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Foreword

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

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

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

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

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

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

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

Thorbjørn Jagland
Secretary General

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

(Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies)

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommends that member states:

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

Appendix to Recommendation CM/Rec(2010)5

I. Right to life, security and protection from violence

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

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

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

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

B. “Hate speech”

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

II. Freedom of association

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

III. Freedom of expression and peaceful assembly

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

IV. Right to respect for private and family life

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

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

V. Employment

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

VI. Education

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

VII. Health

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

VIII. Housing

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

IX. Sports

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

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

X. Right to seek asylum

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

XI. National human rights structures

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

XII. Discrimination on multiple grounds

46. Member states are encouraged to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues.

Explanatory memorandum

The present explanatory memorandum was prepared by the Secretariat in 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 30 years. The Parliamentary Assembly (PACE) has adopted several recommendations to the Committee of Ministers since 1981 and a

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

In the European Convention on Human Rights system, although the list of grounds of discrimination prohibited by Article 14 of the Convention and its Protocol No. 12 (general prohibition of discrimination) does not expressly mention sexual orientation or gender identity, this list is open and there is nothing to prevent their inclusion, in practice, among the protected characteristics. The European Court of Human Rights (hereinafter “the Court”) has already recognised that Article 14 covers sexual orientation¹ and the explanatory report to Protocol No. 12 indicates that this instrument would provide protection against discrimination based on sexual orientation. While this was not expressly stated with regard to gender identity, it may reasonably be considered that it would also be covered by both Article 14 and Protocol No. 12. The Court stated that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.² 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.³ 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.⁴

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

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

2. See *Karner*, paragraph 37.

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

4. See *Karner*, paragraph 41.

Union contains a general anti-discrimination provision expressly mentioning “sexual orientation” in the list of prohibited grounds. The Council of the European Union has adopted a directive establishing a general framework for equal treatment in employment and occupation,⁵ 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,⁶ 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.⁷ 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”⁸

The Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) has recently published several reports and documents analysing certain aspects of issues of discrimination based on sexual orientation or gender identity in OSCE participating states: the 2006 and 2007 annual reports of the OSCE/ODIHR on “Hate crimes in the OSCE region: incidents and responses”, which contain sections on intolerance towards lesbian, gay, bisexual and transgender persons; the OSCE report of 9 March 2009 on “Hate crime laws: a practical guide”; the Handbook on human rights and fundamental freedoms of armed forces personnel of the OSCE/ODHIR,⁹ the report on “Human rights defenders in the OSCE region: challenges and good practices”, April 2007-April 2008.¹⁰

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

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

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

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

8. Part I: legal analysis and Part II: the social situation, available in English at www.fra.europa.eu.

9. Available in English only at www.osce.org/item/30553.html.

10. Available in English only at www.osce.org/item/35711.html.

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

within the General Assembly. The mechanisms of the United Nations covering human rights – the treaty bodies and the Human Rights Council – are ever more frequently called upon to deal with questions of discrimination based on sexual orientation.¹² 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 identity¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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.

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

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

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

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

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

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

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

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

II. Comments

General considerations

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

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

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

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

In this connection, the European Court of Human Rights, in its judgments in the *Dudgeon v. the United Kingdom*¹⁷ and *Norris v. Ireland*¹⁸ 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*,¹⁹ stated that

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

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

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

even though the applicant had not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life. In its reply to Recommendation 211 (2007) of the Congress of Local and Regional Authorities, the Committee of Ministers furthermore pointed out that “in a series of judgments,²⁰ 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.”²¹

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.

20. 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.

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