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Amnesty International's initial comments
on the drafting of a Recommendation on
measures to combat discrimination based
on sexual orientation or gender identity**



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Council of Europe: Amnesty International's initial comments on the drafting of a Recommendation on measures to combat discrimination based on sexual orientation or gender identity

1. Introduction and recommendation on format

Amnesty International is pleased to submit the following comments for consideration by the Committee of Experts on discrimination on grounds of sexual orientation and gender identity (DH-LGBT) in follow-up to its first meeting held from 18-20 February 2009 and in the light of the subsequent discussions of the Committee's work by the Committee of Experts for the Development of Human Rights (DH-DEV) and the Steering Committee for Human Rights (CDDH).¹

Amnesty International welcomes the drafting of a Committee of Ministers Recommendation on measures to combat discrimination based sexual orientation or gender identity. Based on its research, the organization considers that Council of Europe (CoE) member states would benefit from specific guidance in a number of areas to assist them in respecting and protecting the human rights of lesbian, gay, bisexual and transgender (LGBT) persons.

The organization therefore agrees that the Recommendation (and any Annex to it) should "not only recall applicable standards but also focus on *practical* measures to improve the situation of LGBT persons' human rights in Europe" as emphasized in paragraph 3 of the report of the DH-LGBT's first meeting.²

Amnesty International considers that the Recommendation should be based on the case-law of the European Court of Human Rights as well as the jurisprudence and recommendations by other international and CoE bodies and mechanisms. The organization considers that the Recommendation should clearly set out the principles member states are required to comply with under relevant international and CoE standards and that it should also draw on specific measures and best practices regarding their implementation. To reflect the level of detail that will be required to prove useful for member states in devising practical measures aimed at

¹ 38th meeting of the *Committee of Experts for the Development of Human Rights (DH-DEV)*, 11-13 March 2009, Meeting Report, DH-DEV(2009)002final, [http://www.coe.int/t/e/human_rights/cddh/3_committees/04.%20development%20of%20human%20rights%20\(dh-dev\)/04.%20meeting%20reports/38th_en.pdf](http://www.coe.int/t/e/human_rights/cddh/3_committees/04.%20development%20of%20human%20rights%20(dh-dev)/04.%20meeting%20reports/38th_en.pdf). 68th meeting of the *Steering Committee for Human Rights (CDDH)*, 24-27 March 2009.

² *Committee of Experts on Discrimination on grounds of sexual orientation and gender identity (DH-LGBT)*, Meeting Report -1st meeting, 18-20 February, DH-LGBT(2009)005rev, [http://www.coe.int/t/e/human_rights/cddh/3_committees/07.%20other%20committees%20and%20working%20groups/05.%20discrimination%20against%20lgbt%20\(dh-lgbt\)/Meeting%20reports/DH_LGBT_2009_005rev_en.pdf](http://www.coe.int/t/e/human_rights/cddh/3_committees/07.%20other%20committees%20and%20working%20groups/05.%20discrimination%20against%20lgbt%20(dh-lgbt)/Meeting%20reports/DH_LGBT_2009_005rev_en.pdf). Emphasis added.

effectively combating discrimination based on sexual orientation or gender identity it may be necessary that the Recommendation be accompanied by a comprehensive Annex.

2. Recommendations for content

A. Proposals for additional sections not covered in the “list of issues”

Amnesty International recommends the following additions to the list of issues and practical measures for inclusion in a Committee of Ministers Recommendation which is appended to the report of the DH-LGBT's first meeting (DH-LGBT(2009)005rev):

General measures to implement the prohibition of discrimination on the basis of sexual orientation and gender identity

Discrimination on the basis of sexual orientation and gender identity can be direct or indirect. It can result from laws and practices that are discriminatory on their face; vaguely worded regulations and provisions in law that are applied in a discriminatory manner; or apparently neutral laws or regulations that are applied in a manner that amounts to discrimination. Such laws and practices reinforce systemic disadvantage and hostile social attitudes; they can act as an official incitement to or justification for violence against individuals on the basis of their sexual orientation and gender identity by state and non-state actors.

Amnesty International therefore suggests that the first part of the Recommendation contain a set of overarching measures states should take to ensure that the prohibition of discrimination on the basis of sexual orientation and gender identity is effectively implemented in all areas of life. Such an introductory section could then link to separate sections on specific areas of particular concern for example employment, housing, health, freedom of expression, assembly and association, and treatment by law enforcement agencies and the judicial system.

At a minimum Amnesty International proposes that such a section should include recommendations that states should:

- take measures to ensure that all anti-discrimination legislation explicitly includes the prohibition of discrimination on the grounds of sexual orientation and gender identity;
- carry out a comprehensive review of existing laws and practice which could result – either directly or indirectly - in discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity; and thereafter regularly and effectively monitor all legislation, policies and other measures for their impact on the right not to be discriminated against on the basis of sexual orientation and gender identity;
- ensure screening of draft laws and regulations to ensure that, if adopted and implemented, they would not directly or indirectly result in discrimination on the basis of sexual orientation or gender identity;
- ensure that victims of discrimination have access to effective judicial remedies and receive adequate reparation;

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- adopt and effectively implement national action plans or strategies to combat the causes and manifestations of discrimination on the basis of sexual orientation and gender identity; and to consult widely with relevant non-governmental organisations including LGBT activist organizations, when considering the introduction of such plans or strategies;
- carry out training and awareness-raising programmes for public officials to ensure that they perform their duties in a way that respects and protects the right not to be discriminated against on the basis of one's sexual orientation and gender identity;
- put in place public education systems and awareness-raising measures to promote respect for diversity; equality and tolerance;
- introduce statutory equality and non-discrimination duties for all public bodies and provide for the monitoring of their compliance by independent monitoring mechanisms which report publicly;
- ensure that independent national institutions for the promotion and protection of human rights are explicitly mandated to monitor and make recommendations regarding the respect for non-discrimination legislation and policies in relation to sexual orientation and gender identity; that they have effective investigative powers; are mandated and adequately resourced to examine individual complaints of discrimination in both the private and the public sector; and are adequately staffed and funded.

In addition Amnesty International considers that the introductory parts of the Committee of Ministers' Recommendation should recognize the specificity of multiple discrimination. In practice, individuals often experience 'multiple' or 'intersectional' discrimination – on the basis of their sexual orientation or gender identity and e.g. their ethnicity and/or because they are a women. In devising and reviewing the impact of anti-discrimination legislation, policies and other measures, states should therefore take into account different forms of multiple discrimination in order to tackle it effectively.

Police misconduct and abuses against LGBT persons

Amnesty International considers that discrimination (including manifestations of it such as inhuman or degrading treatment prohibited by Article 3 of the European Convention on Human Rights) by law enforcement officials should be addressed directly in the Recommendation. The organization is concerned that this issue is not adequately reflected in the list of issues appended to the DH-LGBT's first meeting report (DH-LGBT(2009)005rev) .

Amnesty International has documented ill-treatment and other forms of discrimination by police directed towards individuals on the basis of their sexual orientation and gender identity including in CoE member states. Such misconduct, which often occurs at the time of arrest, or in detention or in connection with other policing operations, includes: verbal insult; physical and sexual assault and other forms of ill-treatment; humiliating and unnecessary searches; the failure to respond or inappropriate response to crimes against LGBT people in the community and domestic violence; the discriminatory enforcement of vaguely defined laws – such as public order legislation – that allow for significant discretion about who to stop, question or detain.

Recommendations that Amnesty International has previously addressed to authorities on such issues include the following:

- Officials at all levels should publicly condemn torture and other ill-treatment and make clear that any act of torture, ill-treatment or other human rights violations, whoever the victim, will not be tolerated.
- Authorities should establish an effective mechanism for reporting complaints of sexual, physical or verbal abuse by law enforcement officials.
- Authorities should ensure that all allegations and reports of police misconduct are promptly, impartially and effectively investigated. All officers responsible for misconduct should be adequately disciplined and, where there is reasonable suspicion that a criminal offence has been committed, brought to justice. If convicted, they should face penalties commensurate with the seriousness of the crime.
- The government must ensure that victims of human rights violations by police receive fair and adequate reparation, including compensation.
- The authorities should review detention policies and practices and bring them into line with international standards (including those relating to the respect for the rights of LGBT individuals), including the requirement to ensure the safety and dignity of individuals in detention.
- A transgender individual's opinion about whether it would be safest to detain them in a men's or a women's detention facility must be a central consideration in decisions about the location of detention of a transgender individual.
- Officials should make clear and be advised that deliberate use of body searches to degrade or humiliate and the use of sexually explicit language must be prohibited. Law, regulations, practice and training should make clear that transgender individuals must not be searched solely in order to challenge their gender identity. If a search is necessary, it should be carried out in private with full regard to the dignity of the person being searched and taking into consideration the wish of the transgender person as to whether a male or female officer conducts the search.
- Authorities must take positive measures to prohibit and prevent rape and sexual abuse of all persons and to respond adequately to these crimes, regardless of where they take place.
- Authorities should review laws and regulations that have had a discriminatory impact on LGBT individuals. In particular vague legislation – including in relation to public order offences - which lends itself to discriminatory application should be amended to specifically describe the conduct prohibited and should explicitly require monitoring and oversight of enforcement practices in order to prevent selective enforcement.

In reference to the list of issues for inclusion in the Committee of Ministers Recommendation (appended to the report of the first meeting of DH-LGBT), Amnesty International notes that some of the above listed aspects are covered in the section on “various forms of detention (custody, prison)”; other aspects – such as the need for training of law enforcement personnel – are included in the section on “hate crimes and hate-motivated incidents”. But a number of other aspects are not currently included in the list of issues.

Amnesty International considers that the broad range of recurring police misconduct against LGBT people is a specific human rights issue of great concern that should be addressed thoroughly in the Recommendation – either in a separate section or by expanding the scope of the section that is currently limited to human rights violations in detention to cover also excessive use of force, torture and other ill-treatment at the hands of police officials outside of detention, under a more expansive title.

Discrimination in the justice system

Amnesty International considers that the Recommendation should also explicitly address discrimination in the justice system – including the criminal justice system. Discrimination may enter the justice system via prejudice of the police, witnesses, judges, jurors, court officials and lawyers, including those representing prosecution authorities and accused persons. Likewise individuals may face discrimination on the basis of their sexual orientation or gender identity in courts dealing with family or administrative matters.

States should take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage in and in every aspect of the justice system.

B. Proposals for further elaboration of areas contained in the “list of issues”

In addition to the new sections proposed above, Amnesty International makes the following comments and suggestions for further elaboration of some of the areas contained in the list of issues and practical measures for inclusion in a Committee of Ministers Recommendation (appended to the report of the DH-LGBT’s first meeting - DH-LGBT(2009)005rev):

Regarding the section on freedom of association

Amnesty International welcomes that the DH-LGBT has agreed to address the misuse of registration rules and other administrative procedures resulting in the denial of the effective enjoyment of freedom of association of LGBT persons as well as other obstacles encountered by human rights defenders, including threats or violence.

Amnesty International suggests that the focus on human rights defenders be reflected in the title of the section of the Recommendation which addresses freedom of association; that such a section include provisions about the duty of authorities to ensure the right of organizations promoting the rights of LGBT persons to register and to eliminate discriminatory, disproportionate or otherwise unlawful obstacles faced by human rights defenders who are working to promote respect for and protection of the rights of LGBT persons face.

Amnesty International suggests that such a section put particular emphasis on the duty of states to protect human rights defenders at risk and to take measures to create an enabling environment, which is conducive to the realization of the right to freedom of association without discrimination and the right to promote and defend human rights in accordance with the CoE Committee of Ministers Declaration on Council of Europe action to improve the

protection of human rights defenders and promote their activities and the United Nations Declaration on Human Rights Defenders.³

Authorities at the highest level should be urged to speak out against threats and violence against human rights defenders promoting the rights of LGBT people whenever they occur; and to give public recognition to human rights defenders promoting the rights of LGBT people in order to support their work and prevent further abuses. Other specific measures and best practices aimed at creating an enabling environment for the work of LGBT human rights defenders could be further elaborated in an Annex to the draft Recommendation.

Regarding the section on freedom of expression and assembly

Amnesty International considers that the Recommendation drafted by the DH-LGBT should specifically address undue interference with the freedom to receive and impart information relating to LGBT persons.

For example, Amnesty International has expressed concern about legislation previously proposed in two CoE member states that sought to ban the “propagation of homosexuality” to children and the “promotion of homosexuality or other deviance” in schools. Amnesty International considers that such legislation would violate the right to freedom of expression.

Amnesty International has noted that the protection of children or public morals are used as justifications for undue interference with the rights to freedom of expression and peaceful assembly.

Amnesty International considers that the Recommendation drafted by the DH-LGBT should emphasize that any restriction of the right to freedom of expression must be prescribed by law, and necessary and proportionate to meet a legitimate aim under international law.

Furthermore, with regards to measures to protect peaceful demonstrations contained in this section, Amnesty International considers that the Recommendation should specifically emphasize – in accordance with the jurisprudence of the European Court of Human Rights – that states do not only have to refrain from imposing undue restrictions but that they also have a positive duty to protect the right to freedom of assembly.

Furthermore, consideration should be given to group – in accordance with Article 11 ECHR – the measures related to freedom of assembly together with those on freedom of association in one section of the Recommendation.

Regarding the section on the rights of children and young people

³ *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities*, adopted on 6 February 2008, <https://wcd.coe.int/ViewDoc.jsp?id=1245887&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFA C75>. UN General Assembly - *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted on 9 December 1998, <http://www2.ohchr.org/english/issues/defenders/docs/declaration/declaration.pdf>.

Amnesty International welcomes that access of young persons to appropriate information on sexual orientation and gender identity, including on sexual health, is specifically included in the list of issues that the DH-LGBT composed for consideration of inclusion in the Recommendation that it drafts. The organization considers that this is an important topic that should be elaborated on.

We believe that the Committee of Ministers Recommendation should at a minimum recommend states to undertake a comprehensive programme of non-discriminatory sex education to address cultural and other taboos surrounding sexuality and gender expression and identify and provide adolescents with access to appropriate information, support and necessary protection to enable them to live their sexual orientation or gender identity or expression.

Amnesty International also recommends that access to information on gender reassignment options, both on legal and medical aspects, should be included and that guidance on early treatment possibilities for transgender youths ought to also be accessible to parents.

As regards the topic of the negative stereotypical portrayals of LGBT persons, the organization suggests that measures to combat the portrayal of same-sex or bisexual orientation as immoral or abnormal and in particular of transgender status as a mental disease as well as the denial of its existence in school curricula be specifically included in the recommendation.

C. Other specific aspects concerning transgender persons

In view of the specific obstacles transgender persons face in their enjoyment of their rights without discrimination, Amnesty International suggests that the DH-LGBT include in the Recommendation that they draft, among other things, the following particular aspects concerning transgender persons:

- *Respect for Private Life:* The second bullet point in the list of issues appended to the report of the first meeting of the DH-LGBT under the heading Respect for Private life relates to the protection of personal data against misuse and public disclosure. Amnesty International suggests that the Recommendation contain a specific reference to the need to afford better protection against non-voluntary disclosure of the status of transgender persons.

As regards the legal recognition of gender reassignment and the alteration of relevant official documents within a reasonable time, we consider that the Recommendation should explicitly stress that transgender persons should have the opportunity to a change of their recorded name and sex in *all* documents relevant to their daily life – including those that are issued by others than the authorities themselves (such as work and educational certificates).

Amnesty International also considers that the recommendation should not only address the issue of divorce but also that of irreversible surgical infertility, which in many CoE member states is required in order for transgender people to obtain full gender reassignment recognition. The organization considers that such requirements for transgender people

should be abolished in view of states' obligations under the ECHR to safeguard and respect the rights to private and family life and to physical integrity. Individuals' reproductive rights are inherent in these rights.

- *Freedom of movement:* Since refusal to change official documents to reflect outer appearance, name, and gender may prevent transgender people from travel, even short recreational travel within Europe, Amnesty International considers that problems relating to recognition of gender reassignment and the alteration of official documents, including the undue lengthy delays common in most CoE member states, should also be addressed in the Recommendation in the context of discriminatory rules that have a negative impact on the effective enjoyment of freedom of movement.
- *Health-related matters:* Amnesty International considers that the Recommendation should underscore the rights of transgender persons to access to health care without discrimination, which is currently noticeably restricted. Practical measures and best practices to improve the access of transgender people to basic health care (i.e. including treatment not related to their status) should also be given particular emphasis in any Annex that may accompany the Recommendation. Amnesty International and others have noted that most health care professionals receive no training or information on transgender people and there is significant evidence of discrimination, refusal of treatment, and abuse of transgender people by professionals working in the health care system. Such discrimination has led to the effective denial of basic health services to transgender persons which are unrelated to gender reassignment treatment.