

Discrimination on grounds of sexual orientation and gender identity in Europe

2nd edition

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Foreword

Many people in Europe are stigmatised because of their actual or perceived sexual orientation or gender identity and cannot fully enjoy their universal human rights. Some of them are victims of hate crime and may not receive protection when attacked in the street by fellow citizens, while some of their organisations are denied registration or are banned from organising peaceful meetings and demonstrations. Some people have fled to Council of Europe member states from countries where they risk being tortured or executed because of their sexual orientation or gender identity. Too few opinion leaders and leading politicians have taken a firm stand against homophobic and transphobic expressions, discrimination and violence.

I have often discussed these and other problems with the authorities of Council of Europe member states. The serious concerns about the problems faced by lesbian, gay, bisexual and transgender (LGBT) persons are reflected in my country monitoring reports as well as in thematic publications. I have also initiated a debate on the specific human rights issues encountered by transgender persons.

Unfortunately, I have repeatedly noted that there is too little objective data and information available to conduct a well-informed discussion with authorities on these questions. For this reason, my Office launched a comprehensive study on the situation concerning homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the 47 member states of the Council of Europe. This report, coupled with a more comprehensive version, is the result of the study and contains a socio-legal analysis of the situation of LGBT persons across member states. The study relies on data and information made available by public authorities, national human rights structures, non-governmental organisations (NGOs) and academic experts in the member states.

I extend my gratitude to all organisations and people involved for their active participation and forthcoming contributions. Special thanks and recognition are due to the European Union Agency for Fundamental Rights (FRA), which kindly shared its research and data on the 27 member states of the European Union. In this regard, effective use was made of respective areas of expertise and complementary capacities.

The standards used in this report are based on judgments of the European Court of Human Rights and recent recommendations of the Council of Europe's Committee of Ministers and Parliamentary Assembly. Several institutions of the European Union, the Organization for Security and Co-operation in Europe (OSCE) and the United Nations have expressed concerns relating to the treatment of LGBT persons. The report clearly demonstrates that member states need to take further steps to address discrimination on grounds of sexual orientation and gender identity. It also provides a knowledge base for effective measures to combat homophobia and transphobia.

There is considerable resistance among many people to discuss the full enjoyment of universal human rights by LGBT persons. Even if this may not be a popular human rights topic, the time has now come to take the discussion forward and make it concrete. Supported by the facts presented in this report, I look forward to a constructive dialogue with authorities and other stakeholders to improve respect for the human rights of LGBT persons.

Thomas Hammarberg

Summary

This report is the result of the largest study ever made on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the 47 member states of the Council of Europe. The findings are presented in six thematic chapters followed by forward-looking conclusions. The Commissioner's recommendations on the issues that emerged from the findings of the study can be found at the beginning of the report.

Attitudes and perceptions

Homophobic and transphobic attitudes have been identified in all 47 member states, though attitudes vary significantly among and within the countries. Biased, outdated and incorrect information on what constitutes sexual orientation and gender identity as well as stereotypical portrayals of LGBT persons in the media and in textbooks contribute to the shaping of negative attitudes. Inflammatory and aggressive discourse against LGBT persons, occasionally amounting to hatred, has also been identified in several member states. LGBT persons have often been portrayed as a threat to the nation, religion, and traditional notions of gender and the family. Such speech has rarely been officially condemned.

The invisibility of LGBT persons and the absence of a serious discussion about their human rights situation are recurring themes in this report. Many LGBT individuals conceal their sexual orientation or gender identity in everyday life out of fear of negative reactions at school, work, in their neighbourhood or in their family. They fear that public knowledge of their sexual orientation and gender identity will lead to discrimination, harassment, rejection or even violence.

Legal standards and their implementation

A large number of member states have adopted legislative and other measures to prohibit discrimination against individuals on grounds of their sexual orientation and, though in fewer cases, also on grounds of gender identity. The majority of member states (38) have recognised, in line with international and European standards, that sexual orientation is one of the grounds of discrimination in comprehensive or sectoral non-discrimination legislation. Some nine member states do not appear to protect LGB persons against discrimination. A lower number, 20 out of 47 member states cover discrimination based on gender identity in their non-discrimination legislation, either as gender identity explicitly or as a recognised interpretation of the terms "sex", "gender" or "other ground of discrimination". For the other 27 member states, the non-discrimination legislation remains silent or is unclear on the protection of transgender persons.

Official statistics and data regarding discrimination on grounds of sexual orientation and gender identity are scarce in member states. National structures

for promoting equality do not always have an explicit mandate to receive complaints of discrimination based on sexual orientation and even fewer have a clear mandate to cover gender identity as a ground of discrimination.

Protection: violence and asylum

LGBT persons run a serious risk of becoming victims of a hate crime or a hate-motivated incident, especially in public places. Violence may also take place within a family setting. Moreover, some state agents, such as the police, have been involved in blackmailing and harassing LGBT persons. Often LGBT persons do not report such violence to the competent authorities due to lack of trust in law-enforcement agencies, who may have no training in investigating effectively such hate-motivated crimes and incidents.

Homophobic and transphobic incidents or hate crimes are not reflected in official hate crime statistics in most of the member states. The incitement of hatred, violence or discrimination on grounds of sexual orientation is considered as a criminal offence in only 18 member states. Similarly, homophobic intent is accepted as an aggravating factor in common crimes in only 15 member states. In only two member states is gender identity or transphobic hate crime explicitly addressed in hate crime legislation.

Owing to criminalisation and persecution on grounds of sexual orientation and/or gender identity, a number of LGBT persons have sought to flee their country of origin. Thirty-three member states recognise sexual orientation as a ground for persecution in asylum claims, while only six member states do so for gender identity. LGBT persons encounter particular difficulties in the process of seeking asylum, often owing to inadequate knowledge by immigration authorities about conditions for LGBT persons in countries of origin. Some authorities appear to consider that, if LGBT persons kept their sexual orientation or gender identity secret, they would not be at risk. LGBT asylum seekers also face difficulties in asylum centres and may be exposed to harassment from other applicants.

Participation: freedoms of assembly, expression and association

Violent and discriminatory reactions have occurred when LGBT persons have collectively attempted to express their views, freely associate or gather for public demonstrations. In most member states the freedoms of association, expression and assembly of LGBT persons are respected. However, in a few states they have been infringed upon. Bans or administrative impediments imposed on public LGBT demonstrations were identified in 12 member states, and in some instances the police have failed to protect peaceful demonstrators from violent assaults. Obstructions and/or refusal of attempts to register LGBT associations have been identified in five member states, though in some instances courts have overturned such bans at a later stage. Infringement of the freedom of expression has been reported in three member states, whereas attempts to criminalise “propaganda of homosexuality” were identified in three member states.

Privacy: gender recognition and family life

Transgender persons face significant problems in the process of their legal gender recognition. In at least 10 member states no legislation regulating it was identified. In 13 other member states no or only partial legislation was identified, but transgender persons are able to have their new gender legally recognised, either through court decisions or by certain administrative practices. Twenty-nine member states require, as a precondition for legal gender recognition, surgery leading to infertility, whereas 15 member states require the transgender person to be unmarried or divorced, which can leave couples without a legally recognised relationship after divorce.

Same-sex couples wishing to marry can do so in seven member states (gender-neutral marriage) and in 14 other member states they can enter a registered partnership which provides a form of recognition. The lack of access to marriage or registered partnership deprives same-sex couples of rights and benefits granted to different-sex relationships. It has also consequences for same-sex couples having children as one of the partners may not have custody rights, inheritance and next-of-kin status, which need to be assured in the best interests of the child. Ten member states allow second-parent adoption to same-sex couples, while 35 countries provide no access to it. Two member states give only some parental authority and responsibilities to registered same-sex partnerships, but no adoption is available.

Access to health care, education and employment

LGBT persons are more prone to suffer from depression, anxiety, and anguish. Suicide and attempted suicide rates are significantly higher for LGBT persons than their heterosexual peers, especially young people. LGBT persons also experience problems when accessing health care, caused by mistrust between patients and doctors, problematic attitudes of medical staff, as well as outdated approaches to homosexuality and transgenderism. Contrary to international medical classifications, some official textbooks contain references to homosexuality as an illness. Transsexuality continues to be considered a mental disorder according to some international classifications. In 13 member states medical facilities for gender reassignment treatment are non-existent or insufficient. Health care insurance's coverage of gender reassignment treatment is problematic in at least 16 countries. In the remaining states there is partial or full reimbursement.

Bullying of LGBT persons within the educational system is a reality. Objective information on sexual orientation and gender identity is rarely imparted in schools. Discrimination and harassment of LGBT persons also occurs in the employment sector. Even though the majority of member states include sexual orientation in non-discrimination legislation for employment, gender identity is usually only partially included under the sex or gender ground. Trade unions and employers in some member states have taken measures to combat these practices. Transgender persons face particular problems when accessing the labour market, as privacy of personally sensitive data related to their gender identity history is rarely ensured.

Recommendations

The Commissioner's recommendations build on the findings of this report and provide policy-oriented advice to member states to prevent and address homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity.

The Commissioner for Human Rights recommends that authorities in Council of Europe member states should:

1. Attitudes and perceptions

- 1) Take a strong public position against violations of the human rights of LGBT persons and promote respect on issues related to sexual orientation and gender identity, for example through human rights education and awareness-raising campaigns.
- 2) Take steps to encourage factual, objective and professional reporting by the media on LGBT persons and issues related to sexual orientation and gender identity.

2. Legal standards and their implementation

- 1) Implement international human rights obligations without discrimination on grounds of sexual orientation and gender identity. The Yogyakarta Principles are a useful tool to provide guidance for implementing international human rights standards in relation to sexual orientation and gender identity. Member states are also encouraged to sign and ratify Protocol No. 12 to the European Convention on Human Rights on the general prohibition of discrimination.
- 2) Enact comprehensive national legislation on non-discrimination and include sexual orientation and gender identity among the prohibited grounds of discrimination. NGOs representing LGBT persons should be consulted and involved in the legislative process and in the preparation of policy measures for the implementation of the legislation.
- 3) Screen national legislation to detect and correct possible inconsistencies with non-discrimination legislation in force to prevent discrimination on grounds of sexual orientation and gender identity. Eliminate any discriminatory criminalisation of same-sex sexual activity if this is still present in the legislation.
- 4) Set up independent national structures for promoting equality and non-discrimination. The scope of their mandate should include discrimination on grounds of sexual orientation and gender identity.

- 5) Monitor the effectiveness of the implementation of national non-discrimination legislation and involve national human rights structures, including national structures for promoting equality, and organisations representing LGBT persons in the monitoring process. A regular monitoring mechanism should be put in place to this end.

3. Protection: violence and asylum

- 1) Include homophobic and transphobic hatred explicitly as possible motives in national legislation on bias-motivated crime and hate speech. Crimes targeting individuals or groups of people because of their perceived or real sexual orientation or gender identity should be punished and the bias motive taken into account as an aggravating circumstance.
- 2) Investigate effectively bias-motivated crimes, speech and incidents related to homophobia and transphobia. Specific training for law enforcement officials and members of the judiciary should be provided for this purpose.
- 3) Improve systematic data collection on hate-motivated crimes, speech and incidents related to homophobia and transphobia. Data on homophobic and transphobic crimes, speech, incidents and complaints should be clearly disaggregated from other hate-motivated crimes, speech and incidents.
- 4) Recognise that persecution or a well-founded fear of persecution on the basis of sexual orientation or gender identity may be valid grounds for granting refugee status and asylum. Unnecessarily invasive tests for LGBT asylum seekers for giving proof of their sexual orientation or gender identity should be avoided.
- 5) Provide expertise and training to asylum officers and other related professionals in order to ensure that LGBT asylum seekers are met in a respectful, informed and sensitive way during the asylum procedure. Procedures should be set up in a way that LGBT asylum seekers feel safe to disclose their sexual orientation or gender identity.
- 6) Address social isolation, violence and discrimination experienced by LGBT asylum seekers in asylum centres, and provide for their specific health care needs.

4. Participation: freedoms of assembly, expression and association

- 1) Respect the effective right to freedom of assembly of LGBT persons by ensuring that peaceful Pride festivals and other public events organised by LGBT people or focusing on issues related to sexual orientation and gender identity can take place without being subjected to discriminatory measures by the public authorities. Practices amounting to misuse of

legal or administrative provisions in order to hinder the organisation of such events should be prevented.

- 2) Provide effective protection to participants of peaceful Pride demonstrations or public events organised by and for LGBT persons from attacks and violent counter-demonstrations.
- 3) Respect the effective right to freedom of association of LGBT persons by ensuring, in particular, that non-governmental organisations representing LGBT persons or working on issues related to sexual orientation and gender identity can be set up and operate without being subjected to discriminatory measures by the public authorities. Administrative procedures which render the registration of these NGOs disproportionately lengthy or difficult should be prevented.
- 4) Respect the effective right to freedom of expression by safeguarding the possibility to receive and impart information on issues related to sexual orientation and gender identity in any form of expression such as the press, publications, oral and written statements, art and other media. Any discriminatory provision criminalising the dissemination and diffusion of factual information concerning sexual orientation and gender identity should be abolished. Unlawful interferences in the enjoyment of the right to freedom of expression by LGBT persons should be subject to criminal proceedings.

5. Privacy: gender recognition and family life

- 1) Grant legal recognition for the preferred gender of transgender persons and develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, civil registers, identity cards, passports, educational certificates and other similar documents.
- 2) Abolish sterilisation and other compulsory medical treatment which may seriously impair the autonomy, health or well-being of the individual, as necessary requirements for the legal recognition of a transgender person's preferred gender.
- 3) Remove the requirement of being unmarried, or divorce for already married persons, as a necessary condition for the legal recognition of a transgender person's preferred gender.
- 4) Respect the right of transgender persons to effectively exercise their right to marry in accordance with their legally recognised gender.
- 5) Enact legislation recognising same-sex partnerships by granting such partnerships the same rights and benefits as different-sex partnerships or marriage, for example in the areas of social security, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.

- 6) Grant same-sex couples and LGBT individuals, in compliance with the principle of the best interests of the child, similar opportunities as other applicants to be considered without discrimination as adoptive parents for a child.
- 7) Recognise the parental rights of same-sex parents, individually or jointly, including their rights of guardianship and custody without discrimination on grounds of their sexual orientation or gender identity. The parental rights of transgender persons should continue to be respected after the legal recognition of their preferred gender.
- 8) Allow access to assisted reproduction to LGBT persons without discrimination on grounds of their sexual orientation or gender identity.
- 9) Seek to provide adequate support for families with LGBT members in order to foster inclusion, respect and safety.

6. Access to health care, education and employment

- 1) Abolish outdated classification systems which portray homosexuality as an illness or disease.
- 2) Review any requirements of a diagnosis of mental disorder for accessing transgender health care in view of eliminating obstacles to the effective enjoyment, by transgender persons, of the rights to self-determination and the highest attainable standard of health.
- 3) Include in the education and training of health care professionals the importance of respecting the dignity of LGBT persons as well as their specific health care needs and choices.
- 4) Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible to transgender persons subject to informed consent and ensure that they are reimbursed by health insurance.
- 5) Promote respect and inclusion of LGBT persons at school and foster objective knowledge on issues concerning sexual orientation and gender identity in schools and other educational settings.
- 6) Combat bullying and harassment of LGBT students and staff. Schools should be a safe environment for LGBT students and staff, and teachers should be provided with tools to respond effectively to bullying and harassment of LGBT students.
- 7) Promote policies and practices aimed at combating discrimination based on sexual orientation or gender identity; also promote policies to foster diversity in the workplace together with initiatives which encourage the full inclusion and respect of LGBT staff in the work environment.

- 8) Respect the right of transgender persons to access the labour market by guaranteeing the respect of their privacy concerning the disclosure of personally sensitive data related to their gender identity and by promoting measures aimed at ending the exclusion and discrimination of transgender persons in the workplace.

7. Research and data collection

- 1) Encourage systematic research and disaggregated data collection concerning discrimination on grounds of sexual orientation and gender identity in all areas of life. LGBT-related questions should be included in general attitude surveys and public opinion polls.
- 2) Apply safeguards protecting the right to respect for private life of LGBT persons in the collection of any sensitive data.

Introduction

This report presents the results of the largest study ever made on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in Europe.¹ It is published by the Commissioner for Human Rights of the Council of Europe and covers the 47 member states of the Council of Europe. The report is based on research and data collection primarily focused on the period 2004-2010 although some important data preceding this period have been included as well. Changes in policy and legislation in Council of Europe member states which took place after 31 December 2010 have not been systematically taken into account.

There have been two phases in the research and data-collection process. The first phase focused on the collection and comparative analysis of information and data of a legal nature (legislation and case law). This research was conducted through desk research and by national legal experts. The second phase focused on the collection and comparative analysis of data of a sociological nature. The aim of the sociological part of the study was to collect data on the everyday life of lesbian, gay, bisexual and transgender (LGBT) persons in the 47 member states. This part of the research was conducted by desk research and field visits in the member states. The research and data-collection process was co-ordinated by the international consultancy firm COWI.

During the field visits, semi-structured qualitative interviews were conducted with key stakeholders in each member state.² The relevant stakeholders provided oral statements as well as written materials, which gave a broad overview of the issues at stake. To start with, representatives of national authorities, in most instances officials working in the Ministry of Justice, Ministry of the Interior, Ministry of Foreign Affairs or Ministry of Health were met in order to access available official data and statistics. This could include information regarding discrimination on grounds of sexual orientation and gender identity and incidents of homophobia and transphobia as well as information on the relevant national policies, action plans, and “good practice” related to combating discrimination and promoting human rights. These interviews aimed to collect information but also to gauge awareness of the national situation with regard to homophobia, transphobia and discrimination among the interlocutors. Many interlocutors emphasised the usefulness of this study and engaged constructively in the data-collection process, though on many occasions there were not many statistics or data to share. Public authorities have generally been co-operative in their contribution to the study.

1. Voluntary contributions for this project were provided by Belgium (Flemish Government), Finland, Germany, the Netherlands, Norway, the Swedish International Development Cooperation Agency (SIDA), Switzerland and the United Kingdom.

2. With the exception of Andorra, where no field visit took place (phone interviews were conducted instead). Furthermore, meetings with the Russian authorities during the field visit in the Russian Federation did not take place. In the national contributions (sociological reports) a precise overview per country is given regarding the interlocutors interviewed.

Organisations representing LGBT persons were also met, usually LGBT organisations as well as human rights non-governmental organisations. Representatives of LGBT organisations provided their perspectives on the information collected and directed attention to further materials. LGBT organisations, having hands-on experience and knowledge of various aspects of the situation for LGBT persons, have been a valuable source of data. This is particularly the case when research and/or official data have been scarce. The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transgender Europe (TGEU) provided additional information. In addition, consultations regarding the research design and implementation took place at regular intervals with ILGA-Europe and Transgender Europe.

Furthermore, representatives of national human rights structures (that is, national human rights institutions, ombudsman institutions and equality bodies) were met during the field trips. Whereas this report shows that not all these structures are currently engaged in combating discrimination based on sexual orientation and gender identity, the meetings turned out to be useful. Once again, on most occasions, representatives of these national structures emphasised the need for more engagement in this area.

Based on the information and data collected for each country, a legal and a sociological report were drafted for each Council of Europe member state. Regarding the 27 member states of the European Union, this report draws primarily from research conducted by the European Union Agency for Fundamental Rights (FRA). Relevant FRA publications from 2008, 2009 and 2010³ as well as data from primary research as published in the FRA's national contributions (reports on the social situation and – updated – legal reports) were key resource documents. In line with the co-operation agreement between the FRA and the Council of Europe,⁴ these reports and data were shared by the FRA with the Office of the Commissioner for Human Rights. The Commissioner's Office was also able to benefit from the technical expertise of the FRA throughout the research process.

As regards the other 20 member states of the Council of Europe, the legal and sociological reports were drafted by consultants and national experts. All reports have been quality assured by independent reviewers. However, any views or opinions expressed in the national country reports do not necessarily represent those of the Office of the Commissioner for Human Rights. These two sets of 47 national reports form the basis for the comparative report. For readability of this summary report, footnote referencing has been limited

3. See European Union Agency for Fundamental Rights, "Homophobia and Discrimination on the grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part 1 – Legal Analysis", 2008; "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation", 2009; "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – Comparative Legal Analysis", 2010.

4. Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, paragraph 7.

to the most necessary information. Full details and references can be found in the comprehensive version of the report and the national reports, which will be made available separately. Information provided by the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the Office of the United Nations High Commissioner for Refugees (UNHCR) was also used in the compilation of this report.

It should be pointed out that research for this report was conducted in areas which face serious challenges regarding data availability. Systematically collected data on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in most member states remain scarce or simply non-existent. The lack of data requires serious scrutiny, a conclusion backed by the fact that many of the public authorities met during field visits expressed the need for improving the collection and handling of data. Significant improvements in data collection would be needed in order to acquire comprehensive data sets on the socio-legal position of LGBT persons.

The report is structured in the following manner.

The Commissioner's recommendations to member states, which build on the findings of the report, can be found at the beginning of the volume.

The report starts with a chapter providing a general overview of attitudes and perceptions towards LGBT persons. Attitudinal surveys, research and studies related to Council of Europe member states are presented here. This overview can be considered as a general contextual introduction for the thematic chapters to follow.

Chapter 2 outlines the applicable international and European human rights standards from the perspective of non-discrimination followed by a summary of the relevant national legal frameworks with reference to sexual orientation and gender identity as prohibited grounds for discrimination. This chapter also looks into national implementation of non-discrimination legislation, including the work conducted by national structures for promoting equality and policy initiatives undertaken by member states.

Chapter 3 focuses on the right to life and security as protected by international human rights law. It demonstrates the extent to which LGBT persons are victims of hate crimes, hate speech and other violent acts. In addition, this chapter explores the protection mechanisms in place for asylum seekers who have fled countries where they face persecution due to their sexual orientation or gender identity.

Chapter 4 covers the participation of LGBT persons in society through their full enjoyment of the freedoms of association, expression and assembly. In this chapter, obstacles related to the organisation of Pride events as well as problems of registering LGBT organisations are discussed.

Chapter 5 considers aspects of private and family life. It highlights the specific problems transgender persons encounter in obtaining legal recognition of their preferred gender. The recognition of same-sex partnerships and parental rights with reference to the best interests of the child are also discussed in this chapter.

Chapter 6 discusses the access of LGBT persons to health care, education and employment. This chapter analyses the extent to which LGBT persons enjoy their rights to the highest attainable standard of health, education and employment which are essential for their social inclusion and well-being.

General conclusions can be found at the end of the report. They are policy-oriented and forward-looking. The terms and concepts used in the report are explained in an Appendix.