



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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**Contribution of the Commissioner for Human Rights
to the work of the Committee of Experts on
Discrimination on Grounds of Sexual Orientation and
Gender Identity (DH-LGBT)**

A. General observations

1. The aim of this contribution is to provide the DH-LGBT with a brief overview of the Commissioner's observations and activities with regards to combating discrimination based on sexual orientation and gender identity, including homophobia and transphobia.
2. The Commissioner observes that lesbian, gay, bisexual and transgender (LGBT) persons continue to be confronted with discrimination, violence and prejudices in many Council of Europe member states because of their real or perceived sexual orientation or gender identity, as well as with homophobia and transphobia more generally. Many politicians, opinion leaders and religious leaders have used intolerant speech or worse, incitement to hatred. Too often there is no counter-reaction and too few people stand up against homophobia and transphobia. The Commissioner considers these problems as a priority theme for his Office. He is deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity and he raises his concerns consistently during his dialogue with member states of the Council of Europe.
3. The Commissioner observes that *sexual orientation* and *gender identity*, unlike for example 'race', gender and disability, are not explicitly mentioned in any European or international human rights convention. He believes that the Council of Europe as the regional human rights body in Europe has a leading role to play in setting clear human rights standards in this field and enforcing them. He therefore welcomes the Decisions by the Committee of Ministers to step up action to combat discrimination on grounds of sexual orientation and gender identity. This has led to the Terms of Reference of the DH-LGBT with the mandate to 'draft a recommendation on measures to combat discrimination based on 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.' He notes that the Committee of Ministers' Decisions include a message to all governmental committees of the Council of Europe to give 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 activities designed to strengthen the equal rights and dignity of LGBT persons and to combat discriminatory attitudes against them in society.
4. In the absence of an instrument explicitly recognising sexual orientation and gender identity, the Commissioner relies on the non-discriminatory application of the existing human rights treaties, in particular the European Convention on Human Rights (ECHR) and Article 14 which prohibits any form of discrimination in the exercise of the rights and freedoms guaranteed by the Convention as well as Protocol 12 to the ECHR. Whereas sexual orientation and gender identity are not explicitly mentioned as discrimination grounds, the drafters of Protocol 12 pointed out in the explanatory memorandum that it prohibits discrimination on grounds of sexual orientation. This is however, not the case with gender identity, although it would undoubtedly be understood as such since the list of grounds in Protocol 12 is open and because of the jurisprudence of the Court in relevant cases.
5. The Commissioner notes that the European Court of Human Rights has in significant judgments held that consensual sexual relations in private, between adults of the same sex, must not be criminalized; that there should be no discrimination when setting the age of consent for sexual acts; that homosexuals have the right to be admitted into the armed forces; that LGBT persons and organisations enjoy the same freedom of assembly for gay pride parades as any other persons; that same sex partners should have the same right of succession of tenancy as other couples; that sexual orientation cannot be used as a ground to discriminate when child custody is granted; that sex change in identity documents should be authorized for transgender persons and that States cannot discriminate against an applicant for adopting a child based solely on sexual orientation.

6. The Commissioner welcomes the work of other Council of Europe bodies in combating discrimination based on sexual orientation and, to a lesser extent, gender identity. He particularly notes the Recommendations of the Parliamentary Assembly to the Committee of Ministers: Recommendation 924 (1981) on discrimination against homosexuals; Recommendation 1117 (1989) on the conditions of transsexuals; Recommendation 1470 (2000) Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe; Recommendation 1474 (2000) Situation of lesbians and gays in Council of Europe member states and Recommendation 1635 (2003) Lesbians and gays in sport. He looks forward to the report currently under preparation within the Parliamentary Assembly's Committee on Legal Affairs and Human Rights on "Discrimination on the basis of sexual orientation and gender identity". He also notes Recommendation 211 (2007) of the Congress of Local and Regional Authorities on Freedom of assembly and expression by lesbians, gays, bisexuals and transgender persons. Finally, he commends the activities of the DG Education, Culture and Heritage, Youth and Sport, especially the activities and publications in the framework of the campaign *All Different All Equal* and the *Compass* human rights manual which offer practical tools in promoting respect and equality for LGBT persons.
7. The Commissioner also notes important recent developments in the global efforts in combating discrimination based on sexual orientation and gender identity. He particularly welcomes the *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity* which he considers as an important tool in identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their sexual orientation or gender identity. He also welcomes the *Statement on human rights, sexual orientation and gender identity* on behalf of 66 States as delivered on 18 December 2008 in the UN General Assembly. He notes that a vast majority of the Council of Europe member states (41) have endorsed this statement. He also welcomes the Resolution on "Human Rights, Sexual Orientation, and Gender Identity" declared by the General Assembly of the Organization of American States on 3 June 2008.
8. He stresses the importance of cooperation between the Council of Europe and other intergovernmental organisations in addressing homophobia and discrimination based on sexual orientation and gender identity. He welcomes in this regard the Annual Hate Crime Reports of the Organisation for Security and Cooperation in Europe (OSCE), the Fundamental Rights Agency report 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU member states' as well as the support from the United Nations High Commissioner for Human Rights and the work of the UN Special Procedures and UN treaty bodies.

B. Specific human rights issues of concern to the Commissioner

9. Some Council of Europe member states put unjustified restrictions on the freedom of assembly and association of LGBT people and their organisations. A large number of Gay Pride festivals are banned or face violent attacks by demonstrators, sometimes with the failure of the police to provide adequate protection to the participants they are entitled to. Hostility towards Gay Pride Parades is a reality in many European cities today. Some LGBT organisations in Council of Europe member states face problems with registering their organisations or see registration challenged in courts.
10. In a large number of Council of Europe member states LGBT persons are not protected under anti-discrimination or hate crime legislation as sexual orientation and gender identity are not explicitly mentioned as discrimination grounds.
11. There is a pattern of cruel hate crimes and hate motivated incidents against LGBT persons and a lack of appropriate response from law enforcement officials. On some occasions, human rights defenders are the target of hate motivated incidents, which undermines the recognition that

activists defending the rights of LGBT persons are also human rights defenders. The Commissioner is worried about a number of reports about LGBT activists facing aggressive responses or even death threats.

12. In most Council of Europe member states, there is no consistent educational programme to promote tolerance, respect, and awareness on LGBT issues – not in schools, nor for public servants or law enforcement agencies. There is a need to learn from *best practices* from member States that have such programmes in place.
13. LGBT persons in a number of Council of Europe member states face regular arbitrary arrests and other malpractice by law enforcement agencies. LGBT persons are blackmailed, put under pressure or have to pay bribes in exchange for not being publicly outed to family, colleagues and friends. Transgender persons in some Council of Europe member states are particularly vulnerable to this.
14. In most Council of Europe member states there is no possibility of legal recognition of same sex partnerships. The Commissioner believes that there is a need for legal recognition of same sex partnerships which guarantee the same rights as different sex partnerships, which include the area of social security, family reunification, inheritance, employment and pension benefits. The Commissioner is concerned about recent proposals in some Council of Europe member states to amend their domestic constitution to introduce a clause banning same sex marriage.
15. The Commissioner is deeply concerned about the situation of transgender persons. Lack of recognition of the new gender before the law, problems in accessing health care, high levels of unemployment, hate crimes are only a few of the problems many transgender persons face. The Commissioner stresses the need for all Council of Europe member states, human rights organisations and human rights protection bodies, including National Human Rights Structures, to pay more and consistent attention to the human rights abuses transgender people face. There is also an urgent need to collect more and reliable data on the human rights situation of transgender persons, including the particular circumstances of transgender adolescents, transgender elderly and transgender refugees and asylum seekers.

C. The relevant activities of the Commissioner

16. In order to be informed fully of the situation of LGBT persons, the Commissioner meets regularly with representatives of LGBT organisations during his missions or in Strasbourg. This provides him with the necessary information for his human rights assessment work.
17. The Commissioner has expressed his main concerns in his comprehensive country assessment reports as well as in his Viewpoints (attached): [‘Gay Pride marches should be allowed – and protected’](#) (24 July 2006); [‘Homophobic policies are slow to disappear’](#) (16 May 2007); [‘Time to recognise that human rights principles apply also to sexual orientation and gender identity’](#) (14 May 2008); [‘Discrimination against transgender persons must no longer be tolerated’](#) (05 January 2009).
18. In October 2008, Commissioner Hammarberg was the keynote speaker at the annual ILGA-Europe Annual Conference “Thinking Globally, Acting Locally” in Vienna, which gathered 230 participants from 40 countries. The Commissioner stressed in his [Speech](#) the importance to apply in a non discriminatory way the existing human rights treaties and conventions in the absence of a specific instrument which recognises that sexual orientation and gender identity cannot be a reason for persecution and discrimination of LGBT persons. He also expressed concerns about the lack of implementation of human rights standards on a national and local level.

19. In the framework of the Annual Meeting of Contact Persons of National Human Rights Structures (NHRSSs) one working session was dedicated to the role NHRSSs could play in combating homophobia and discrimination based on gender identity and sexual orientation. The working session aimed at strengthening the knowledge of NHRSSs regarding human rights standards relating to sexual orientation and gender identity. The goal is to enable NHRSSs to monitor in a continuous way the authorities' compliance with European and international human rights standards when it comes to sexual orientation and gender identity. The Commissioner's Office extended its interest to work closely together with Ombudspersons and National Human Rights Institutions in identifying concrete ways to include the human rights concerns of LGBT persons in their work.
20. The Commissioner's Office was represented at the second Council Meeting of Transgender Europe (Berlin, May 2008). As a follow-up, he invited 12 experts to an Expert Meeting in Strasbourg in order to discuss the specific human rights problems encountered by transgender persons. The Commissioner intends to use the results of the expert meeting with an *Issue Paper on the human rights of transgender persons*.
21. In 2008 the Commissioner's Office participated in several expert meetings organised by the Fundamental Rights Agency (FRA) in view of the study on 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU member states'. He stresses the need for a broad and systematic collection of objective and reliable data and information on incidents and manifestations of homophobia and discrimination on grounds of sexual orientation and gender identity across all 47 member states. In that context the Commissioner proposes a complementary study that will include the 20 non EU member states of the Council of Europe and resulting in a comprehensive, policy oriented, comparative report covering both sociological and legal aspects on discrimination on ground of sexual orientation and gender identity in the 47 Council of Europe Member States.