage to property, insults or verbal attacks, threats or intimidation.

<sup>23</sup> In the introduction to the OSCE report: *Hate Crime Laws – A Practical Guide*, (p. 7) where hate crimes are described as “Crimes motivated by intolerance towards certain groups in society”. The OSCE/ODIHR also provides a “working definition” in its annual report for 2006, whereby a hate crime is “Any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a group” See also the definition given by the Home Office: <http://www.homeoffice.gov.uk/crime-victims/reducing-crime/hate-crime/> or the U.S. Department of Justice – Bureau of Justice Assistance : *A Policymaker’s Guide to Hate Crimes* : <http://www.ncjrs.gov/pdffiles1/bja/162304.pdf>.

<sup>24</sup> See OSCE annual report for 2006, p. 9, [http://www.osce.org/publications/odihr/2007/09/26296\\_931\\_en.pdf](http://www.osce.org/publications/odihr/2007/09/26296_931_en.pdf)

<sup>25</sup> See OSCE report: *Hate Crime Laws – A Practical Guide*, p. 42:

[http://www.osce.org/publications/odihr/2009/03/36671\\_1263\\_en.pdf](http://www.osce.org/publications/odihr/2009/03/36671_1263_en.pdf)

<sup>26</sup> See OSCE Annual report for 2006, pp. 53-54.

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

Legislative measures to combat these crimes are vital. By condemning discriminatory motives, they send out a signal to offenders that a just and humane society will not tolerate such behaviour. By recognising the harm done to the victims, they give these people and their community the assurance of being protected by the criminal justice system. In addition, the existence of such laws renders hate crimes or other hate-motivated incidents more visible and makes it easier to gather statistical data, which in turn is of importance for the designing of measures to prevent and counteract them.

In legislation, hate crimes will generally be punished by a more severe penalty, as the offence is committed with a discriminatory motive. A failure to take into account such biased motives for a crime may also amount to indirect discrimination under the ECHR.<sup>27</sup> Member states should ensure that when determining sanctions a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. They should furthermore ensure that such motives are recorded when a court decides to hand down a more severe sentence.<sup>28</sup> At least 14 Council of Europe member states have already included sexual orientation as an aggravating circumstance in the committing of an offence in their legislation.<sup>29</sup>

Indeed, it appears from many reports that few of these crimes or incidents are complained of or reported to the police or any public authority. The fact that hostility may be shown to lesbian, gay, bisexual and transgender persons by police officers themselves, either when a victim goes to the police station or at the officers' own initiative, makes them even less likely to do so.<sup>30</sup>

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

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

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<sup>27</sup> *Angelova and Iliev v. Bulgaria*, No. 55523/00, judgment of 26 July 2007, para. 115.: “[W]hen investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.”

<sup>28</sup> The OSCE practical guide (op. cit.) points out that (p. 36) in some states the reasons for penalty enhancements are not publicly recorded, which deprives the law of much of its symbolic and statistical value.

<sup>29</sup> By way of example, Article 132-77 of the French Criminal Code stipulates that “*In the cases provided for in law, the penalties incurred for a crime or misdemeanour shall be more severe when an infringement is committed on grounds of the victim's sexual orientation.*”

The European Union Agency for Fundamental Rights notes that 10 member states of the European Union have included sexual orientation as an aggravating circumstance in the committing of an offence. These are Belgium, Denmark, Spain, France, the Netherlands, Portugal, Romania, Finland, Sweden and the United Kingdom. See *Homophobia and Discrimination on grounds of sexual orientation in the EU member states (Part I – Legal analysis)*, p. 122, available at

[http://www.fra.europa.eu/fraWebsite/products/publications\\_reports/pub\\_cr\\_homophobia\\_0608\\_en.htm](http://www.fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_0608_en.htm)

Where Council of Europe member states are concerned, Andorra, Croatia, Iceland, Norway have also done so.

<sup>30</sup> See the FRA report – Part II, p. 46-47.

<sup>31</sup> *Hugh Jordan v. the United Kingdom*, No. 24746/94, § 154, 4 May 2001.

motives are tricky to prove, the quality of investigations are all the more important. Similarly, the obligation to investigate cases with racist connotations must be fulfilled without discrimination, as required by Article 14 of the Convention.<sup>32</sup> Such obligations are clearly applicable when a crime is motivated by a person's sexual orientation or gender identity.

3. Member states should introduce appropriate measures to encourage the victims and witnesses of hate crimes or other hate-motivated incidents based on sexual orientation or gender identity to report these acts. Such measures could include:
  - a. drawing up and disseminating a simple and comprehensible definition of "hate crimes" including the motive of sexual orientation or gender identity, aimed at the general public so that these crimes are more frequently reported and at the police services which log the complaints;
  - b. setting up training programmes in order to ensure that the different structures of the law enforcement authorities, including the judicial system, possess the knowledge and skills required to provide victims and witnesses with adequate assistance and support;
  - c. creating special units tasked inter alia with investigating crimes and incidents linked to sexual orientation or gender identity and special liaison officers for maintaining contact with local communities in order to foster a relationship of trust;
  - d. placing special emphasis on the setting up of independent and effective machinery for receiving and investigating reports of hate crimes or hate-motivated incidents allegedly committed by law enforcement staff, particularly where sexual orientation or gender identity constitute one of the motives;
  - e. introducing systems of anonymous complaints or on-line complaints or using other means of easy access and allow reporting by third parties in order to gather information on the incidence and particular nature of these incidents;

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

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

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<sup>32</sup> See the Court's argumentation in the case of *Nachova and others v. Bulgaria*, judgment of 26 February 2004, paras. 155-162, concerning killings with racist connotations: "The right to life under Article 2 of the Convention and the prohibition of discrimination in general, and of racial and ethnic discrimination in particular, under Article 14 reflect basic values of the democratic societies that make up the Council of Europe. Acts motivated by ethnic hatred that lead to deprivation of life undermine the foundations of those societies and require particular vigilance and an effective response by the authorities". Furthermore, a failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], No. 34369/97, para. 44, ECHR 2000-IV).

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

5. To be able to combat discrimination it is vital to conduct relevant research and to gather data on discriminatory measures and practices, particularly where "hate crimes" and "hate-motivated incidents" related to sexual orientation or gender identity are concerned, having due regard to the right to respect for private life. The Commissioner for Human Rights, for one, has noted the lack of data on the situation of transgender persons in Europe, particularly in the member states not belonging to the EU.<sup>33</sup>

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

## B. "Hate speech"

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

As the White Paper on Intercultural Dialogue also points out, public debate must respect cultural diversity.<sup>34</sup> Public expressions of racism, xenophobia or any other form of intolerance, whether from individuals in public office or members of civil society, should be rejected and condemned, in line with the relevant provisions of the European Convention on Human Rights, including Article 17. Homophobic public statements by public figures are particularly worrying in that they negatively influence public opinion and fuel intolerance.

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

<sup>33</sup> Human Rights and Gender Identity, Issue Paper, Commissioner for Human Rights, 29 July 2009, p. 9: <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1331143&SecMode=1&DocId=1433126&Usage=2>

<sup>34</sup> In section 5.1 of the White Paper it is stated, *inter alia*, that "states should have robust legislation to outlaw "hate speech" and racist, xenophobic, homophobic, anti-Semitic, islamophobic and anti-gypsy or other expressions, where this incites hatred or violence."



The Court has stated that “whoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses”<sup>35</sup> and the exercise of these freedoms may be subject to restrictions, particularly for the protection of the rights of others.<sup>36</sup> The Court also held that, while Article 10 leaves little scope for restrictions on political speech or debate, the exercise of freedom of expression by elected politicians who at the same time are holders of public offices in the executive branch of government entails particular responsibility.<sup>37</sup> Those individuals must exercise this freedom with restraint, therefore, bearing in mind that their views can be regarded as instructions by civil servants whose employment and careers depend on their approval.

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

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

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

Given the growing importance of the internet and the difficulty of detecting and punishing those who perpetrate “hate speech” on the internet, the member states should establish or maintain a solid and adequate legal framework applicable to the new media and services or communication networks, including in the area of “hate speech” based on sexual orientation or gender identity.<sup>38</sup> Measures of this kind should be taken in compliance with the requirements laid down by Article 10 § 2 of the Convention, so that interference with freedom of expression is as limited as possible, provided for in law and proportionate to the aim sought. States should *inter alia*.<sup>39</sup>

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

## II. Freedom of association

9. The Court held that the positive obligation of states to ensure real and effective respect for freedom of association and assembly is “of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation”.<sup>40</sup>

<sup>35</sup> *Handyside v. the United Kingdom* of 7 December 1976, Series A No. 24, p. 25, para. 49.

<sup>36</sup> Article 10 § 2 of the Convention.

<sup>37</sup> *Bączkowski and others v. Poland*, No. 1543/06, judgment of 3 May 2007, paras. 98-99.

<sup>38</sup> See also, in this respect, the *Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, Council of Europe Treaty Series, No. 189.

<sup>39</sup> The Additional Protocol to the Convention on Cybercrime of 30 January 2003 already establishes the principle that acts of a racist and xenophobic nature disseminated via computer systems must be criminalised.

<sup>40</sup> See for instance *Bączkowski and others v. Poland*, *op. cit.*, para. 64.

A PACE Committee on Legal Affairs and Human Rights report of 24 February 2009 on “The situation of human rights defenders in Council of Europe member states” reveals that, while the activities of human rights defenders working for the rights of lesbian, gay, bisexual and transgender persons has greatly intensified in the last few years in Council of Europe member states, this trend has encountered very strong opposition and these individuals run a particularly high risk.<sup>41</sup> The OSCE report entitled “*Human rights defenders in the OSCE region: challenges and good practices*”<sup>42</sup> shows that obstacles to freedom of association may take the form of refusal of registration, dissolution, expulsion or threats of expulsion from premises, damage to or attacks on premises, defamation campaigns and abuses of taxes. The report further lists the eventuality of repressive measures: criminal sanctions for activities not registered, abusive prosecutions, demands for exorbitant registration and re-registration fees, checks, audits or investigations by state officials, abusive or even illegal taxation.

Anyone should be able to form and gain accreditation for associations, without discrimination, which pass on information to or about lesbian, gay, bisexual and transgender persons, facilitate communication between them or advocate their rights. States should ensure that notions of public order, public morality, public health or public safety are not abused to restrict the exercise of the right to freedom of association in this respect. Refusal to register an association should be on the basis of an objectively justified and properly reasoned decision open to appeal. States where laws or practices prohibit the setting up of organisations advocating the human rights of lesbian, gay, bisexual and transgender persons should abolish those laws or practices and also allow for the possibility of re-registration where dissolution has been ordered.<sup>43</sup> States should not only abstain from interference in these associations’ activities resulting in discriminatory restriction of the exercise of their right to freedom of association but also take appropriate steps to ensure that such organisations operate freely, to defend their interests when necessary and to facilitate and encourage their work. States should also involve them on a partnership basis when framing and implementing public policies, so that their voice may be heard.

10. Access to public funding earmarked for non-governmental organisations should be guaranteed without discrimination on grounds of sexual orientation or gender identity. NGOs should be free to solicit and receive contributions – donations in cash or kind – not only from the public authorities in their own state but also from institutional or individual donors, and other state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.<sup>44</sup>

11. Those who defend the human rights of lesbian, gay, bisexual and transgender persons, are, as recalled by the Parliamentary Assembly,<sup>45</sup> among the most exposed of human rights defenders to attacks and abuses, because of their identity or because of the issues on which they work. In accordance with the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities of 6 February 2008,<sup>46</sup> member states should take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities, and should create an environment conducive to their work, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights.

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

41 §§ 31-32 of the report.

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

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

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

45 See Parliamentary Assembly of the Council of Europe Resolution 1660 (2009) - Situation of human rights defenders in Council of Europe member states, para. 5.

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

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

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

### III. Freedom of expression and peaceful assembly

13. The right to freedom of expression, in particular to share and express one's identity, is fundamental to promoting diversity and tolerance in society.<sup>47</sup> The Court has repeatedly ruled that freedom of expression and peaceful assembly is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. "Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>48</sup>

Everyone must have the right to freedom of expression and peaceful assembly without discrimination, including on the grounds of their sexual orientation or gender identity. This right includes the right to express identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium.<sup>49</sup>

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

14. Within Council of Europe member states, it has been observed that the exercise of freedom of expression and peaceful assembly by lesbian, gay, bisexual and transgender persons and the organisations that represent them sometimes arouses hostility which at times even results in the banning of "gay pride" marches or violent attacks on demonstrators and failure by the police to protect these demonstrators. In many cases, it was observed that the authorities, despite having a positive obligation to protect their citizens against discrimination, are actually endorsing, actively supporting or perpetrating these injustices, thus encouraging homophobic or transphobic attitudes and actions.<sup>50</sup>

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

<sup>47</sup> Committee of Ministers reply of 16 January 2008 to Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe.

<sup>48</sup> *Handyside v. the United Kingdom*, 7 December 1976, No. 5493/72, 1 EHRR 737, para. 49.

<sup>49</sup> Article 19 of the UN International Covenant on Civil and Political Rights of 16 December 1966; Article 19 of the Universal Declaration of Human Rights.

<sup>50</sup> FRA report, op. cit., "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU member states: Part II", pp. 54-58.

As regards the law enforcement agencies in particular, it should be noted that the Committee of Ministers in its Recommendation of 19 September 2001 on the European Code of Police Ethics<sup>51</sup> stated that the police, in carrying out their activities, “shall always bear in mind everyone’s fundamental rights, such as freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions” and that “police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups.”

16. Although the Convention allows restrictions to be placed on the exercise of freedom of expression and assembly, such restrictions must be prescribed by law and necessary in a democratic society, in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.<sup>52</sup> Member states should ensure that these notions are not abused to interfere with the exercise of freedom of opinion and expression in support of lesbian, gay, bisexual and transgender persons. Moreover, according to the established case-law of the European Court of Human Rights, peaceful demonstrations, be they in favour of the rights of lesbian, gay, bisexual and transgender persons or others, cannot be banned simply because of the existence of attitudes hostile to the demonstrators or to the causes they advocate. On the contrary, the state has a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.<sup>53</sup>

The Court has ruled in its case-law that a demonstration may “annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; [...] In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”<sup>54</sup>

In any event, any interference with the exercise of freedom of expression should be “narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria” and should be “subject to independent judicial control”.<sup>55</sup>

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

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

18. The right to freedom of sexual expression, as an element of private life, is protected by Article 8 of the Convention. The Court strongly condemns not only the existence of laws that criminalise same-sex sexual relations between consenting adults in private,<sup>56</sup> but also legislation that prescribes one age of consent for such relations and another for heterosexual relations.<sup>57</sup> It has also ruled that this being one of the most intimate aspects of a person’s private life, the margin of appreciation afforded to states in this area is narrow.

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

<sup>51</sup> Committee of Ministers Recommendation Rec(2001)10 on the European Code of Police Ethics adopted by the Committee of Ministers, on 19 September 2001, at the 765<sup>th</sup> meeting of Ministers’ Deputies, paras 43 and 44 .

<sup>52</sup> See also the OSCE/ODIHR – Venice Commission “Guidelines on Freedom of Peaceful Assembly”, in particular paragraph 69.

<sup>53</sup> Committee of Ministers reply of 16 January 2008 to Recommendation 211 (2007) of the Congress of Local and Regional Authorities of the Council of Europe, paragraph 3.

<sup>54</sup> *Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, Series A No. 139, p. 12, para. 32.

<sup>55</sup> Committee of Ministers Recommendation No. R (97) 20 on “hate speech”.

<sup>56</sup> *Dudgeon v. the United Kingdom*, No. 7525/76, judgment of 22 October 1981; *Norris v. Ireland*, judgment of 26 October 1986 and *Modinos v. Cyprus*, judgment of 23 April 1993. See also *A.D.T. v. the United Kingdom*, No. 35765/97, 30 July 2000, in which the Court found the UK law prohibiting male homosexual acts in private involving more than two partners to be in breach of the Convention.

<sup>57</sup> See also the judgments *L. and V. v. Austria* and *S. L. v. Austria*, of 9 January 2003.

19. Member states should ensure that personal data referring to a person's sexual orientation or gender identity are not collected, stored or otherwise used by public institutions, including notably within law enforcement structures,<sup>58</sup> except where this is necessary for specific, lawful and legitimate purposes.

This applies notably to any criminal register, record or file or any other document related to a criminal investigation (for example, files containing information on the sexual orientation or gender identity of persons heard as victims, witnesses or perpetrators in proceedings), as well as existing special records on lesbian, gay, bisexual and transgender persons. Existing records containing such information should be re-examined with a view to ensuring the immediate destruction of records which do not comply with these principles<sup>59</sup>.

Of course, the benefit of collecting statistics on discriminatory behaviour and other offences against lesbian, gay, bisexual and transgender persons, motivated by their sexual orientation or gender identity is not incompatible with the need to protect personal data relating to sexual orientation or gender identity – which is a legitimate aim – provided that these statistics are collected anonymously or rendered anonymous as soon as they are no longer necessary in an identifiable form. They should, in any event, serve only these purposes and must on no account be used to take decisions or measures in respect of the data subjects or to supplement or correct existing files which have a non-statistical purpose.<sup>60</sup>

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

As affirmed in Committee of Ministers Recommendation Rec(2007) 17 on gender equality standards and mechanisms, "both women and men must have a non-negotiable right to decide over their own body, including sexual and reproductive matters. Such acknowledgement must be reflected in the development, implementation, access to, monitoring and evaluation of health-care services and in research priorities."<sup>61</sup>

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

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

States thus have a positive obligation to legally recognise the new identity of a transsexual person<sup>62</sup> who has undergone a complete gender reassignment. This includes the issuing of official documents such as birth certificates, identity papers, driving licences, passports, social insurance cards and numbers, electoral, land and tax registers. The Court has stressed that it is of "crucial importance", that the Convention be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.<sup>63</sup> There is

<sup>58</sup> Committee of Ministers Recommendation Rec (2001) 10 on the European Code of Police Ethics states that the police shall only interfere with an individual's right to privacy when strictly necessary and only to obtain a legitimate objective. The collection, storage and use of personal data by the police shall be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes. The police-register containing information relating to private life must satisfy the requirements of Article 8 of the Convention.

<sup>59</sup> As already provided in 1981 by Parliamentary Assembly Recommendation 924 (1981).

<sup>60</sup> Committee of Ministers Recommendation No. R(97)18, of 30 September 1997, "concerning the protection of personal data collected and processed for statistical purposes", principles 3.3 and 4.1. See also on this subject the Fundamental Rights Agency report, Part I, pp. 145-148.

<sup>61</sup> Committee of Ministers Recommendation Rec(2007) 17, of 21 November 2007, Principle 44.

<sup>62</sup> Judgments *B. v. France* of 25 March 1992, Series A No. 232-C, pp. 52-54; *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports of Judgments and Decisions*, 1998-V, p. 2021; *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, 11 July 2002, §§ 89 and 124, ECHR 2002-VI and *Grant v. the United Kingdom*, No. 32570/03, ECHR 2006.

<sup>63</sup> *Christine Goodwin v. the United Kingdom*, op. cit., para. 74.

an obligation on states to issue e.g. new birth certificates, and also non-official documents issued by non-government agencies such as diplomas, certificates of employment, insurance or banking documents should, where appropriate and upon request, be altered to conform to the new gender identity of such persons.

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

22. Transgender persons have a right to marry a person of the sex opposite to their own newly assigned sex, **provided that their gender reassignment has been recognised in accordance with applicable law and paragraphs 20 and 21**. The Court has recognised that persons who have undergone a complete gender reassignment have the right to marry and ruled that the allocation of sex in national law, for the purposes of marriage, to that registered at birth is a limitation impairing the very essence of the right to marry.<sup>64</sup> It further considered that although the text of Article 12 referred in express terms to the right of a man and woman to marry, it was not persuaded that it could now still be assumed that these terms must refer to a determination of gender by purely biological criteria.<sup>65</sup> Similarly, the refusal to award a pension to the unmarried transsexual partner of a woman (the couple having been unable to marry because of the legislation on gender reassignment) affiliated to a pension scheme, under which benefits were payable only to her surviving spouse, amounts to discrimination on grounds of sex under European Community law as ruled by the ECJ.<sup>66</sup>

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex couples and different-sex couples. The Court, for example, has already considered a number of specific issues, taking the view that differences based on sexual orientation require particularly serious reasons by way of justification and that the margin of appreciation afforded to member states in this area is narrow. In matters relating to tenancy rights, for example, it ruled that the refusal to allow a surviving unmarried same-sex partner to succeed to his partner's tenancy, when unmarried heterosexual partners were permitted to do so, amounted to discrimination on the ground of sexual orientation in the exercise of the right to respect for the home, in breach of Articles 8 and 14 of the Convention.<sup>67</sup>

In the case *Young v. Australia*, the UN Human Rights Committee considered that the refusal by a state to grant a person in a same-sex relationship a pension on the ground that he does not meet with the definition of "dependant" violated Article 26 of the ICCPR, on the basis of his sexual orientation. In reaching this conclusion, the Committee recalled its constant jurisprudence that not every distinction amounts to prohibited discrimination under the ICCPR, as long as it is based on reasonable and objective criteria, and noted that the state party provided no arguments on how the distinction between same-sex partners, who were excluded from pension benefits under law, and unmarried heterosexual partners, who were granted such benefits, was reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction.<sup>68</sup>

<sup>64</sup> *Christine Goodwin v. the United Kingdom*, op. cit. and *I v. the United Kingdom*, 11 July 2002, paras. 101 and 81.

<sup>65</sup> Ibid. §§ 100 and 80. Note that this case-law does not pave the way for same-sex marriages, as the Court merely accepts the notion of "social gender" as a decisive factor in determining sex. A case is nevertheless pending before the Court concerning the annulment of a civil marriage between two people of the same sex, notably on the ground that under the legislation in question, "marriage is a union between a man and a woman". Case of *Chapin and Charpentier v. France*, No. 40183/07, see the Communicated Cases Collection: Statement of facts and Questions to the parties:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=40183/07&sessionId=30302497&skin=hudoc-cc-fr>.

<sup>66</sup> *K. B. v. National Health Service Pensions Agency and Secretary of State for Health*, ECJ, case C-117/01, judgment of 7 January 2004.

<sup>67</sup> *Karner v. Austria*, No. 40016, 24 July 2003, paras. 37-42.

<sup>68</sup> See *Young v. Australia* (Communication No 941/2000, U.N. Doc. CCPR/C/78/D/941/2000(2003)), paragraph 10.2. Similar considerations were applied also in the case *X v. Colombia* (Communication No. 1361/2005, U.N. Doc. CCPR/C/89/D/1361/2005 (2007), para. 7.2).

24. If under national legislation registered partnerships between persons of the same sex are recognised, their legal status and their rights and obligations should be equivalent to those of heterosexual couples in a comparable situation.<sup>69</sup> The evaluation of whether under national law a same-sex couple is in a “comparable situation” with an opposite-sex couple is however left to the appreciation of national authorities on the basis of the specific circumstances of each case.<sup>70</sup> This means that in some circumstances same-sex couples may not be considered as being in a situation comparable to opposite sex-couples.

25. **It is recalled that the right to marry as set out in Article 12 of the European Convention on Human Rights and Fundamental Freedoms refers to traditional marriage between persons of the opposite sex. This has been confirmed by the European Court of Human Rights in several cases.** The study prepared for the Council of Europe’s European Committee on Legal Co-Operation (CDCJ) by the Danish Institute for Human Rights on various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity, also concludes that the lack of access to marriage or to obtain a similar partnership status for same-sex couples has a negative impact on the effective protection of lesbian, gay, bisexual and transgender persons’ human rights.<sup>71</sup>

Where national law recognises neither same-sex registered partnerships nor unmarried couples, member states should at least consider the possibility of providing same-sex couples with some legal or other means to deal with the practical problems arising from this lack of legal recognition, without discrimination of any kind. It is clear, in particular, that this should not result in discriminatory treatment of different-sex couples where they have similar needs. In this respect, it should also be noted that already in 2000, the Parliamentary Assembly of the Council of Europe, in its Recommendation 1474(2000), had invited member states to adopt legislation which made provision for registered partnerships for same-sex couples.<sup>72</sup>

26. Throughout family life and when parents separate or divorce, the primary consideration in all decisions on parental responsibility or guardianship, i.e. care and protection, the provision of education, maintenance of personal relations, the child’s place of residence, administration of the child’s assets, legal representation etc, should be the child’s best interests, in accordance with Article 3 § 1 of the International Convention on the Rights of the Child. Taking this into account, member states should **ensure that such decisions are taken without discrimination** ~~this concept is not abused to justify a difference of treatment between parents or legal guardians solely based on sexual orientation or gender identity.~~<sup>73</sup> In the *Salgueiro Da Silva Mouta v Portugal* case,<sup>74</sup> concerning the award of custody of a child to the applicant’s ex-wife, the Court found that the national court had made a distinction in this context based on the applicant’s sexual orientation, which was not acceptable under the Convention. The Court therefore found a violation of the applicant’s right to respect for his family life (Article 8) and taken together with the prohibition on discrimination on grounds of sexual orientation (Article 14).

27. No state is obliged to allow unmarried persons to adopt children individually. If they choose to allow for such adoptions under their national law they should however apply such legal provisions without discrimination.<sup>75</sup> Lesbian, gay, bisexual and transgender persons should therefore be able to adopt individually in the same way as heterosexuals in a comparable situation. ~~Again, while, with the primary consideration in all decisions that affect children should be being the child’s best interests,~~<sup>76</sup> ~~states should ensure that this concept is not abused to justify a difference in treatment between adoptive parents based solely on sexual orientation or gender identity as such.~~

<sup>69</sup> For a full review of national regulations on same-sex partnerships in Council of Europe member states, see the study prepared for the CDCJ by the Danish Institute for Human Rights on various forms of marital and non-marital partnerships and cohabitation with a view to identifying possible measures to avoid discrimination on grounds of sexual orientation or gender identity, document CDCJ(2009)9, pp. 18-22.

<sup>70</sup> *Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen*, case C-267/06, paras 65 to 73.

<sup>71</sup> Study for the CDCJ, op. cit., p. 23.

<sup>72</sup> More recently, on 14 January 2009, the European Parliament called on those member states who had not yet done so, and in application of the principle of equality, to take legislative action to overcome the discrimination experienced by some couples on the grounds of their sexual orientation.

<sup>73</sup> With respect to gender identity, this may imply for instance that if either of the parents changes sex, that should no effect on their initial parental status, nor be a relevant issue when ruling on a parental right.

<sup>74</sup> *Salgueiro Da Silva Mouta v Portugal*, judgment of 21 December 1999, paras. 34-36.

<sup>75</sup> See *E.B v. France*.

<sup>76</sup> See Art. 3 of the International Convention on the Rights of the Child.



The Court has already had occasion to rule on the issue of discrimination on grounds of sexual orientation with respect to adoption of children by unmarried individuals. **In the *Fretté v. France* case, after finding that “the decision [to dismiss his application for authorisation to adopt] contested by the applicant was based decisively on the latter’s avowed homosexuality”,<sup>77</sup> the Court held that the justification given by the Government appeared objective and reasonable and that the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention,<sup>78</sup> and there was no doubt that the decisions to reject the applicant’s application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure.<sup>79</sup>** Thus, **Later** in a Grand Chamber judgment in the *E.B. v. France* case, the Court found that the sexual orientation of the applicant was a decisive factor in the authorities’ decision to refuse her the authorization which was necessary for her to be allowed to adopt a child. The Court, citing its ruling in the *Salgueiro da Silva Mouta* case, therefore concluded that the authorities had “made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention”. The Court found a violation of Articles 8 and 14 of the Convention.

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

## V. Employment

29. According to the case law of the Court, employment matters may also come under the protection of private life in Article 8. In *Niemietz v. Germany*,<sup>80</sup> the Court stated that “There appears, furthermore, to be no reason of principle why this understanding of the notion of ‘private life’ should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that [...] it is not always possible to distinguish clearly which of an individual’s activities form part of his professional or business life and which do not.” It is also under this perspective that states should ensure the establishment and implementation of appropriate legislative and other measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation.

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

- the adoption of codes of conduct applying both to employers and to employees;
- training and awareness-raising programmes aimed both at employers and at employees on issues relating to such discrimination in the workplace and on the legal consequences of discriminatory practices, with the emphasis on recruitment and promotion procedures;
- distribution to employees of information material explaining their rights, any available complaint mechanisms and effective remedies;
- recruitment efforts directed at lesbian, gay, bisexual and transgender persons.

It should be encouraged that such measures be developed in cooperation with existing employee groupings or associations recognised as being representative of lesbian, gay, bisexual and transgender persons.

In particular, states should take the appropriate measures to abolish laws, regulations and practices which discriminate on grounds of sexual orientation or gender identity, as regards access to and the career advancement within certain professions or occupations, such as the armed forces. With respect in particular to the latter, measures should be designed and implemented in order to provide protection against interferences based on sexual orientation or gender identity in the everyday lives of members of the armed forces (e.g. investigations, warnings, harassment, bullying, cruel initiation rites, humiliation and other forms of ill-treatment), in accordance with the case-law of the Court.<sup>81</sup> Codes of conduct and training programmes designed to combat discrimination on grounds of sexual orientation or gender identity in the armed forces should be put in place to promote tolerance and the respect of the human dignity of every individual.

<sup>77</sup> *Fretté v. France*, judgment of 26 May 2002, para. 37.

<sup>78</sup> *Ibid*, para. 43.

<sup>79</sup> *Ibid*, para. 38.

<sup>80</sup> See *Niemietz v. Germany*, No. 13710/88, judgment of 16 December 1992, para. 29.

<sup>81</sup> See *Smith and Grady v. the United Kingdom* and *Lustig-Prean and Beckett v United Kingdom*, judgments of 27 December 1999. The question of discrimination against lesbian, gay, bisexual and transgender persons in the armed forces is also referred to in a draft Committee of Ministers recommendation on the human rights of members of the armed forces.



What indicated above is without prejudice of the possibility that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate. The principle of non-discrimination will not be violated if the distinction between individuals in analogous situations has an objective and reasonable justification by pursuing a legitimate aim and employing means which are reasonably proportionate to the aim sought to be realised.<sup>82</sup>

30. Discrimination in employment and occupation is a particular concern for transgender persons, who are hard hit by unemployment and social exclusion. The number of transgender persons made redundant, particularly during a gender reassignment procedure, who leave their jobs to avoid any forms of harassment or who decide against gender reassignment for the same reasons is also very high.<sup>83</sup>

Member states should therefore ensure that measures designed to combat discrimination in employment also apply to gender identity issues, take care to avoid unnecessary disclosure of a transgender person's gender background or previous name, both in recruitment procedures and during working life,<sup>84</sup> and develop programmes focusing specifically on employment opportunities for transgender persons.

## VI. Education

31. The right to education is expressed in Article 2 of the Protocol to the Convention. The health and development of young people are heavily influenced by the environment in which they live, and school has a crucial place in that, especially in view of the fact that discrimination on grounds of sexual orientation or gender identity among young people is a factor contributing to isolation, underachievement and malaise and may even lead to suicide attempts. The right of children not to be discriminated in the enjoyment of their rights is also expressed in Article 2 of the Convention on the Rights of the Child, and Article 29§1 of the same Convention provides that education shall be directed to "the development of the child's personality, talents and mental and physical abilities to their fullest potential". The United Nations Committee on the Rights of the Child notes in this connection that sexual orientation is a prohibited grounds of discrimination in this respect, and that many young lesbian, gay, bisexual and transgender persons do not have access to the appropriate information, support and necessary protection to enable them to live their sexual orientation and that adolescents' human rights need to be promoted in order to ensure that they enjoy the highest attainable standard of health, develop in a well-balanced manner and are adequately prepared to enter adulthood and assume a constructive role in their communities and in society at large.<sup>85</sup>

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

<sup>82</sup> See also Recommendation CM/Rec(2010)4 of the Committee of Ministers on human rights of members of the armed forces (adopted on 24 February 2010 at the 1077th meeting of the Ministers' Deputies).

<sup>83</sup> Employment is also vital for access to certain gender reassignment treatments as it can provide health insurance cover.

<sup>84</sup> According to the report by the FRA (Part I, p 155), even after a gender reassignment has been officially recognised, information may still be collected on the past of the persons concerned, particular in the context of job applications, through access to certain records. The ECJ, in the *P. v S. and Cornwall City Council* case (C-13/94), censured the dismissal of a person for a reason relating to a gender reassignment as constituting sex discrimination.

<sup>85</sup> Committee on the Rights of the Child, General Comment No 4 (2003) : "Adolescent health and development in the context of the Convention on the Rights of the Child", 1 July 2003.

32. Failure to address the issue of sexual orientation or gender identity may have harmful consequences for the self-esteem of young lesbian, gay, bisexual and transgender persons. States should therefore deal with the issue of sexual orientation and gender identity in a respectful and objective manner in curricula or in sex and health education classes, for example, and set up initial and in-service training programmes or support and guidance for teachers and other educational staff to address these issues, in particular from an anti-discrimination perspective. The European Committee on Social Rights has recently affirmed that by officially approving or allowing the use of the textbooks that contain anti-homosexual statements a state has failed in its positive obligation to ensure the effective exercise of the right to protection of health by means of non-discriminatory sexual and reproductive health education, which “extends to ensuring that educational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to the social exclusion, embedded discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation”.<sup>86</sup>

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

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

**All measures should take into account the rights of parents regarding education of their children, such as the right to ensure education and teaching in conformity with their own religious and philosophical convictions, as enshrined in Article 2 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms.**

## VII. Health

33. International human rights law asserts that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care and necessary social services, and that states recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>87</sup> Recommendation Rec(2006)18 of the Committee of Ministers to member states on health services in a multicultural society, adopted on 8 November 2006, recommends that states adapt their health services to the needs of multicultural societies, inter alia by developing “culture competence” for health professionals, which may be defined as the ability to offer effective health services while having due regard, among other things, to the patient’s sexual orientation.

The report by the FRA shows that many lesbian, gay, bisexual and transgender persons suffer discrimination in the health-care area: for example, they are advised to undergo psychiatric treatment, and gay men are still associated with HIV and even paedophilia.<sup>88</sup> Therefore, many lesbian, gay, bisexual and transgender persons do not disclose their sexual orientation to their general practitioner and forego treatment for fear of discrimination or intolerant reactions, which may lead to not only physical but also mental health problems,<sup>89</sup> including dietary problems, drug or alcohol misuse, depression, suicide and suicide attempts.<sup>90</sup>

<sup>86</sup> See: *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* - European Social Charter Complaint No. 45/2007, decision of 30 March 2009, paras. 60-61.

<sup>87</sup> Article 25 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

<sup>88</sup> FRA report, Part II, p. 78.

<sup>89</sup> In connection with the refuse of disclosing sexual orientation for fear of discrimination to the general practitioners, a marked tendency towards psychological problems, suicide and suicide attempts may be observed among lesbian, gay, bisexual and transgender persons, and particularly among younger lesbian, gay, bisexual and transgender persons.

<sup>90</sup> See also the Parliamentary Assembly Resolution 1608(2008) on Child and teenage suicide in Europe: a serious public health issue, in particular paras 9 and 10.

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

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

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

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

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

35-36. The Court's case-law considers the right to sexual self-determination as one of the aspects of the right to respect for one's private life guaranteed by Article 8 of the Convention and requires Contracting States to provide for the possibility to undergo surgery leading to full gender-reassignment, but also that insurance plans should cover "medically necessary" treatment in general, which gender reassignment surgery may be part of.<sup>91</sup> Where legislation provides for coverage of necessary health care costs by public or private social insurance systems, such coverage should then be ensured in a reasonable, non-arbitrary and non-discriminatory manner,<sup>92</sup> taking into account also the availability of resources.

Concerning the conditions governing gender reassignment procedures, international human rights law provides that no one may be subjected to treatment or a medical experiment without his or her consent.<sup>93</sup> Hormonal or surgical treatments as preconditions for legal recognition of a gender change (see §19 above) should therefore be limited to those which are strictly necessary, and with the consent of the person concerned. Similarly, therapy to force transgender persons to accept their birth gender should be abandoned, and states should take appropriate measures to ensure that no child has his or her body irreversibly changed by medical practices designed to impose a gender identity without his or her full, free and informed consent, in accordance with his or her age and maturity, unless such medical interferences are necessary for other health reasons.

<sup>91</sup> *Van Kück v Germany*, no 35968/07, judgment of 12 June 2003, paras. 73 to 86.

<sup>92</sup> See *L v Lithuania*, judgment of 11 September 2007, §59, and *Schlumpf v Switzerland*, no 29002/06, judgment of 8 January 2009, §115.

<sup>93</sup> See in this connection General Comment No 14 of the Committee on Economic, Social and Cultural Rights, §8, and the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, CETS No 164, Chapter II.

## VIII. Housing

37. States should take appropriate measures to ensure non-discriminatory security of tenure and access of lesbian, gay, bisexual and transgender persons to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation.<sup>94</sup>

In accordance with this principle, measures should be taken to prevent, for example, the refusal to sell or rent housing to a person, or to give financial assistance to a person for the purchase of housing, or to recognise the rights of a tenant's partner, because of his or her sexual orientation or gender identity. In the *Karner v. Austria* case,<sup>95</sup> the European Court of Human Rights held in this connection that the refusal to allow a surviving unmarried same-sex partner to succeed to his partner's tenancy, whereas this possibility exists for unmarried heterosexual partners, constitutes discriminatory treatment on grounds of sexual orientation in the exercise of the right to respect for one's home, in violation of Articles 8 and 14 of the Convention. Information material to this effect could, for example, be made available to landlords and tenants in order to identify and prevent instances of discrimination in housing.

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

38. Many lesbian, gay, bisexual and transgender persons, in particular young persons, are rejected by their own families and may find themselves homeless. States should therefore establish social programmes, including support programmes, to address factors relating to sexual orientation and gender identity which increase vulnerability to homelessness, especially for children and young people<sup>96</sup> and promote schemes of neighbourhood support and security. States should also provide training and awareness-raising programmes to ensure that relevant agencies are aware of and sensitive to the needs of those facing homelessness or social disadvantage as a result of their sexual orientation or gender identity, in particular young lesbian, gay, bisexual and transgender persons.

## IX. Sports

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

Member states should therefore take appropriate measures to implement the sports-related recommendations and principles adopted by Council of Europe bodies with respect to sexual orientation and gender identity, whether or not they include such specific references or not. States should consider PACE Recommendation 1635 (2003) of 25 November 2003 on lesbians and gays in sport, calling on states to "include homophobia and abusive language directed at lesbians and gays as grounds for accusation of discrimination and harassment on the basis of sexual orientation; make homophobic chanting at or around sports events a criminal offence, as is presently the case with racist chanting in many member states; involve NGOs from the gay and lesbian community in their sports campaigns and in all other necessary confidence-building steps". They should likewise implement the relevant provisions of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, the European Sports Charter and ECRI's General Policy Recommendation No. 12,<sup>97</sup> adapting them also to cover discrimination towards sports players or spectators on the grounds of their sexual orientation or gender identity.

<sup>94</sup> General Comment No 4 of the Committee on Economic, Social and Cultural Rights relating to Article 11 of the ICESCR, document E/1992/23. See also *Karner v. Austria*, op.cit., relating to Article 8 of the European Convention. The proposal for a European Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation provides explicitly for protection of lesbian, gay, bisexual and transgender persons against discrimination in access to goods and services, including housing.

<sup>95</sup> *Karner v. Austria*, op.cit., paras. 37-42.

<sup>96</sup> Such as social exclusion, domestic and other forms of violence, discrimination, lack of financial independence and rejection by families or cultural communities.

<sup>97</sup> European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, CETS No 120, of 19 August 1985. European Sports Charter, Recommendation No R(92)13 rev of the Committee of Ministers, adopted on 24 September 1992. ECRI's General Policy Recommendation No 12 on combating racism and racial discrimination in sport (adopted by ECRI on 19 December 2008).

Sports activities and facilities should be open to all, without discrimination on any grounds, including sexual orientation and gender identity. In this connection, states should encourage the drawing up and dissemination of codes of conduct on questions relating to sport and sexual orientation or gender identity for the attention of sports organisations and clubs. They should also encourage partnerships between associations representing lesbian, gay, bisexual and transgender persons and sports clubs, anti-discrimination campaigns in the sports world, and support sports clubs set up by lesbian, gay, bisexual and transgender persons themselves. As regards in particular transgender persons, states should take appropriate measures to put an end to their exclusion from sports activity or competitions,<sup>98</sup> to remove the obstacles encountered by transgender persons in participating in sports and to recognise their preferred gender, particularly in connection with dressing room access, in the interest of fair competition.

## X. Right to seek asylum

42. In its Recommendation 1470 (2000),<sup>99</sup> the Parliamentary Assembly criticised the fact that the majority of Council of Europe member states did not recognise persecution on grounds of sexual orientation as a valid ground for granting asylum. It also noted that homosexuals who have a well-founded fear of persecution resulting from their sexual preference are refugees under Article 1.A.2. of the 1951 Convention Relating to the Status of Refugees as members of “a particular social group”, and consequently should be granted refugee status. Recommendation Rec(2004)9 of the Committee of Ministers of 30 June 2004 provided a definition of the concept of “a particular social group” and established principles to determine whether a person is persecuted because of membership in a particular social group.<sup>100</sup> In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law. However, interpretation of the 1951 Convention’s concept of membership of a particular social group should not impose upon states obligations to which they have not consented.

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

43. The protection of the right to life and the prohibition of torture entail an obligation for member states not to deport a person to a state where he or she is likely to be subjected to treatment contrary to Articles 2 and 3 of the Convention.<sup>101</sup> According to Article 33 of the 1951 Convention Relating to the Status of Refugees “No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his [...] membership of a particular social group”. If there is a risk that a person be subject to application of the death penalty, to torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity in their country of origin, member states should refrain from returning such persons and instead grant them the protection they seek. Where same-sex sexual relations are illegal in a particular society, the imposition of severe criminal penalties amounting to the risk outlined above could also be considered as a valid ground not to send a person to that country.

<sup>98</sup> On the lines of the Stockholm Declaration, adopted by the International Olympic Committee in May 2004, specifying the conditions under which a person may compete in a sports event in a gender different from their birth gender.

<sup>99</sup> Recommendation 1470 (2000), adopted on 30 June 2000, on the situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe.

<sup>100</sup> Recommendation Rec(2004)9, adopted on 30 June 2004, on the concept of “membership of a particular social group” (MPSG) in the context of the 1951 Convention relating to the status of refugees. It considers that “a “particular social group” is a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state or the persecutors. Persecutory action towards a group may however be a relevant factor in determining the visibility of a group in a particular society”. It also provides that “the concept of MPSG should be interpreted in a broad and inclusive manner in the light of the object and purpose of the 1951 Convention. However, interpretation of the concept of MPSG should not extend the scope of the Convention to impose upon states obligations to which they have not consented” and that “mere membership of a particular social group, as described above, will not normally be enough to substantiate a claim for refugee status. Each asylum claim must be considered individually with regard to the nexus between the MPSG and the existing risk of persecution. Furthermore, the factual circumstances in the country of origin need to be taken into account. There may, however, be special circumstances in individual cases where mere membership can be a sufficient ground for fearing persecution”.

<sup>101</sup> *Soering v. the United Kingdom*, judgment of 7 June 1989. The Court has already applied Rule 39 of the Rules of Court with regard to the deportation of persons alleging a risk of treatment contrary to Articles 2 and/or 3 of the Convention because of their sexual orientation if they are returned to their country of origin (in the case of deportations to Afghanistan, Pakistan or Iran, for example). These cases have not yet been heard on the merits.

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

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

## **XI. National Human Rights Structures**

45. National human rights protection structures, which may include, but are not limited to, equality bodies and ombudsmen, should be given the broadest possible mandate for tackling problems of discrimination including on grounds of sexual orientation or gender identity as well as multiple discrimination, taking account of the “Paris principles” relating to the status and functioning of national institutions for the protection and promotion of human rights.<sup>102</sup>

## **XII. Multiple discrimination**

46. Human beings are not defined by one single criterion such as their gender, skin colour, language, national, ethnic or social origin, religion, age or sexual orientation, but are beings with diverse identities where a range of criteria interact with each other. Multiple discrimination can be said to occur when a person suffers discrimination based on his or her connection to at least two different protected discrimination grounds, or because of the specific combination of at least two such grounds. The latter situation is often also referred to as intersectional discrimination. An example of that is when a lesbian woman is treated less favourably than a heterosexual woman would be but also less favourably than a gay man.<sup>103</sup>

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

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

<sup>102</sup> Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, known as the “Paris Principles” set out in United Nations General Assembly resolution 48/134 of 20 December 1993 (A/RES/48/134).

<sup>103</sup> Danish Institute for Human Rights : “*Tackling multiple discrimination – Practices, policies and laws*”, report commissioned by the European Commission, September 2007. At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001, the United Nations General Assembly recognised the phenomenon of multiple discrimination (Report, declaration No. 2, document A/CONF.189/12, p. 5).