

Summary Report

**on implementation
of the Recommendation CM/Rec(2010)5
of the Committee of Ministers of the Council of Europe
on measures to combat discrimination
on grounds of sexual orientation
or gender identity
by Ukraine**



Kyiv - 2012

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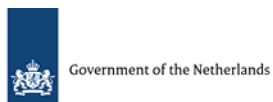
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Table of contents

I. Executive summary	3
II. Recommendations to the Ukrainian government for priority actions towards implementation of the CMCE Recommendation adopted by the Council of LGBT Organisations of Ukraine	5
III. Introduction	6
IV. Findings	8
A. Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010)5	8
B. Appendix to Recommendation CM/Rec(2010)5	9
i. Right to life, security and protection from violence	9
a. <i>“Hate crimes” and other hate-motivated incidents</i>	9
b. <i>“Hate speech”</i>	10
ii. Freedom of association	11
iii. Freedom of expression and peaceful assembly	12
iv. Respect for private and family life (excluding specific transgender issues)	13
v. Respect for private and family life and access to health care – specific transgender issues	14
vi. Employment	15
vii. Education	16
viii. Health	17
ix. Housing	18
x. Sports	19
xi. Right to seek asylum	19
xii. National human rights structures	19
Appendix I. 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	21
Appendix II. Glossary	28
Appendix III. Compliance Documentation Report	30
Recommendation CM/Rec(2010)5	30
Appendix to Recommendation CM/Rec(2010)5	34
I. Right to life, security and protection from violence	34
A. <i>“Hate crimes” and other hate-motivated incidents</i>	34
B. <i>“Hate speech”</i>	38
II. Freedom of association	41
III. Freedom of expression and peaceful assembly	45
IV. Right to respect for private and family life	49
V. Employment	57
VI. Education	59
VII. Health	61
VIII. Housing	65
IX. Sports	67
X. Right to seek asylum	69
XI. National human rights structures	71
About Nash Mir (Our World) Centre	73

I. Executive summary

The Ukrainian authorities have to all intents and purposes ignored the CMCE recommendation. From the time of its adoption up to this report's completion (September 2012) there have been no actions – whether enactments of laws or introduction of policies – aimed at implementation of the Recommendation, beyond publication of a few relatively minor documents. State bodies have not collected information related to discrimination on the grounds of sexual orientation or gender identity, and corresponding information from non-governmental organisations has not been examined and analysed. The interests and needs of LGBT persons as well as relevant proposals of LGBT organisations have not been taken into account in any way when developing legislative and the other measures. Even the simplest item of the Recommendation – its translation into the national language and its dissemination as widely as possible – has not been carried out.

In recent years there has been a noticeable rise of homophobic aggression and statements, yet – with the notable exception of an intervention by the Ombudsman in September 2012 regarding draft laws on “prohibition of propaganda on homosexuality” (see below), – the state authorities have not reacted in any way. Among local authorities and members of the national parliament, on the contrary, there has been an increasing level of homophobic rhetoric that is never condemned by representatives of governmental or presidential bodies.

The recently adopted law on civil associations has improved the operating environment for NGOs. We hope that it will make impossible the unjustified delays in the registration of LGBT organisations observed in recent years. However, LGBT organisations remain, in practice, excluded from any role in the development of state policies, and their recommendations and proposals are disregarded. The state does not interfere in their activities, but does not assist them in any way (the only exception being in the HIV/AIDS prevention sphere).

Freedom of expression in relation to LGBT issues has recently come under serious threat, with the possibility that the Ukrainian parliament will adopt one of the three draft laws “on prohibition of propaganda of homosexuality” currently before it. These would have the effect of banning dissemination of any information that could be viewed as positive towards homosexuality and transgenderism, and are supported by deputies of all parliamentary factions with the tacit consent of the government and the presidential administration.

Freedom of peaceful assembly in Ukraine is subject to very limited regulation in the law and its exercise depends to a significant extent on the arbitrary rulings of local authorities, who are inclined to ban public LGBT actions on spurious grounds, such as public morals or the objections of third parties. In addition, law enforcement bodies often do not ensure safety at such events, and when homophobic aggression takes place, they typically make little effort to try to find and punish the guilty persons. We are aware of no actions by the state authorities towards improvement of the situation in this field in recent years.

Same-sex couples are discriminated against in law compared with different-sex ones, and the state totally dissociates itself from providing solutions to the everyday problems to which this discrimination gives rise.

The regulations for legal recognition of a person's gender reassignment have been improved to some extent, but regrettably most of abusive prior requirements for legal recognition (including gender reassignment surgery) remain in force. Effective access of transgender persons to appropriate gender reassignment services, especially endocrinological expertise and treatment, is practically absent.

The state does nothing to combat the homophobia and transphobia that is omnipresent in society, and law enforcement bodies simply deny that they illegally collect and use information on the private life of LGBT persons, practices which are constantly noted by Ukrainian LGBT organisations.

State bodies have done absolutely nothing to overcome discrimination on the grounds of sexual orientation or gender identity in employment, education, housing, and sports.

In the field of health protection the specific needs of LGBT persons remain largely disregarded. Indeed, there has been no substantial action to improve matters since the exclusion of homosexuality from the official classification of diseases in 1999. Despite the fact that

homosexuality has not officially been considered as a disease for a long time, there still occur attempts within the medical services “to cure” it.

There appears to be a *de facto* recognition by Ukraine that a well founded fear of persecution based on sexual orientation or gender identity is a valid ground for the granting of refugee status. But it has proved impossible to obtain information from the State Migration Service as to the extent to which this policy is observed.

The sole human rights institution in Ukraine that has an obvious (if unspecified) duty to address discrimination against LGBT people, is the Parliamentary Commissioner on Human Rights (Ombudsman). The former Ombudsman ignored complaints by Ukrainian LGBT persons and organisations. The new Human Rights Commissioner, appointed in the April of this year, has, as noted above, taken the very positive step of opposing the proposals for laws prohibiting “propaganda of homosexuality”.

II. Recommendations to the Ukrainian government for priority actions towards implementation of the CMCE Recommendation adopted by the Council of LGBT Organisations of Ukraine.

1. To explicitly include sexual orientation and gender identity in the list of anti-discrimination grounds in the law on combating discrimination in Ukraine.
2. To explicitly include sexual orientation and gender identity in the list of anti-discrimination grounds in the Labour Code of Ukraine.
3. To amend Art. 74 of the Family Code of Ukraine (“Right to property of a woman and a man who live as a family together but are not married”) with the purpose of extending its effect to same-sex couples.
4. To amend the Order of the Ministry of Health Care No. 60 of 3.02.2011 “On improvement of medical assistance to persons needing change (correction) of sex” with the purpose of removing contraindications to change (correction) of sex where the individual concerned:
 - has children younger than 18;
 - is a homosexual or a transvestite;
 - has any sexual perversions;
 - has morphological peculiarities which complicate adaptation to the desired sex (hermaphroditism, sexual organs development disorder etc.);
 - has severe somatic diseases which make impossible hormonal or surgical gender reassignment;
 - disagrees with the scope of the diagnostic and therapeutic measures for change (correction) of sex which are recommended by the Commission.
5. Also to amend the Procedures for observation of persons needing change (correction) of sex, set forth by the above-mentioned Order, namely:
 - to remove from para. 2.2 of the Procedures the requirement for inpatient psychiatric examination in a mental hospital by providing for the possibility of such examination in a day hospital or in an outpatient setting;
 - to remove from para. 13 of the Procedures the requirement that a medical certificate on change (correction) of sex can only be issued after gender reassignment surgery, in order to provide for the possibility of issuing the certificate without surgical correction.
6. To amend the Order of the Ministry of Health Care No. 479 of 20.08.2008 “On establishment of the list of diseases which disqualify a person from being an adoptive parent” by removing from item 9 “Mental and behavioural disorders at a mature age” code F64 (“Gender identity disorders” under ICD-10).
7. To include topics of sexual orientation and gender identity in the school curriculum and initial and in-service training programmes for educational staff.
8. To issue an Order of the Ministry of Health Care on revision of current and proposed medical textbooks, programmes etc. with the purpose of removing any formulations which describe homosexuality or bisexuality as a disease, mental disorder, sexual perversion etc. and/or propose “the cure for homosexuality”.
9. To include topics of sexual orientation and gender identity in initial and in-service training programmes for judges and other members of the legal profession and law enforcement officials.
10. To adopt a medium/long term action plan for implementing other aspects of the Recommendation.

III. Introduction

Background

On 31 March 2010 the Committee of Ministers of the Council of Europe adopted its Recommendation to member states “on measures to combat discrimination on grounds of sexual orientation or gender identity”.

It was an historic moment. The Recommendation is, as Council of Europe Secretary-General Thorbjørn Jagland recognised, the world's first international legal instrument dealing specifically with discrimination on these grounds, which he described as “one of the most long-lasting and difficult forms of discrimination to combat”.¹

In broad terms the Recommendation does three things:

- It emphasises the key principle, that human rights are universal and apply to all individuals, including therefore LGBT persons;
- It acknowledges the fact of the centuries-old and continuing discrimination experienced by LGBT persons on account of their sexual orientation or gender identity;
- It recognises that specific action is required to ensure the full enjoyment of human rights by LGBT persons, and sets out the measures required of member state governments.

The Recommendation was agreed unanimously by the 47 Council of Europe member states. Although, as a Recommendation rather than a Convention, it is not legally binding, it is based solidly on the existing legally binding international and European human rights obligations of the member states, which therefore have a clear duty to implement its main elements.

The Recommendation has three parts: first, a preamble, which sets out the background to its adoption, and the key principles guiding it; second, the operative section of the Recommendation, which is very brief, listing broad measures to be taken; and thirdly, an Appendix which sets out specific measures to ensure enjoyment of rights and combat human rights violations across a wide range of areas, including hate crimes, hate speech, freedom of association, expression and assembly, right to respect for private and family life, employment, education, health and housing, sports, the right to seek asylum, and discrimination on multiple grounds. It also includes a section on the role of national human rights structures.

The Recommendation is supported by an Explanatory Memorandum, which documents the international human rights instruments and legal precedents on which the individual measures in the Recommendation and the Appendix are based.

The purpose of this report

The purpose of this report is to assess what progress has been made by the Ukraine's authorities in implementing the Recommendation, and to highlight the areas where further action is needed. By documenting which measures have, and which have not been completed, it provides a base line against which to measure further progress in implementing the Recommendation in the coming years.

The report has two main target audiences. First, at national level, the political leaders and civil servants who are responsible for implementing the Recommendation. And secondly, the Committee of Ministers of the Council of Europe, which agreed, on adopting the Recommendation, that it would conduct a review of progress towards its implementation in March 2013. It is intended that this report will contribute to that review.

¹ “Council of Europe to advance human rights for lesbian, gay, bisexual and transgender persons”
<https://wcd.coe.int/ViewDoc.jsp?id=1607163&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>

Methodology

The report's assessment of progress is based on a checklist of specific detailed measures required by the Recommendation. This list of measures is derived from the text of the Recommendation and its Appendix, supplemented by additional details set out in the Explanatory Memorandum.

This checklist, and the data which Our World Centre has compiled in order to assess progress in implementation of the individual measures of the Recommendation, are set out in Appendix III to this report, entitled "the Compliance Documentation Report".

The data used to assess progress in implementation have been obtained from a number of sources:

- Responses from individual ministries and departments to letters from the Council of LGBT Organisations of Ukraine, listing the relevant checklist questions and asking for comments on actions taken to implement the related measures.
- Information from published sources, such as the reports on Ukraine commissioned by the Council of Europe Commissioner for Human Rights as documentation for his report, "Discrimination on grounds of sexual orientation and gender identity in Europe".
- Research and documentation assembled by Our World Centre and other non-governmental organisations.
- Information available through Ukrainian mass media and Internet.

IV. Findings

The Recommendation

The operative text of the Recommendation includes four main steps: a review of existing measures to eliminate any discrimination on grounds of sexual orientation or gender identity, introduction of effective measures to combat such discrimination, ensuring that victims have access to effective legal remedies, and ensuring that the recommendation is translated and disseminated as widely as possible. It also requires that member states be guided by the principles and measures contained in the Appendix to the Recommendation.

The evidence presented in the Compliance Documentation Report indicates that the state authorities have not even carried out the simplest of these, the translation and dissemination of the Recommendation, despite requests to the Ministry of Foreign Affairs and the Ministry of Justice from the Council of LGBT Organisations of Ukraine ("the Council"). Even after the Council translated the Recommendation, the government and Administration of the President still ignored suggestions that it be disseminated, so that at the date of this report neither a translation nor the original of the Recommendation has been published officially at a government website or through any other medium. The Ukrainian government and Administration of the President have also ignored the Council's request that a state body be assigned responsibility for coordinating implementation of the Recommendation.

In the only case where a legal proposal developed with the participation of government included an explicit prohibition of discrimination on grounds of sexual orientation and gender identity, the draft law No. 8487 of 12 May 2011 to amend the *Code of Labour Laws*, the relevant clause was removed in the preliminary discussions in parliament, and no attempt was made by the government to restore it. Other anti-discrimination proposals developed by governmental bodies have never mentioned sexual orientation or gender identity, despite numerous requests by Ukrainian LGBT organisations.

Indeed, except in the field of HIV/AIDS prevention, Our World Centre has been unable to find any example of official documents that promote tolerance towards LGBT people or are directed at the elimination of homophobia and transphobia, and discrimination on the grounds of sexual orientation or gender identity. Nor have we found any examples of the creation of effective mechanisms of legal protection, including adequate reparation for victims of discrimination.

Furthermore, we know of no single case where a state representative has officially denounced manifestations of homophobic or transphobic aggression, and called for tolerance towards LGBT people. Until September 2012 governmental bodies did not publicly oppose in any way three draft laws whose object is to restrict freedom of expression on issues of sexual orientation (and also sometimes gender identity) – the so-called "laws on prohibition of propaganda of homosexuality". Up to that time the only official reaction had come from the State Committee on Television and Radio Broadcasting of Ukraine, which supported rather than opposed one of these proposals. It is therefore very much to be welcomed that in September the Ombudsman wrote to the Chairman of the Verkhovna Rada (the parliament of Ukraine) strongly opposing these draft laws.

Apart from this intervention by the Ombudsman, the only positive signs we have noted in recent years are: some improvement in the exercise of the right to freedom of peaceful assembly by LGBT people, inclusion of men who have sex with men in the field of HIV/AIDS prevention, and a modest improvement in the processes for legal recognition of gender reassignment of transgender persons, although in the latter case there is still a need for much further work on the part of government.

Update: On 2 Oct 2012 the Verkhovna Rada (Ukrainian parliament) supported by 289 votes (1 abstention, 0 against, 60 did not vote) the draft law No. 8711 (one of so-called "laws on prohibition of propaganda of homosexuality") at first reading despite negative resolution of parliamentary legal department and sharp criticism from the Ukrainian Ombudsman, international human rights organisations, representatives of the UN, EU and CoE. Later some MPs from opposition parties condemned this move but none of them voted against it at the sitting of the Rada.

Appendix to Recommendation CM/Rec(2010)5

i. Right to life, security and protection from violence

a. "Hate crimes" and other hate-motivated incidents

The key recommendations in Section I.A of the Appendix cover training of police officers, judiciary and prison staff, the introduction of independent machinery for investigating hate crimes allegedly committed by law-enforcement and prison staff, and a range of other legislative and other measures to combat "hate crimes" and hate motivated incidents on grounds of sexual orientation or gender identity, including hate crimes legislation. Member states are also required to gather and analyse data on the prevalence and nature of discrimination in this field. In total, some 17 measures are identified under this heading in the Compliance Documentation Report.

The evidence presented in the "Hate crimes and other hate motivated incidents" section of the Compliance Documentation Report, including information obtained in reply enquiries to the Ministry of Internal Affairs and the State Penitentiary Service, indicates that Ukraine fails to comply with the requirements of the CMCE Recommendation in almost every respect.

No provision of the *Criminal Code of Ukraine* can currently be interpreted as treating homophobic or transphobic motivation as an aggravating factor in determining sanctions for a crime. Training of police officers, prison officials and judiciary does not adequately address the need to investigate homophobic or transphobic connotations in such crimes, mechanisms for investigating alleged crimes by police officers and prison officials are not fully independent, and there is no collection of data either in respect of such hate crimes and other hate motivated incidents, nor in respect of sexual orientation and gender identity discrimination more generally.

The Ministry of Internal Affairs apparently considers that training for the police of a general nature on the prevention of discrimination and the treatment of the general public with respect is sufficient, and that there is no need to mention sexual orientation or gender identity in any context. But the experience of LGBT people shows there is a pressing need for specific measures to address homophobic and transphobic hate crimes and hate motivated incidents, and the way in which the authorities deal with them. A survey by Our World Centre revealed that in 2010/2011 41% of those polled experienced harassment from ordinary citizens (ranging from insults to physical violence). Of those who contacted the police, and whose sexual orientation was known to or suspected by the police, 77% experienced infringement of their rights by the police.² Moreover, the experience of Our World Centre is that when LGBT events or individuals are subject to homophobic or transphobic attacks, it is rare that such incidents are investigated thoroughly, that those responsible are found and punished, or that hatred on the ground of sexual orientation is established as the motivation.

The only positive step identified towards implementation of the Recommendation in this field is the on-going cooperation of the State Penitentiary Service with non-governmental organisations in respect of men who have sex with men and HIV/AIDS prevention in penitentiary institutions.

A recent example of hate crimes directed at the LGBT community occurred in relation to the plan to carry out a peaceful march within the framework of the 2012 Kiev Gay Pride events. Threats of violence were so serious as to force the abandonment of the event. Even so, three of the organisers were the victims of severe assaults by unidentified persons screaming homophobic insults. Two occurred in full view of the press on the day of the planned march³, the third – after a month⁴.

² O. Zinchenkov et al., *A step forward, two steps back. The state of LGBT in Ukraine in 2010-2011* (Our World Centre, Kiev, 2011), pp. 92-101, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

³ See for instance http://www.kyivpost.com/content/kyiv/gay-pride-parade-in-kyiv-cancelled-1-12_7943.html

⁴ See for instance <http://www.hrw.org/news/2012/06/26/ukraine-investigate-brutal-attack-gay-activist>

b. "Hate speech"

Section I.B. of the Appendix requires measures to combat "hate speech" on grounds of sexual orientation or gender identity, including laws penalising such "hate speech", promotion of good practice within media organisations and by internet service providers, public disavowal of such speech by government officials, and guidelines to government officials to refrain from such speech and indeed to promote respect for the human rights of LGBT people. In all, some nine measures are identified under this heading in the Compliance Documentation Report.

The evidence presented in the Compliance Documentation Report indicates an almost total absence of compliance with these requirements. There are no laws penalising "hate speech" on grounds of sexual orientation or gender identity (although laws prohibiting incitement of hatred and calls to discrimination and public insults of citizens on the grounds of religion, race or nationality (ethnicity) do exist); there are no examples of public officials condemning homophobic or transphobic statements, no guidelines requiring public officials to refrain from such speech, nor encouragement to them to promote tolerance and respect for the human rights of LGBT people.

On the contrary, representatives of local authorities from many Ukrainian regions and members of the national parliament regularly express negative attitudes towards LGBT people and call for discrimination against them. For example, in 2011/2012 Lviv, Ternopil, Ivano-Frankivsk city councils, and Lviv, Volyn and Rivne regional councils appealed to the President to revoke the registration of the Council of LGBT Organisations of Ukraine, forbid gay pride events, and "to fight against homosexuality". These appeals were never denounced by government officials.

Regarding promotion of good practices by the media and internet service providers, there is one positive development: the law *On Television and Radio Broadcasting* obliges broadcasting companies to adopt an official Editorial Statute that specifies, among other things, "requirements for dissemination of information concerning various social groups" – including sexual minorities. However, this is the only positive example identified.

Other initiatives by the government – particularly the adoption by the Cabinet of Ministers of the *Plan of Actions on Developing Civic Culture and Raising Level of Tolerance in the Society* make no mention of sexual orientation or gender identity, and are in any event devoid of concrete implementation measures.

The recent words of Mr. Serhiy Kyi, a member of Ukrainian parliament from the ruling Party of Regions, serve as an illustration of typical statements by some Ukrainian MPs on LGBT issues: "Let's think about our state. I don't care what Europe thinks about. What is happening on the streets of our cities is much more important. So I, of course, support adoption of this law [Note: one of the above-mentioned "laws on prohibition of propaganda of homosexuality"]. All these gay parades must be scattered, burnt down"⁵.

ii. Freedom of association

Section II of the Appendix requires member states to take appropriate measures to ensure that LGBT organisations can gain official registration, are able to operate freely, are involved on a partnership basis when framing and implementing public policies which affect LGBT persons, and are able to access public funding earmarked for NGOs without discrimination; also, that LGBT human rights organisations are protected effectively from hostility and aggression.

The evidence presented in the Compliance Documentation Report indicates partial compliance with these requirements. LGBT organisations are able to gain official registration, although in the past some have met unjustified delays and demands during the process of registration. For example, in one case in 2010 an organisation had to resubmit its application after reducing the

⁵ See <http://most-dnepr.info/news/society/59536.htm> – in Russian.

references to LGBT people. However, a recently adopted law, *On Citizen' Associations*, should, if implemented correctly, substantially restrict the possibility for arbitrary decisions by local departments of justice.

In general, the state does not encourage or assist NGOs, but does not oppose them either (unless they are in active and effective political opposition to the authorities, which is not the case with LGBT organisations). Thus, while LGBT organisations are able to operate freely, Our World Centre knows of only one case outside the field of HIV/AIDS prevention when a state body sought the opinion of LGBT organisations – in relation to a prohibition of discrimination. Their proposals were rejected, as have all other proposals and opinions of Ukrainian LGBT organisations before and since this case. All requests for public funding have also been rejected, including one which requested a contribution of just 1 (one) Ukrainian hryvnia.⁶

Hostility and aggression are real concerns for LGBT organisations, with attacks on events organised in the course of public activity. Our World Centre's experience is that the police prefer to ignore homophobic motives in such attacks and are reluctant to investigate them thoroughly.

iii. Freedoms of expression and peaceful assembly (Section III of the Appendix)

This section of the Appendix requires member states to guarantee freedoms of expression and peaceful assembly to LGBT people, ensuring the freedom to receive and transmit information and ideas relating to sexual orientation and gender identity, encouraging pluralism and non-discrimination in the media, protection of lawful assemblies, and condemnation by public authorities of any interference with the exercise of the right to freedoms of expression and peaceful assembly by LGBT people.

In summary, the position with regard to freedom of expression has been acceptable, apart from occasional censorship on moral grounds, but is now seriously threatened by draft laws proposing the prohibition of "propaganda of homosexuality"; while that regarding freedom of assembly is unacceptable, with a mixed picture in regard to the prohibition of events, and repeated failures by the police to provide protection for lawful assemblies. In no case have the authorities denounced publicly interference with the right to freedoms of expression and assembly, whether resulting from prohibitions by authorities, or (in the case of freedom of assembly) violent opposition.

Freedom of expression

Ukrainian legislation contains general guarantees of freedom of expression. The Ukrainian mass media generally present a pluralism of views and preferences, particularly in relation to LGBT subjects, although there has been no attempt by the authorities to encourage pluralism and non-discrimination. But there have been cases of censorship on grounds of morality. An advisory body, the National Expert Commission on the Protection of Public Morals has invoked a provision regarding protection of the health of the population to persuade the relevant authorities to instigate restrictions on LGBT materials – resulting, for instance, in the banning of the film *Bruno* in Ukrainian cinemas, and the broadcasting of the film *Brokeback Mountain* only after 11 p.m. An initiative by the authorities to dissolve this commission has been blocked in parliament because of public pressure, mostly from religious organisations.

The recent past has seen a very disturbing development, with the introduction into parliament of three separate draft laws seeking to prohibit "propaganda of homosexuality"⁷. The effect of these bills would be to prohibit dissemination of any information on sexual orientation that could be interpreted as positive, seriously curtailing the activities of human rights defenders working to support LGBT people. Two were approved by the relevant parliamentary committee (ironically, the Committee on freedom of speech and information), with the support of representatives of all parliamentary parties. The support of representatives of the ruling coalition was unanimous, and included the parliamentary representative of the President. However in September 2012 the Ombudsman sent a letter to the Chairman of the Verkhovna Rada pointing out that all three bills

⁶ See <http://korrespondent.net/ukraine/events/182777-ukrainskie-gei-prosyat-u-pravitelstva-odnu-grivnu> – in Russian.

⁷ Draft laws No. 8711, 10290, and 10729.

violated the rights of LGBT people. Apart from the letter of the Ombudsman, there has been no condemnation by any public official of these serious threats to freedom of expression.

The Council of LGBT Organisations of Ukraine learned from the internet that the State Committee on Television and Radio Broadcasting had supported the draft law No. 8711 at the meeting of its board. On 28 March 2012 the Council sent an official enquiry to the Committee questioning whether this event actually took place, and supplementing this with the text of the CMCE Recommendation and a detailed explanation of how this draft law would contravene not only the Recommendation but also fundamental principles of the Constitution of Ukraine. In his reply dated 26 Apr 2012 the First Deputy Head of the Committee informed that the mentioned bill was considered by the board of the Committee on 24 Apr 2012 [Note: Apparently for the second time] and as a result of the discussion it was decided to support this draft law.

Freedom of assembly

Legal provisions regulating freedom of assembly in Ukraine are wholly inadequate, with the Constitution being the only applicable legal instrument. It includes some normal grounds for restrictions on this right (national security and public order), but these are widely used by local authorities to prohibit events considered undesirable.

LGBT events were banned by the courts in Mykolaiv (2009) and Kharkiv (2010) on the pretext of public opposition. However in 2012 the Kiev City State Administration supported a peaceful march organised within the framework of Kiev Gay Pride, cooperating with the organisers despite opposition from hostile groups. Unfortunately this did not prevent the organisers from having to cancel the march because of the serious risk to participants from violent opponents.

While the police usually make themselves available to protect peaceful public actions, in practice they often do not provide effective protection for LGBT events. The Compliance Documentation Report notes that Amnesty International held the police responsible for their unwillingness to protect the 2012 Kiev gay pride march from violence. It documents seven other cases where police failed to provide adequate protection in recent years.

There are no examples of public officials denouncing such aggression. On the contrary, in recent years there have been repeated statements by local councillors and mayors, as well as members of the national Parliament, supporting restriction of the right to freedom of assembly. The statements have never been repudiated by the government.

On 6 July 2012 a group of aggressive youths with emblems of the far right-wing radical nationalist party Svoboda disrupted a picket of LGBT activists in front of the Ukrainian Ministry of Foreign Affairs immediately in front of the police on guard duty and the special police squad that soon arrived. The police made no attempt to stop the aggressors even when picketers directly asked for their help⁸.

iv. Respect for private and family life (excluding specific transgender issues) (Section IV, paras. 18, 19, and 23-27 of the Appendix)

These paragraphs of section IV of the Appendix address criminalisation of same-sex sexual acts, collection of personal data, and discrimination in access to the rights of couples and parenting.

Apart from the question of criminalisation, Ukraine largely fails to comply with the requirements of these paragraphs, and the authorities have taken no steps to implement them.

Ukraine was the first among post-Soviet states to abolish criminal prosecution for voluntary homosexual relations between men (in 1991). The “age of consent” in Ukraine is equal for both homosexual and heterosexual acts.

Although the law *On Protection of Personal Data* forbids collecting and storing of information on the private life of a person without her/his consent, there is some evidence that some police gather such data during investigations and police actions in relation to LGBT people, and sometimes use

⁸ See for instance <http://www.nr2.ru/kyiv/394071.html> – in Russian.

them for purposes of blackmail, or to “out” individual LGBT people to other persons and organisations (for instance, to relatives or employers). These actions include photographing, fingerprinting, and copying of telephone numbers from mobile phones. For the last ten years Ukrainian LGBT organisations have repeatedly submitted applications to the Ministry of Internal Affairs demanding an end to this illegal collecting and storing of confidential information on LGBT citizens. But the Ministry have always replied that such information is not gathered, contrary to the evidence of victims of such actions, which is known to Our World Centre.

Recently evidence has emerged of a new abusive practice by some police officers: acting as *agents provocateurs*, they approach gay men on internet social networks or dating websites and persuade them to disclose intimate photographs and/or offer to pay for sex. They then prosecute them for distribution of pornography or for prostitution, or seek to blackmail them.

So far as access to the rights of couples are concerned, Ukraine does not recognise same-sex couples in any way – from the right not to testify against one’s partner in court to the right of free disposal and inheritance of jointly obtained property. In the latter example Ukrainian same-sex couples are discriminated against even by comparison with unmarried different-sex couples, since these couples have property rights equivalent to spousal ones under the *Family Code of Ukraine*.

So far as parenting is concerned, Ukrainian legislation governing parental responsibility or guardianship of a child, adoption by a single person, or access to assisted reproductive treatment for single women, makes no reference to sexual orientation. Moreover, the authorities have taken no measures to ensure that these laws are applied without discrimination on this ground. This is a matter of particular concern, given widespread homophobic attitudes, and, in the case of adoption, a provision in the *Family Code of Ukraine* that leaves room for arbitrary interpretation – namely that adoptive parents may not be "... persons whose interests contradict the interests of the child".

So far as gender identity is concerned, Article 212 of the *Family Code of Ukraine*, "Persons who may not be adoptive parents", prohibits adoption by persons with medical conditions on a list published by the Ministry of Health Care. This includes transsexualism, in direct contravention of the Recommendation. So far as parental responsibility or guardianship is concerned, the legislation makes no reference to gender identity, although the prohibition on adoption by transsexuals is likely to influence decisions adversely.

Again, it is a matter of particular concern that the authorities have taken no measures to ensure that the laws in the field of parenting are applied without discrimination on the ground of gender identity.

A further serious concern is that the absence of any legal recognition for same-sex couples and their children means that children brought up by same-sex couples are denied protection for their interests (for instance, guardianship of the non-biological parent over the child in the case of severe disease of the biological parent, or the right to parental leave in cases where the biological parent cannot take leave).

Since adoption of the CMCE Recommendation the authors of this report have been unable to find any steps by the Ukrainian authorities towards implementation of the Recommendation and improvement of the situation for Ukrainian LGBT people on the subjects discussed in this section. Despite numerous appeals to governmental and legislative authorities, they have taken no steps towards the solution of the everyday problems of same-sex couples. These couples are still openly discriminated in the field of property rights, as compared with different-sex ones; and no measures have been taken protecting from discrimination on the ground of sexual orientation or gender identity related to parental rights, adoption and guardianship of a child.

From February to May 2009 while investigating the murder of a gay man, officers from Halytsky District Police Department in Lviv interrogated more than 300 men whom they suspected to be homosexual. Without their consent and in breach of procedural provisions those men were photographed and fingerprinted and their mobile phone address lists were copied. About ten people needed medical treatment as a consequence of their treatment by the police, but they all were forced to sign declarations that they had no complaints against the police, although later many of them testified to representatives of LGBT organisations about insults and intimidation from the police officers. Their only “fault”, and the only reason for the police interest in them was that they were presumed to be homosexual and thus, according to the police officers’ notions, could

know something about the murdered man. There is no information on destruction of the data which were collected in this way after completion of investigation in this case⁹.

v. Respect for private and family life and access to health care – specific transgender issues (Section IV of the Appendix, paras. 20, 21 and 22, and Section VII, paras. 35 and 36)

These paragraphs of Section IV of the Appendix require member states to guarantee the full legal recognition of a person's gender reassignment in a quick, transparent and accessible way, to remove any prior requirements for legal recognition (including any of a physical nature) that are abusive, and ensure that transgender persons are able to marry once gender reassignment has been completed. The paragraphs of Section VII require member states to ensure that transgender persons have effective access to appropriate gender reassignment services, and that any decisions limiting the costs covered by health insurance should be lawful, objective and proportionate.

Ukraine does not comply with the requirements concerning legal recognition of a person's gender reassignment, since abusive preconditions still apply. In particular, legal recognition of a gender reassignment is only permitted after invasive reassignment surgery (involving irreversible sterilisation), which can be conducted no earlier than a year after diagnosing the person's transsexualism. Moreover, since legal recognition and change of documents are only permitted after completion of all stages of the gender reassignment process, which can last for years, transgender people seeking legal recognition are forced to spend a long period when their physical appearance does not conform with their legal documents, resulting in difficulties in any situation where they are required to show these documents. In addition, non-state actors are not legally obliged to make alterations in documents issued by them, and in practice are often unwilling to do so, leading to undesirable disclosure of the transgender person's gender history even after legal recognition has taken place.

The Ministry of Health Care Order "On improvement of medical assistance to persons needing change (correction) of sex" (2011) unreasonably excludes from gender reassignment (*inter alia*) persons with children younger than 18, persons with homosexuality or transvestism "against a background of sexual role transformation", and persons whose medical condition is such as to make them unable to undertake hormonal or surgical reassignment treatment. The only requirement with which Ukraine complies is that relating to marriage, once legal recognition of gender reassignment has taken place.

Regarding access to appropriate gender reassignment services, Ukraine is also in non-compliance. There are problems with inadequate qualifications among medical staff, absence of necessary specialists, offensive behaviour of medical staff and irregular functioning of the Commission on change (correction) of sex. Regarding coverage of the cost of gender reassignment treatment by health insurance, the reality is that patients have no alternative but to pay for the costs themselves.

The issuing in February 2011 of the Order "On improvement of medical assistance to persons needing change (correction) of sex" by the Ministry Health Care provided an opportunity for the authorities to bring the Ukrainian procedures on legal recognition of a gender reassignment up to the best standards in Europe, and into consistency with the Recommendation. It is to be regretted that, although the opportunity was taken to make some improvements (lowering the minimum age for gender reassignment from 25 to 18, and removing the requirement for the presence of a suicidal threat to the applicant), the authorities failed to abolish the prior requirement for medical treatment (including sterilisation) and included the restrictions on persons able to apply for reassignment outlined above. However, we wish to acknowledge the constructive position taken since by the Ministry of Health Care, whose Chief Sexopathologist, Prof. Ihor Horpinchenko, has promised to take into consideration the proposals of the Council of LGBT Organisations of Ukraine on changing some provisions of the Order when developing a new edition of this document.

Apart from this, there are no signs of any moves by the authorities towards solving the problems of Ukrainian transgender persons. It should be noted that these go far beyond problems relating to

⁹ *Observance of human rights towards LGBT in Ukraine in 2008-2009*, p. 6
http://gay.org.ua/publications/gay_ukraine_2009-r.doc – in Russian

legal recognition and access to health care. Transgender persons suffer serious discrimination in many spheres of life, but it would seem that there are no plans by the authorities to address these in any way. It will also be noted that one of the proposals in the Ukrainian Parliament concerning prohibiting "propaganda of homosexuality" (namely, draft law No. 10279) also proposes prohibiting "propaganda of transsexualism".

At first I was just sent to the endocrinologist and this doctor sent me to the department's head. She gathered about 5-6 people who made me undress, show them my physical capabilities, and pressurise me morally... She started to talk about God. "What about God?" She told me that I am such a fool, that I don't understand what I am doing, that God will punish me, and that anyway I won't be a fully-fledged man. She tried to dissuade me in every possible way. And when she had read in my medicine file that I am an orphan, and that my mother recently died, she said : "This is why your poor mother could not stand it and died!" It was a time of severe trauma for me then, after burial of my mom... And here some... doctor starts telling me something like this... It was horrible! What right has she to judge me and tell me such things? And what if I would lose my mental balance and hang myself because nobody needs me?! (A., 24 years old, Luhansk region)¹⁰

vi. Employment

Section V of the Appendix requires Member States to provide effective protection against discrimination on grounds of sexual orientation and gender identity in employment, including legislation prohibiting discrimination, other policy related measures to combat discrimination, and specific measures in relation to the armed forces and transgender persons. It also requires Member States to protect the privacy of transgender individuals in employment.

The evidence presented in the Compliance Documentation Report, including responses from the Ministry for Social Policy and the Ministry of Defence, suggest that Ukraine has taken no steps to meet the above requirements.

Explicit legal prohibition of discrimination on the grounds of sexual orientation or gender identity in the field of employment is absent in Ukraine. Art. 2¹ of the *Code of Labour Laws of Ukraine* guarantees equality of labour rights for Ukrainian citizens "independently of ... other circumstances", which in theory should include sexual orientation and gender identity. However Art. 22 "Safeguards for conclusion, change and termination of the labour contract" contains a closed list of anti-discrimination grounds that does not mention sexual orientation or gender identity. The absence of any official interpretation of these provisions leaves them open to arbitrary understanding of the employer's rights on these questions.

Attempts to provide explicit protection from sexual orientation discrimination in employment have been unsuccessful – one at the time of preparation of a new *Labour Code of Ukraine*, in 2007, and a second in May 2011, when a provision which would have amended the *Code of Labour Laws* to this effect was deleted after discussion in the Parliamentary Committee on Human Rights.

The state does not collect statistical information on infringements of citizens' rights on the grounds of their sexual orientation or gender identity, However monitoring by Our World Centre revealed that 34% of the people polled, whose homosexual orientation was known to their co-workers, experienced harassment on this ground in the field of employment¹¹. There is no statistical information on discrimination of Ukrainian transgender people in the field of employment but other evidence collected clearly shows that the situation in this case is very serious¹².

Currently Our World Centre does not know of any steps by the Ukrainian government to combat discrimination on the ground of sexual orientation in employment, nor to implement the CMCE Recommendation in this area.

As to gender identity, it is revealing that the Ministry of Social Policy totally omitted this subject in its reply to the information enquiry on implementation of the CMCE Recommendation. As far as is known to Our World Centre, the Ukrainian government has never taken measures to combat

¹⁰ S. Ivanchenko et al., *The Situation of Transgender Persons in Ukraine – a research report*, (NGO Insight, Kiev, 2010), pp. 44, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

¹¹ Zinchenkov et al., supra note 2, p. 70, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

¹² Ivanchenko et al., supra note 10, pp. 45-47, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

discrimination on the ground of gender identity and there is no information that such steps have ever been planned. In particular, no measures have been taken to ensure that after gender reassignment transgender persons may obtain new labour documents that would prevent undesirable outing of their previous gender history before employers and co-workers.

The sexual orientation of Maksim, who worked in the executive service of Odessa, became known to his colleagues and then to his managers. Following this, Maksim experienced unfriendly and humiliating attitude of his colleagues, and his boss bluntly said: "There is no place in our service for such ones as you! Do a favour for yourself – quit!" In December 2010 Maksim had to voluntarily leave his job because he "did not want extremes" in his own words.¹³

I had an interview, and nobody asked for my documents. I was interviewed as a professional. Three times I was chosen from a wide circle of people. I would leave my previous job. I would come to the new job and tell them: "Dear colleagues, I am a bit different, I'm transsexual". I did not see anything particularly complicated or special to present myself as such a person to the staff. Every time I was refused. Once even a famous company, Olimp, when I used to be a bank worker, told me that they would employ me, that I suited them. I told them several times that I am transsexual and my documents are under revision. I was told that this is unimportant, and everything is OK. When I had quit my previous job and the next day came to this company, they said: "Sorry, but we cannot employ you". (V., 23 years old, Kyiv region)¹⁴

vii. Education

Section VI of the Appendix requires member states to ensure that the right to education can be enjoyed without discrimination on grounds of sexual orientation or gender identity, including measures to provide protection from bullying and social exclusion such as equality and safety policies, codes of conduct and training programmes for staff, and measures to promote mutual tolerance and respect in schools, including objective information in school curricula and educational materials, specific information and support for LGBT pupils and students, and measures to meet the special needs of transgender students.

As set out in the Compliance Documentation Report, neither responses by the Ministry of Education, Science, Youth and Sports to enquiries by the Council of LGBT Organisations of Ukraine, nor other information available to Our World Centre, indicate that the authorities have complied in any way with the above requirements.

Although the state does not collect and analyse statistics on infringements of the human rights of LGBT people in the field of education, some idea of the situation in this sphere can be formed on the basis of Ukrainian LGBT organisations' surveys. In particular, a sociological survey by Our World Centre in 2011 revealed that 31% of the respondents whose homosexuality was known to or suspected by the other people in their educational establishments faced harassment from other students or teaching staff on this ground. Among those who experienced such harassment 34% reported prejudiced attitudes of teachers, and 25% reported that the administration of the establishment did nothing to protect them against homophobic aggression from other students¹⁵.

In its reply to the information enquiry of the Council of LGBT Organisations of Ukraine the Ministry of Education failed to mention any policy or document in the field of its responsibility which would solve the problems of LGBT students in any way or that even mentioned sexual orientation or gender identity. The Council of LGBT Organisations of Ukraine also has no information on the existence of such policies or documents, and personal testimonies by LGBT pupils and students confirm that there are no measures directed at solving these problems in the field of education. Our World Centre has been unable to identify any reference to sexual orientation or gender identity in any school curriculum.

At the date of completion of this report the Ministry of Education had not reacted to the proposal of the Council to bring courses of school and university studies into conformity with modern scientific

¹³ Zinchenkov et al., supra note 2, p. 103, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

¹⁴ Ivanchenko et al., supra note 10, p. 46, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

¹⁵ Zinchenkov et al., supra note 2, pp. 74-75, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

knowledge on issues of sexual orientation and gender identity, and also to include corresponding materials in in-service education for teachers and school psychologists.

They got to know about me in the dean's office and immediately called my home; they told my mother about me and informed her that I would be expelled; then they started failing me in the examinations and eventually expelled me. After having left the dean's office my classmates ostracised me and demonstrated their prejudiced attitude towards me; they must have been told that I am gay there, and these students just rejected me... (a gay man, 23 years old, Donetsk region)¹⁶

They would not let me into the school, insisting that I change my clothes. I would sneak in through the back door, would be late for the lessons, but came in my usual clothes. Every morning the director stood at the entrance and checked who was wearing what. And she would let me in. But then some teacher told her that I am a girl. And then it all started. I was not let in anywhere, and in the ninth form they even did not let me take the history exam. They said I must go and change my clothes. And I just could not change my clothes, I only had clothes for boys. I was told to go and borrow my mom's. I came home in tears. My father went to the school with me, brought me into the classroom. I got a C for the exam. (S., 26 years old, Kyiv region)¹⁷

viii. Health – other than transgender specific health issues¹⁸ (Section VII of the Appendix paras. 33, 34)

These paragraphs of Section VII of the Appendix require member states to ensure that the highest attainable standard of health can be enjoyed without discrimination on grounds of sexual orientation or gender identity. Measures proposed include taking account of the specific needs of LGBT people in the development of national health plans, including suicide prevention measures, health surveys, curricula and training courses, permitting patients to identify their "next of kin" without discrimination, withdrawing medical textbooks and other documents that treat homosexuality as a disease, and ensuring no one is forced to undergo any medical treatment because of their sexual orientation or gender identity.

Ukraine removed homosexuality from its national classification of diseases in accordance with the WHO standards in 1999. The Ukrainian authorities have also adopted positive responses in the field of HIV/AIDS prevention in relation to LGBT people, although most of such work is actually carried out by NGOs and foreign charitable foundations. Neither the responses to information enquiries to the Ministry of Health Care, nor other information gathered by Our World Centre, suggest compliance with the measures proposed in any other health-related field.

The reply to the information enquiry of the Council of LGBT Organisations of Ukraine from the Ministry of Health Care asserts that specific needs of LGBT people are taken into account in full and completely satisfied when developing and monitoring health-care programmes, in medical education so on. However, the Ministry failed to provide any concrete information on these issues, and monitoring by Ukrainian LGBT organisations shows that in the sphere of health care LGBT people can face highly unprofessional and sometimes even homophobic and discriminatory attitudes. In particular, the survey of Our World Centre revealed that when medical staff knew or suspected the homosexuality of the patient 28% of the respondents met with discriminatory attitudes by the personnel¹⁹. In recent years some positive changes have been observed in the field of HIV/AIDS prevention, where health-care bodies sometimes quite successfully co-operate with NGOs representing vulnerable minorities, men who have sex with men particularly.

Though the Ukrainian Ministry of Health Care officially uses the 10th revision of the International Statistical Classification of Diseases and Related Health Problems, which does not regard homo- or bisexuality as a disease or mental disorder, in Ukraine officially approved textbooks are still issued, which consider "homosexuality" as a mental disorder, sexual perversion etc. In addition,

¹⁶ Zinchenkov et al., supra note 2, p. 76 <http://gay.org.ua/publications/report2011-u.pdf>

¹⁷ Ivanchenko et al., supra note 10, p. 45, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

¹⁸ See Section v above.

¹⁹ Zinchenkov et al., supra note 2, p. 88, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

despite the obvious absurdity of applying medical treatment to something which is not an illness, there are still attempts “to treat homosexuality” in health-care establishments. Though such instances are not numerous, they are a clear indication that the Ministry of Health Care has not made sufficient efforts to implement effectively international standards regarding homosexuality in the Ukrainian health-care system.

February 2011 – my local doctor insisted that I should be treated for homosexuality, prescribed for me some injections and drugs that I decided not to take. (A man, 26 years old, Donetsk region)²⁰

ix. Housing

Section VIII of the Appendix requires that adequate housing can be enjoyed without discrimination on the grounds of sexual orientation or gender identity through such measures as prohibiting discrimination in the sale or rent of housing, in the provision of loans for purchase of housing, in the recognition of the rights of a tenant's partner, and evictions; also, the provision of related information to landlords and tenants, and measures to ensure non-discriminatory access to shelter and emergency accommodation, and to address the risks of homelessness faced by LGBT people, including young persons excluded by their families.

Our World Centre has no evidence that any of the above-mentioned measures have been adopted by the authorities.

Ukrainian housing legislation is obsolete and wholly inadequate for modern requirements. It is mostly a remnant of the Soviet age and thus does not pay attention to the necessity to provide protection against discrimination of any kind, let alone discrimination on the grounds of sexual orientation or gender identity. However the failure to provide protection from discrimination in the field of housing is consistent with current government policy, in that the state has just dissociated itself from the regulation of relations in the housing sphere. In circumstances where there is a total absence of anti-discrimination provisions in Ukrainian housing legislation, no general anti-discrimination law, and, in consequence, an ineffective constitutional prohibition against discrimination, relations between the landlord and the tenant are governed solely by the goodwill of the parties, leaving the tenant unprotected from arbitrary actions by the landlord.

The absence of regulations governing the treatment of the common property of same-sex partners who live together deprives one partner of her/his rights if the property, which was acquired during their time living together, was registered only for the other partner. In this case death of one partner or separation of the couple leaves the other partner without any rights regarding the jointly acquired property, real estate particularly. For different-sex partners in a similar situation the law recognises automatic right of each partner to half of the property unless something else was stipulated by written agreement between them (Art. 74 of the *Family Code*).

Yevhen, 18 years old, rented an apartment in Ivano-Frankivsk. His partner from another city had moved to join him and they lived together for about a fortnight. One day their residence was visited by its owner, a man about 40. He came in without warning and found the men naked in bed. He immediately started to shout at them calling them perverts and other insulting words, including obscene ones. He overturned a coffee table with homosexual magazines on it. After that he told the men to leave the apartment although Yevhen had paid his rent for a month in advance. When Yevhen drew his attention to this, he started threatening to call the police. They had not concluded a contract, but Yevhen was not afraid of his threats and pointed out that the proprietor was breaking the law himself by renting out the apartment illegally. Then the proprietor threatened that they would be evicted by force unless they left the next day. The following day he came again and saw that they had not left. He returned in the evening along with his nephew Andriy who was threatening to the men – he had been in prison and believed that “the place for a fag is beside the toilet”. Yevhen said that he was ready to leave if they returned his money paid in advance. They refused and kept on pressing the men to leave. Eventually they went but the next day, when Yevhen came home from his work, he met his partner who told him that he had been beaten by three men, one of whom was Andriy, the nephew of the apartment’s owner. They said that they

²⁰ Zinchenkov et al., supra note 2, p. 89, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

*would kill them with a knife unless he and Yevhen left the apartment at once. Yevhen's partner refused to call the police and the men had to leave the apartment*²¹.

x. Sports

Section IX of the Appendix requires member states to combat sexual orientation or gender identity discrimination in sports through measures to counteract and punish the use of discriminatory insults, codes of conduct for sports organisations, encouragement of partnerships between LGBT organisations and sports clubs, and anti-discrimination campaigns, and to put an end to the exclusion of transgender persons from sports activity.

The information presented in the Compliance Documentation Report indicates that the Ukrainian authorities have not taken any of the above measures.

Issues of discrimination on the grounds of sexual orientation or gender identity, and homophobia and transphobia as well, are still taboo in the Ukrainian sports. The State Service for Youth and Sports did not provide any concrete information in response to the Council of Ukrainian LGBT Organisations' information enquiry on measures taken to implement the CMCE Recommendation in its sphere of responsibility. Moreover, there have been no reports in the national media of any such measures being taken. It just has to be stated that the subject of LGBT people in sport is totally beyond the attention of either the Ukrainian sports public or corresponding state bodies. The latter, in the opinion of Our World Centre and judging from the absence of any reaction to the CMCE Recommendation, have totally ignored this document in their activities.

xi. Right to seek asylum

Section X of the Appendix requires member states, where they have international obligations in this respect, to recognise a well-founded fear of persecution based on sexual orientation or gender identity as a valid ground for the granting of refugee status and to ensure 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. It also requires that asylum seekers be protected from any discriminatory policies or practices on these grounds, and that staff responsible for processing asylum requests are provided with training in the specific problems encountered by LGBT asylum seekers.

The State Migration Service reacted only to the second letter of the Council of LGBT Organisations of Ukraine and answered no question asked in the enquiry. We have managed to find from other sources that applications for asylum in Ukraine based on the applicant's well-founded fear of persecution on account of her/his sexual orientation do happen, though quite seldom, and in most known cases they have been granted; applications from transgender people have not been detected. Accordingly, one can state that Ukraine recognises LGBT people as a specific social group for purposes of refugee legislation and a well-founded fear of persecution for belonging to the social group may serve as a legal ground for granting asylum. At the same time we could find no information on the existence of measures which would ensure that LGBT asylum seekers are protected from being sent to countries known for their cruel attitude and regular persecutions towards open homosexual and transgender persons. Also there is no information on measures which would protect such asylum seekers from possible harassment in places of their temporary detention.

xii. National human rights structures

Section XI of the Appendix requires member states to ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity, and in particular should be able to make recommendations on legislation and policies, raise awareness amongst general public, and – as far as national law provides – examine individual complaints and participate in court proceedings.

²¹ Zinchenkov et al., supra note 2, p. 109, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

The only national human rights structure that could clearly address LGBT problems is the Parliamentary Commissioner for Human Rights (Ombudsman). The law on the Ombudsman does not explicitly mention either sexual orientation or gender identity, although it contains no provisions which could prevent the Ombudsman from addressing discrimination on these grounds.

Ms. Nina Karpachova held the position of Ombudsman from its establishment until April 2012. On no occasion did she take up discrimination on the grounds of sexual orientation or gender identity, but, on the contrary, was inclined to defend the homophobic attitude of society towards LGBT people. Since April 2012 this position has been occupied by Ms. Valeria Lutkovska, who immediately displayed readiness to co-operate closely with human rights organisations, including LGBT organisations, and has carried out a number of important changes in the activity of her institution. It is still too early to estimate the results of these reforms in relation to protection from discrimination on the grounds of sexual orientation or gender identity. However, in September 2012 the Ombudsman took the welcome, and for Ukraine, unprecedented step of writing to the Chairman of the Verkhovna Rada opposing the draft laws on “prohibition of propaganda for homosexuality”.

*The opinion of the Ombudsman is that society needs adequate protection from the negative influence of total information on occult and mystical services, in particular astrologers and psychics, as well as from popularisation of sexual minorities’ club parties in the mass media. Therefore, in the opinion of the Commissioner, special attention and thorough discussion have to be devoted to the draft law “On making changes to some legal acts (regarding protection of the population and informational space against negative influence)”.*²²

²² *The annual report of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights on observance of human rights in Ukraine*, p.111, in Ukrainian. http://ombudsman.gov.ua/images/stories/07022011/Dopovid_8_1.pdf

**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.

Glossary

Gender identity refers to a person's deeply felt individual experience of gender, which may or may not correspond with the sex assigned at birth, and includes the personal sense of the body and other expressions of gender (that is, "gender expression") such as dress, speech and mannerisms. The sex of a person is usually assigned at birth and becomes a social and legal fact from there on. However, some people experience problems identifying with the sex assigned at birth – these persons are referred to as "transgender" persons. Gender identity is not the same as sexual orientation, and transgender persons may identify as heterosexual, bisexual or homosexual.

Gender reassignment treatment refers to different medical and non-medical treatments which some transgender persons may wish to undergo. However, such treatments may also often be required for the legal recognition of one's preferred gender, including hormonal treatment, sex or gender reassignment surgery (such as facial surgery, chest/breast surgery, different kinds of genital surgery and hysterectomy), sterilisation (leading to infertility). Some of these treatments are considered and experienced as invasive for the body integrity of the persons.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground (including sexual orientation and gender identity) takes place with the purpose or effect of violating the dignity of a person or creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment can consist of a single incident or several incidents over a period of time. Harassment can take many forms, such as threats, intimidation or verbal abuse, unwelcome remarks or jokes about sexual orientation or gender identity.

Hate crime towards LGBT persons refers to criminal acts with a bias motive. Hate crimes include intimidation, threats, property damage, assault, murder or any other criminal offence where the victim, premises or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership of an LGBT group. There should be a reasonable suspicion that the motive of the perpetrator is the sexual orientation or gender identity of the victim.

Hate-motivated incident are incidents, acts or manifestations of intolerance committed with a bias motive that may not reach the threshold of hate crimes, due to insufficient proof in a court of law for the criminal offence or bias motivation, or because the act itself may not have been a criminal offence under national legislation.

Hate speech against LGBT people refers to public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards LGBT people – for example, statements made by political and religious leaders or other opinion leaders circulated by the press or the Internet which aim to incite hatred.

Homophobia is defined as an irrational fear of, and aversion to, homosexuality and to lesbian, gay, bisexual and transgender persons based on prejudice.

Intersex people are persons who are born with chromosomal, hormonal levels or genital characteristics which do not correspond to the given standard of "male" or "female" categories as for sexual or reproductive anatomy. This word has replaced the term "hermaphrodite", which was extensively used by medical practitioners during the 18th and 19th centuries. Intersexuality may take different forms and cover a wide range of conditions.

LGBT people or **LGBT persons** is an umbrella term used to encompass lesbian, gay, bisexual, and transgender persons. It is a heterogeneous group that is often bundled together under the LGBT heading in social and political arenas. Sometimes LGBT is extended to include intersex and queer persons (LGBTIQ).

Multiple discrimination describes discrimination that takes place on the basis of several grounds operating separately.

NGO is the abbreviation for "non-governmental organisation".

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender (heterosexual) or the same gender (homosexual, lesbian, gay) or more than one gender (bisexual).

Transgender persons include persons who have a gender identity which is different from the gender assigned to them at birth and those people who wish to portray their gender identity in a different way from the gender assigned at birth. It includes those people who feel they have to, prefer to, or choose to, whether by clothing, accessories, mannerisms, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth. This includes, among many others, persons who do not identify with the labels “male” or “female”, transsexuals, transvestites and cross-dressers. A transgender man is a person who was assigned “female” at birth but has a gender identity which is “male” or within a masculine gender identity spectrum. A transgender woman is a person who was assigned “male” at birth but has a gender identity which is female or within a feminine gender identity spectrum. Analogous labels for sexual orientation of transgender people are used according to their gender identity rather than the gender assigned to them at birth. A heterosexual transgender man, for example, is a transgender man who is attracted to female partners. A lesbian transgender woman is attracted to female partners. The word **transgenderism** refers to the fact of possessing a transgender identity or expression.

Transphobia refers to a phenomenon similar to homophobia, but specifically to the fear of, and aversion to, transgender persons or gender non-conformity. Manifestations of homophobia and transphobia include discrimination, criminalisation, marginalisation, social exclusion and violence on grounds of sexual orientation or gender identity.

**Monitoring Implementation of
the Council of Europe Recommendation to member states
on measures to combat discrimination on grounds of sexual orientation
or gender identity (the “CMCE Recommendation”)**

Compliance Documentation Report

© Nash Mir (Our World) Gay and Lesbian Centre, Kyiv, Ukraine, 2012

As a part of the monitoring process Our World Centre wrote information enquiries to the state bodies responsible for implementing the different parts of the Recommendation, requesting their comments on the extent to which they consider they have completed the checklist questions (corresponding sections of the checklist were attached to every letter), and their responses are mentioned in the report. These letters also informed addressees about the very existence of the Recommendation and its content. Most of these enquiries and other correspondence to the state bodies were made on behalf of the Council of LGBT Organisations of Ukraine uniting all actively working Ukrainian LGBT organisations (currently 23 NGOs).

All inquired state bodies responded to the enquiries for information: Ministry of Justice, Ministry of Internal Affairs, Ministry of Social Policy, Ministry of Foreign Affairs, Ministry of Health Care, Ministry of Defence, Ministry of Education, Science, Youth and Sports, Ministry of Regional Development, Building, and Housing and Communal Services, State Service for Youth and Sports, State Penitentiary Service, State Migration Service and the Ombudsman.

The copies of all letters to state bodies and replies of those, used in the course of preparation of this report, are available at Our World Centre and may be provided on request.

Recommendation

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;

- i. Has a review been conducted of existing legislative and other measures which could result directly or indirectly in (a) sexual orientation or (b) gender identity discrimination?*

In its reply dated 12 Mar 2012 the Ministry of Justice informed that on 15 Feb 2012 the Cabinet of Ministries of Ukraine approved the *Strategy of Struggle against Discrimination in Ukraine Regarding Rights and Freedoms of a Person* under the p. 42 of the Ukraine-EU *Visa Liberalisation Action Plan*. This document was developed by the Ministry after public discussion of the draft. Later this Strategy was put in force with decree of the President. The Ministry of Justice considers that this document defines the fundamentals of state policy of protection from and struggle with discrimination on the various grounds. On the basis of the Strategy the Cabinet of Ministries has to develop the Plan of Actions on implementing anti-discrimination policy.

It should be noted that the Strategy does not mention explicitly either sexual orientation or gender identity. Although Ukrainian LGBT organisations (including Our World Centre) during the public discussion proposed to include those anti-discrimination grounds in the document,

the Ministry rejected these suggestions and left in the Strategy only grounds listed in corresponding article of the Constitution (that does not include references to sexual orientation or gender identity). The Ministry also informed that the CMCE Recommendation would be also used when developing draft laws under the Strategy, however the bill on anti-discrimination proposed by the Ministry in May 2012 did not mention said references as well, proposals to include them in it were rejected by the Ministry. As a result there is no reason to consider that existing legislative and other measures related to sexual orientation and gender identity have really been reviewed.

- ii. *Are processes in place to ensure that the discrimination thus identified is redressed?*

Currently the Ukrainian government is developing the previously mentioned plan of anti-discrimination actions. During the public discussion of the draft law on anti-discrimination Our World Centre proposed that sexual orientation and gender identity would be explicitly mentioned in the list of anti-discrimination grounds which had already been expanded in this bill comparing with the mentioned in the Constitution. This proposal was rejected by the Ministry of Justice. Until now there is no any sign that the government intends to identify and redress discrimination on grounds of sexual orientation or gender identity in the mentioned plan or other documents.

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;

- i. *Has legislation against discrimination on the grounds of (a) sexual orientation and (b) gender identity covering employment, social security and health care, education, access to and supply of goods and services, including housing, been introduced?*

“Ukraine does not have a comprehensive anti-discrimination law that prohibits discrimination on grounds of sexual orientation and/or gender identity. Instead, antidiscrimination provisions, none of which explicitly includes sexual orientation or gender identity, are scattered throughout the legal system and are contained, among others, in the Constitution of Ukraine, several Codes and a number of secondary legislative acts. The absence of direct reference to sexual orientation or gender identity in the law allows to assume that gay men, lesbians, bisexual men and women and transgender/transsexual persons are generally protected by the general anti-discrimination norms in the constitutional law; however, with absence of court rulings it is hard to determine how discrimination on ground of gender identity will be seen and dealt with.”¹

In May 2012 the Ukrainian government approved a draft antidiscrimination law which is a part of Ukrainian obligations before EU under *Visa Liberalisation Action Plan*. Despite its own promises the Ukrainian government approved this draft law without consultations with NGOs and actual public discussion. The proposed statute was quite negatively estimated by Ukrainian human rights NGOs and does not mention explicitly sexual orientation or gender identity. A proposal of the Council of LGBT Organisations of Ukraine and Coalition against

¹ S. Ponomaryov, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity. Legal Report: Ukraine*, para. 1.
http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

Discrimination in Ukraine to the Ministry of Justice to explicitly include sexual orientation and gender identity in this law was rejected².

- ii. *Has 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, been implemented?*

On 25 Apr 2012 the Cabinet of Ministries of Ukraine approved the *Plan of Actions on Developing Civic Culture and Raising Level of Tolerance in the Society*³. It is just a framework document hardly providing for any concrete activities and it is too early to judge its effectiveness. Moreover, it makes no reference to sexual orientation or gender identity. As a result there is no reason to consider that the mentioned comprehensive strategy has really been implemented.

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;

- i. *Do effective legal remedies for victims of (a) sexual orientation or (b) gender identity discrimination exist at national level?*
- ii. *Are there effective procedures to make victims aware of, and able to access, such remedies, even where a violation is committed by a person acting in an official capacity?*
- iii. *Are the remedies effective, proportionate and dissuasive?*
- iv. *Do the remedies include, where appropriate, adequate reparation for victims?*

The Ukrainian legislation and policies do not provide victims of discrimination with effective remedies for discrimination on any ground. A victim may make a complaint to corresponding state body or bring a case in a court but legal practice shows extremely low effectiveness of such actions⁴.

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

- i. *What steps have been taken to ensure as wide as possible dissemination of the Recommendation and its appendix?*

² Letter of the Council of LGBT Organisations of Ukraine dated 4 May 2012. The results of so-called public discussion of the draft please see <http://www.minjust.gov.ua/0/41303> - in Ukrainian.

³ See <http://zakon2.rada.gov.ua/laws/show/236-2012-%D1%80/print1340963372076946> – in Ukrainian.

⁴ See, for instance, Amnesty International, *Ukraine: "No evidence of a crime": Paying the price for police impunity in Ukraine* (Amnesty International, London, 2011), in particular Chap. 5. *Ineffective Complaint Mechanisms*, Chap. 6. *Flawed Investigations*. <http://www.amnesty.org/en/library/asset/EUR50/009/2011/en/8b104ee8-689f-4bc3-9fb2-2c68916be33b/eur500092011en.pdf>

As far as is known to Our World Centre, the Ukrainian government did not inform anyone or any state body about the existence of the Recommendation let alone disseminating it in any way. There is no mention of it at any governmental website or in any generally accessible document. The only organisations spreading information about the Recommendation are Ukrainian LGBT NGOs. They have informed all relevant state bodies about the Recommendation, translated it into Ukrainian and sent the translated text to them, and pointed out their duty to disseminate it⁵, but have received no reaction to this request.

ii. Have the Recommendation and its appendix been translated?

The Council of LGBT Organisations of Ukraine had asked the Ministry of Justice and the Ministry of Foreign Affairs about translating the Recommendation and the Appendix into Ukrainian. The Ministry of Foreign Affairs answered that it has an obligation to translate only important international agreements, while the Ministry of Justice just ignored the question. The Council made an unofficial translation of the Recommendation and the Appendix and proposed to the Minister of Justice, to the Vice Premier Minister responsible for European integration and to the Prime Minister that this text be used for the purposes indicated in the Recommendation. These proposals were left without answers. The text of the Recommendation has not been placed at website of any Ukrainian state body by the time of completion of this report.

iii. Have they been disseminated:

- *within the lesbian, gay, bisexual and transgender communities?*
- *throughout public administration?*
- *throughout law-enforcement structures, including the judiciary and penitentiary system?*
- *to national human rights protection structures (including equality bodies)?*
- *throughout the educational system?*
- *throughout the health-care system?*
- *to representatives of public and private sector employees and employers?*
- *to the media?*
- *to relevant non-governmental organisations?*

See above. All dissemination of the Recommendation has been carried out exclusively through the efforts of Ukrainian LGBT NGOs. The unofficial Ukrainian translation of the Recommendation and the Appendix was made by Our World Centre and is available at its website⁶.

⁵ In particular, the letters of the Council of LGBT Organisations of Ukraine mentioned in the text of this report (titled "On Ukraine's implementation of the Recommendation CM/Rec(2010)5 of the Council of Europe's Committee of Ministers of 31.03.2010" to the Ministry of Justice, Ministry of Internal Affairs, Ministry of Social Policy, Ministry of Health Care, Ministry of Defence, Ministry of Education, Science, Youth and Sports, the State Migration Service, and the State Penitentiary Service dated 26 Jan 2012, to the Ministry of Foreign Affairs – 9 Feb 2012, to the Ombudsman – 16 May 2012, to the Ministry of Regional Development, Building, and Housing and Communal Services – 16 Jul 2012, and also its letters to the President, Prime Minister, and 10 parliamentary committees dated 26 Jan 2012, to the First Vice-Prime Minister dated 19 Apr 2012, and to the State Committee on Television and Radio Broadcasting dated 28 Mar 2012.

⁶ See http://gay.org.ua/documents/recommendation_CE_KM-u.doc

Appendix to Recommendation CM/Rec(2010)5

I. Right to life, security and protection from violence

A. “Hate crimes” and other hate-motivated incidents⁷

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.**
 - i. *Does the training of police officers ensure that they are aware of the need to make special efforts to investigate any (a) homophobic or (b) transphobic connotations in hate crimes or hate motivated incidents effectively, promptly and impartially, particularly where violence is involved?*

In its reply to our letter requesting information on compliance with the Recommendation, the Ministry of Internal Affairs indicated that police officers regularly have training courses which pay substantial attention to the observation of the rights and legitimate interests of citizens regardless of any grounds. This reply also mentioned that the Minister declared to police staff on 27 Feb 2012 the necessity for them not to tolerate any violation of citizens' rights and freedoms as well as to establish relations based on partnership with the population. However the Ministry's letter failed to confirm that the training of police officers specifically addresses the need to make special efforts to investigate homophobic or transphobic connotations in hate crimes or hate motivated incidents.

On 16 May 2012 the Council of LGBT Organisations of Ukraine proposed to the Ministry to introduce basic information on LGBT issues in training courses for police staff. In his reply dated 15 Jun 2012 the Head of the Public Security Department rejected this proposal, stating that the existing course on general human rights observation is quite enough. However, the practice of police activity shows the contrary – usually the police investigate hate motives of incidents and crimes extremely reluctantly⁸. The reason offered for not investigating homo- or transphobic motives for incidents and for qualifying them as ordinary hooliganism rather than “hate crime” is that the police may not institute proceedings under the applicable article (namely 161) of the *Criminal Code*, since this right is reserved to the Public Prosecutor's Office. Unfortunately this law enforcement body is even less inclined to take action in relation to these types of incident.

In May 2012 the Kiev police started its investigation of the undoubtedly homophobic assault on the organisers of Gay Pride events quite promptly, but refused to qualify this crime under Art. 161 of the *Criminal Code* for the above-mentioned reasons.

- ii. *Is there an independent and effective machinery for receiving and investigating reports of hate crimes or hate motivated incidents allegedly*

⁷ See Glossary (Appendix II) or Explanatory Memorandum for explanation of hate crimes and hate-motivated incidents
<https://wcd.coe.int/ViewDoc.jsp?id=1570957&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

⁸ Report of Ukrainian human rights NGOs *Human rights in Ukraine 2011*. Chapter XIII. *PROTECTION FROM DISCRIMINATION, RACISM AND XENOPHOBIA*. <http://khpq.org/en/index.php?id=1332401709>

committed by law-enforcement staff, particularly where sexual orientation or gender identity constitute one of the motives?

The Ministry of Internal Affairs in its reply considers that mechanisms of such a kind exist, yet human rights defenders constantly draw attention to the fact that Ukraine lacks any really independent (not to speak of public) control over the activity of law enforcement bodies. In fact such control is conducted by the same or closely related bodies and complaints against police staff are usually referred to the related police department. Our World Centre knows of no case involving the punishment of law enforcement staff for any kind of hate motivated behaviour, let alone such behaviour related to sexual orientation or gender identity. On the contrary, Ukrainian human rights NGOs point out that it is the law enforcement bodies themselves that often act as a source of xenophobia.⁹

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.

- i. Do legislative measures to combat “hate crimes” and other hate motivated incidents exist? Do these measures recognise (a) sexual orientation and (b) gender identity as a possible motive in such crimes or incidents?*
- ii. Does this legislation ensure that a bias motive related to (a) sexual orientation (b) gender identity may be taken into account as an aggravating circumstance when determining sanctions?*

No provision of the *Criminal Code of Ukraine* can currently be interpreted as treating homophobic or transphobic motivation an aggravating factor. Art. 161 of the Code has limited scope being restricted to “Violation of equality of citizen’s rights regarding their race, nationality or religious convictions”, and there are no legal precedents which would allow one to interpret it as protecting LGBT people from hate crimes. Arts. 115 (“Premeditated murder”), 121 (“Premeditated severe bodily injury”), 122 (“Premeditated bodily injury of medium severity”), 126 (“Assault and battery”), 127 (“Tortures”), 129 (“Threat of murder”) and 300 (“Bringing in, manufacturing or distribution of production promoting the cult of violence and atrocity, racial, national or religious intolerance and discrimination”) are similarly restricted to racial, national and religious hatred or intolerance as aggravating factors to a crime. The same is also true of Art. 67 of the *Criminal Code*, which provides a list of aggravating factors (para. 1.3) covering only crimes committed due to hatred on grounds of race, nationality or religious belief.¹⁰

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.

⁹ *Human rights in Ukraine 2011*, supra note 8. <http://khpq.org/en/index.php?id=1332401709>

¹⁰ Ponomaryov, supra note 1, para. 80. http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

- i. *Has a simple and comprehensible definition of “hate crimes”, which includes the motive of (a) sexual orientation and (b) gender identity been disseminated to the general public?¹¹*

Ukrainian legislation does not recognise a separate category of crime under the heading of "hate crime". As noted above, while it does provide for aggravated penalties under some circumstances, these do not cover crimes where sexual orientation or gender identity is a motivating factor. And accordingly, there is no basis for the police developing simple and comprehensible language in this regard.

- ii. *Do training programmes and procedures ensure that the police and judiciary possess the knowledge and skills to identify such crimes and incidents and provide victims and witnesses with adequate assistance and support?*
- iii. *Do training programmes and codes of conduct for the police and judiciary ensure that LGBT persons are treated in a non-discriminatory and respectful manner so that they feel safe to report hate crimes or other hate motivated incidents, whether as victims or witnesses, in relation to their (a) sexual orientation and (b) gender identity?*

As noted in para. 1.i of this chapter, proposals by Ukrainian LGBT organisations that basic LGBT issues be introduced in training courses for police officers were rejected by the Ministry of Internal Affairs. It seems that issues of discrimination on grounds of sexual orientation or gender identity are sometimes considered in the context of seminars and training courses for judges addressing decisions of the European Court of Human Rights and European Union law¹².

- iv. *Are units within the police tasked specifically with investigating crimes and incidents linked to (a) sexual orientation and (b) gender identity?*
- v. *Are there special police liaison officers tasked with maintaining contact with local LGBT communities in order to foster a relationship of trust?*

The Ukrainian police do not have special units or officers authorised in any way to work specifically with LGBT issues. In general the police have quite a bad reputation among Ukrainian LGBT people as well as broader public. Reports of Ukrainian human rights NGOs show an extremely high level of corruption and infringements of citizens' rights on the part of the police. A survey conducted by Our World Centre in 2011 found that only 23% of polled LGB people, who contacted police and whose homosexuality was known or suspected, did not experience infringement of their rights, and almost twice more – 40% – did not experience it when police officers did not suspect their homosexual orientation¹³.

- vi. *Is there a system of anonymous complaints or on-line complaints, or using other means of easy access, which allow reporting by third parties in order to gather information on the incidence and nature of these incidents?*

In general, police departments have so-called “confidential telephone numbers” which are used for receiving complaints, possibly anonymous. However, as explained in p. 1.i of this chapter, since the police usually try to avoid qualifying xenophobic or hate-related incidents as such, information of this kind from third parties is not usually sought and often ignored.

¹¹ e.g. through police websites or leaflets distributed in the community.

¹² See for instance <http://aj.court.gov.ua/news/623/show/> – in Ukrainian.

¹³ O. Zinchenkov et al., *A step forward, two steps back. The state of LGBT in Ukraine in 2010-2011* (Our World Centre, Kiev, 2011), p. 62, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

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.

- i. Do training programmes and codes of conduct for prison staff ensure that prisoners are treated with respect and without discrimination in relation to their (a) sexual orientation and (b) gender identity?*
- ii. Are there effective measures to minimise the dangers of physical assault, rape and other forms of sexual abuse, including effective procedures for determining the disciplinary or criminal liability of those responsible, including for failure of supervision?*
- iii. Is there an independent and effective machinery for receiving and investigating reports of such crimes by prison staff?*

In its reply (dated 14 Feb 2012) to the information enquiry, made by the Council of LGBT Organisations of Ukraine in the course of preparation of this report, the State Penitentiary Service did not confirm that issues of sexual orientation or gender identity in any way are considered in training programmes and codes of conduct for prison staff.

This reply also failed to confirm the existence of effective measures to minimise the dangers of physical assault, rape and other forms of sexual abuse related to sexual orientation or gender identity.

Prisons remain largely closed to society at large, so little information on the activities of the prison service is available. Judging by numerous articles in the mass media and human rights defenders' reports, the Ukrainian penitentiary system has a very closed and repressive character, violation of prisoners' rights is widespread, and the administration reacts to abuses only when they result in extensive adverse publicity¹⁴.

Art. 24 of the *Criminal Executorial Code* establishes that there are several categories of official who have the right of independent investigation at penitentiary institutions without special permission – in particular, the Ombudsman, members of the Presidential Commission for Pardon, members of the European Committee for the Prevention of Torture, heads of local state administrations, members of the Ukrainian parliament, heads of local councils, and members of the supervisory commission. In practice only the first and the last of those listed play an important role. Both the Ombudsman and human rights defenders from supervisory commissions have repeatedly investigated complaints from prisoners and sometimes achieved correction of the situation. However there is no information regarding complaints in relation to LGBT issues.

The only positive practice related to LGBT issues in this field of which Our World Centre is aware is some co-operation between the State Penitentiary Service and NGOs concerning men who have sex with men (MSM) and prevention of HIV/AIDS in prisons. In particular Penitentiary Initiative, an NGO from Mykolaiv region, has since 2008 carried out programs of

¹⁴ Report of Ukrainian human rights NGOs *Human rights in Ukraine 2011*. Chapter XXVI. *PRISONERS' RIGHTS*. <http://khpq.org/en/index.php?id=1332410904>

psychological support and HIV/AIDS prevention among MSM prisoners. This group also drew up a manual on preventing HIV infection among vulnerable minorities within the prison population that was approved and recommended for use by the State Penitentiary Service.

- iv. *In the case of transgender prisoners, are there procedures to ensure that the gender identity of the individual is respected in regard to interactions with prison staff such as body searches and also particularly in the decisions taken on the placement of a prisoner in a male or female prison?*

In its reply the State Penitentiary Service simply indicated that Art. 92 of the *Criminal Executorial Code* provides for separate facilities for men and women, and Art. 102 of the Code prescribes that body searches may only be conducted by persons of the same sex as the person searched. However it should be noted that the Ukrainian legislation does not contain the concept of a transgender person, and accordingly the sex of a person for legal purposes is defined exclusively by the record in her/his birth certificate and/or passport. A transgender person who has not completed legal recognition of a gender reassignment will be considered as belonging to the sex indicated in his/her documents.

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.

- i. *Is there research into the nature and causes of hostile and negative attitudes to LGBT people, with a view to developing effective policies to combat these phenomena?*
- ii. *Are there regular surveys into levels of social acceptance of / hostility towards LGBT people?*
- iii. *Is there an effective system for recording and publishing statistics on hate crimes and hate-motivated incidents related to (a) sexual orientation and (b) gender identity?*

The Ukrainian law enforcement bodies' statistics on hate-related crimes are limited to registering most serious assaults against foreigners and the number of criminal lawsuits under the article 161 of the Criminal Code of Ukraine (violation of person's equality on the basis of race, ethnicity or religion)¹⁵. As far as is known to Our World Centre all surveys relevant to LGBT issues in Ukraine have been carried out only by LGBT and human rights NGOs or independent researchers. No state body has ever requested that such data be gathered or presented it in its publications or other media.

B. “Hate speech”¹⁶

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

¹⁵ *Human rights in Ukraine 2011*, supra note 8 <http://khpq.org/en/index.php?id=1332401709>.

¹⁶ See Glossary (Appendix II) or Explanatory Memorandum for definition of “hate speech”.

fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.

- i. Do legislative measures penalising “hate speech” on certain grounds exist? Do these measures penalise (a) homophobic and (b) transphobic “hate speech”?

The Ukrainian legal system does not contain explicit prohibition of hate speech in relation to sexual orientation and/or gender identity. The corresponding articles (161 and 300) of the *Criminal Code* contain only a limited number of grounds (namely race, nationality (ethnicity) and religion) which are protected from incitement of hatred and intolerance. Art. 161 par. 1 of the *Criminal Code* only marks as punishable “intentional actions directed at incitement of national, racial or religious hostility or hatred, disparagement of national honour and dignity or insult to religious feelings of citizens [...]”. Thus, the law recognises only an extreme form of “hate speech” and has a closed list of protected grounds, which do not include sexual orientation or gender identity¹⁷.

- ii. Are media organisations, including those operating on the internet, encouraged to promote in their own practices (e.g. through codes of practice):
- a culture of respect, tolerance and diversity, and
 - to avoid negative and stereotyped representations of LGBT people?

Aspects of journalistic ethics are not explicitly mentioned in the law *On Printed Media (Press) in Ukraine*. Enforcement of adherence to the principles of journalistic ethics is the prerogative of the Journalistic Ethics Commission, which is a corporate professional organisation whose purpose is to resolve conflicts of an ethical and professional nature that arise in the context of media relations with civil society and governmental bodies. The unofficial *Ethic Code of Ukrainian Journalist* adopted by the Commission contains a provision that reads: “No one shall be discriminated on grounds of sex, language, race, religion, national, regional or social origin or political views. One should specify respective characteristics of a person (a group of people) only if such information is indispensable for the purpose of a publication’s consistency”. There exists also the *Code of Journalistic Ethics* adopted by the National Union of Journalists of Ukraine that reads: “In his/her publications and programmes a journalist has to avoid insults on grounds of national, racial, ethical and religious views and feelings of people, oppose extremism and restriction of civil rights on any bases”. Nevertheless none of the documents regulating printed media in Ukraine explicitly mention LGBT issues.

Unlike with printed media, the law *On Television and Radio Broadcasting* obliges broadcasting companies to adopt an official Editorial Statute that specifies, among other things, “requirements for dissemination of information concerning various social groups (national and **sexual minorities**, religious groups, hospital patients and the disabled)” (Art. 57). It is noteworthy that in establishing the rules governing dissemination of such information, the Statute must uphold the non-discrimination principles established in the Law and in other legislation. In addition, par. 5 of the Article stipulates that the Editorial Statute must require creation of an internal editorial board to monitor journalists’ compliance with the principles set forth in the Statute¹⁸.

Ukraine still does not have a law specifically regulating the Internet, and websites have not so far been considered legally as mass media. Regulation in the Ukrainian segment of the Internet is provided by the Internet Association of Ukraine – a voluntary NGO. At present this association has not yet drawn up ethical principles for its members.

¹⁷ Ponomaryov, supra note 1, para. 76 http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf.

¹⁸ Ibid. paras. 184, 185.

- iii. *Has legislation for criminalising “hate speech” on the internet been implemented, and does this cover (a) homophobic and (b) transphobic “hate speech”?*

Currently the Ukrainian legislation does not contain provisions specifically regulating Internet issues including “hate speech”, so it is regulated by the general provisions described in p. i of this chapter.

- iv. *Have internet service providers been encouraged to take measures to prevent the dissemination of (a) homophobic and (b) transphobic materials, threats and insults?*

Up to date neither state regulations nor corporate professional rules and customs in Ukraine impose such obligations upon internet service providers.

- v. *If there are incidents of “hate speech”, are they publicly disavowed by leading public officials?*

Although cases of “hate speech” related to sexual orientation or gender identity are quite common in Ukraine they have never been the subject of adverse comment by a prominent public official, whereas “hate speech” related to other forms of xenophobia (ethnic, national, religious etc.) often meets resolute condemnation. For instance, when in the spring of 2012 one of the leaders of the far right-wing Ukrainian nationalist party Svoboda used racist speech about Gaitana – a Ukrainian singer of African origin, his words were strongly repudiated by representatives of most political forces, prominent public figures, and state officials up to the level of a presidential aide. None of the numerous homophobic statements of Svoboda’s representatives ever faced any similar reaction.

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.

- i. *Have guidelines been issued or other measures been taken to raise awareness of public authorities/ institutions of their responsibility to refrain from such statements?*

No action of this kind has been carried out. Our World Centre knows of no example when an important representative of the state authorities pointed to the necessity of abstention from such statements.

- ii. *Have there been cases of statements by representatives of public authorities and institutions which may reasonably be understood as legitimising such hatred or discrimination?*

Statements which are evidently homophobic and/or justify and call for discrimination are quite common among representatives of local authorities, members of the Ukrainian parliament and public servants of low and middle level. However, higher state officials voice their position on these issues very seldom. For instance, in 15 May 2012 the Mayor of Donetsk Mr. Oleksandr Lukianchenko declared that this city will never host a Gay Pride event¹⁹ and in 28 Mar 2012 the Mayor of Kharkiv Mr. Hennady Kernes gave instructions to

¹⁹ See for example <http://donbass.ua/news/region/2012/05/15/mjer-donecka-rasskazal-o-seksualnyh-naklonnostjah-gorozhan.html> – in Russian.

close a gay club and never to allow the opening of this venue in communal property²⁰. In the meantime homophobic statements and calls to discrimination against LGBT people by the deputies of the Ukrainian parliament and local councils have recently become commonplace. So just in 2011-2012 appeals were made to the President to revoke the registration of the Council of LGBT Organisations of Ukraine, forbid Gay Pride events and “to fight against homosexuality” by Lviv, Ternopil, Ivano-Frankivsk city councils and Lviv, Volyn, Rivne regional councils²¹.

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.

- i. Has guidance been issued to public officials and state representatives in this respect?*
- ii. If so, is there evidence of public officials and other state representatives promoting tolerance for LGBT people in their dialogue with civil society, and encouraging the use of responsible and non-violent speech?*

Unfortunately there is not a single statement by any prominent state representative which can be seen as actively promoting tolerance and defending the human rights of LGBT people. Neither the mass media nor informal sources of information accessible to Ukrainian LGBT and human rights organisations contain any evidence of the existence of such guidance. The nearest to this are very rare statements by some state representatives of medium rank about their personal tolerance of LGBT people. Such statements however have never been accompanied by appeals to others to exercise such tolerance.

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, this 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.

- i. Are organisations whose publicly stated purpose is to work for the well-being of LGBT people, whether for their human rights, or in other ways, prevented from gaining official registration?*

The activity of non-governmental organisations in Ukraine is regulated, first and foremost, by the law *On Citizens' Associations*. The law states that public organisations may not be legalised if their objectives include: undermining the constitutional or territorial order of Ukraine and the national security of the State; propaganda for war, violence and cruelty,

²⁰ See for example <http://ukranews.com/ru/news/ukraine/2012/03/29/67238> – in Russian.

²¹ See for example <http://news.if.ua/news/14103.html>, <http://zik.ua/ua/news/2012/05/17/348963>, <http://www.bible.com.ua/news/r/79058> – in Ukrainian.

fascism or neo-fascism; incitement to national or religious hatred; creation of illegal paramilitary forces; and setting restrictions to the exercise of human rights. Thus, the law establishes no restrictions that may hinder the ability of LGBT people to create associations to protect their rights and freedoms or satisfy their common interests. All organisations that have declared as their purpose working for LGBT issues have been finally registered, though some of them met unjustified delays and demands during the process of registration.

- ii. *If so, is this through the use of discriminatory administrative procedures, through restrictions based on public health, public morality or public order, or through other means?*

The delays and illegal requests during registration of LGBT organisations relied partially on misinterpretation of the law on citizen's associations and partially on the sheer arbitrariness of the local authorities. They just did not want to register some organisations, and delayed their decision as long as they could. The most recent cases took place in 2008 and 2010 when two local organisations were compelled to mask their LGBT nature under more obscure formulations:

- On 12 Dec 2008 the Department of Justice in Chernivtsi oblast registered the NGO Liudy Bukovyny which was formed to serve the interests of homosexual citizens. However, officials made the founders of the organisation delete the wording "sexual orientation" from the Statute agreeing only to the use of an absurd term "gender orientation". Thus, one of the statutory missions of the organization reads as follows: "to contribute to promoting tolerance towards people with non-traditional gender orientation in the society".
- In September 2010 the LGBT initiative group Tematychna Halichyna reported undue and unmotivated delays in the registration process on the part of the Ivano-Frankivsk Department of Justice. This resulted in the decision of the group to change their name to Queer-IF, to modify its statute to minimize instances of referring to LGBT as the organisation's target audience, and to apply for registration as a new entity²².

On the other hand in 2011 the Ministry of Justice legalised the Council of LGBT Organisations of Ukraine without any problems.

- iii. *Are there examples of measures taken to:*
- *ensure that LGBT organisations can operate freely,*
 - *defend their interests when necessary,*
 - *facilitate and encourage their work?*

Our World Centre is unaware of any measures by the authorities aimed at the encouragement of their work. The most that can be said is that the Ministry of Justice has refused to act on the numerous demands of homophobic groups that it revoke the registration of the Council of LGBT Organisations of Ukraine.

- iv. *Are LGBT organisations involved on a partnership basis when framing and implementing public policies which affect LGBT persons?*

Indeed, on the contrary, all proposals by Ukrainian LGBT organisations to the authorities on co-operation have been ignored except in the field of HIV/AIDS prevention. In 2010 an open activist from the LGBT movement was appointed a member of National Council on Tuberculosis and HIV/AIDS and has since then been taking an active part in its work. The only use of the term "sexual orientation" in the national law arises in the context of HIV/AIDS prevention. The same co-operation between state bodies and LGBT anti-AIDS organisations

²² Ponomaryov, supra note 1, paras. 61, 62.
http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

sometimes happens at the local level according to Mr. Oleksandr Cherniavsky, the leader of NGO Gay-Alliance Cherkasy.

10. Access to public funding available for non-governmental organisations should be secured without discrimination on grounds of sexual orientation or gender identity.

- i. Is public funding earmarked for NGOs accessible to LGBT organisations without discrimination?*

Theoretically yes, but there are still no cases of granting such funding to LGBT organisations. Up to date all their requests have been declined suggesting the possibility of hidden discrimination against LGBT NGOs.

Note: Examples of such attitude were provided by NGO Gay Forum of Ukraine. According to its leader Mr. Sviatoslav Sheremet three organisations (League of Deputies' Assistants, Youth Human Rights Centre and Gay Forum of Ukraine) in 2005, 2006 and 2007 jointly applied to the selection board of the Ministry of Family, Youth and Sports with the project "LGBT-Socis" aimed at everyday problems of LGBT youth within the framework of the national youth support programme. It should be noted that while in 2005 and 2006 the requested financing of the project made up about 60% of total cost, in 2007 the applicants symbolically asked just 1 Ukrainian hryvnia (UAH) of total 142049.46 UAH, the rest had to be paid off by the applicants. All of these applications were declined²³.

- ii. Has such funding been made available to LGBT organisations?*

The only field of activity where the state is ready to co-operate with LGBT organisations is HIV/AIDS prevention. Some organisations (for instance, Gay Alliance) have received funding within the framework of state adopted programmes in this area, but it should be noted that the funding of these programmes and the decisions on grant distribution are exercised exclusively by the structures of the Global Fund to Fight AIDS, Tuberculosis and Malaria.

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.

- i. Does the state provide effective protection from hostility and aggression for LGBT human rights organisations?*

There is no formal policy on this issue and state officials have never made any encouraging statements directed to the LGBT movement. The police prefer to ignore homophobic motives in acts of aggression against LGBT events and tend to avoid investigating them. For example, on 20 Nov 2010 there was an assault against a film show at the Centre of Contemporary Art in Kyiv Mohyla Academy (the film show was organized by NGO Insight and timed for the International Transgender Day of Remembrance). The police very

²³ The copies of the mentioned applications are available at Our World Centre; the brief description of the situation can be found, for example, at <http://korrespondent.net/ukraine/events/182777-ukrainskie-gei-prosyat-u-pravitelstva-odnu-grivnu> - in Russian.

reluctantly started investigation and eventually found no violators²⁴. On 17 May 2012 activists of the far right-wing Ukrainian nationalist party Svoboda prevented a screening of the film *Milk* in the American Library of the same university²⁵. Incidents such as these make us suggest that the state does not provide effective protection of LGBT organisations from homophobic aggression.

- ii. *Are there examples of measures taken by the state to create an environment conducive to the work of such organisations, enabling them freely to conduct their activities, and promoting respect for their work?*

Our World Centre could find no example of the mentioned measures.

- iii. *Are LGBT human rights organisations able to work with*
- *national human rights institutions and ombudsmen,*
 - *the media,*
 - *other human rights organisations?*

Yes, there are no formal or informal restrictions, though everything depends on the willingness of the counterparts. In particular, as documented in response to para. 45.ii below, the previous Ombudsman consistently failed to support the rights of LGBT people, and indeed adopted discriminatory positions, while the recently appointed Ombudsman, although much more supportive, opposed inclusion of sexual orientation and gender identity in draft anti-discrimination legislation.

- iv. *Are they able to take part in training sessions, international conferences and other human rights activities?*

Yes, there are no problems in this area.

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.

- i. *Are LGBT organisations consulted on the adoption and implementation of measures affecting the rights of LGBT persons?*

Practically all such requests and proposals by LGBT organisations have been ignored by state bodies and there has been just one case when a state official requested their opinion on any issue²⁶. The only example of co-operation between the state and the LGBT movement at the national level is the participation of Mr. Zorian Kis, an openly LGBT activist, in the council developing anti-AIDS policy. At the end of 2010 the *Standard of Social Services for HIV Prevention among Persons at High-risk of Contracting HIV through Sexual Transmission* came into effect. It was developed with his assistance as a member of the National Council on Tuberculosis and HIV/AIDS. Also recently LGBT activist Mr. Oleksandr Chernyavsky became a member of the Cherkasy Oblast Council on HIV/AIDS. On the other hand, repeated submissions of LGBT organisations to state bodies on the draft Labour

²⁴ *Overview of LGBT situation in Ukraine in 2010* by Our World Centre, p. 5.

http://gay.org.ua/publications/gay_ukraine_2010-e.doc

²⁵ See for example <http://news.tochka.net/118205-svobodovtsy-sorvali-pokaz-filma-propagandiruyushchiy-gomoseksualizm/> – in Russian.

²⁶ In its reply dated 22 Mar 2012 to the letter of the Council of LGBT Organisations of Ukraine concerning draft *Strategy of Struggle against Discrimination in Ukraine*, the Ministry of Justice asked the Council to make its proposals to the draft which were eventually declined.

Code, anti-discrimination law etc. were ignored. For example, Our World Centre sent its proposal to include protection against discrimination on grounds of sexual orientation and gender identity in the draft Labour Code to the Ministry of Justice, the Ministry of Social Policy, the Ukrainian government, the Administration of the President and corresponding parliamentary committees in 2003, 2005, 2010, 2011, 2012, the same proposal on the draft anti-discrimination law in 2011 and 2012.

- ii. *Have there been such consultations regarding the implementation of this Recommendation?*

Up till now all Ukrainian state bodies have totally ignored the Recommendation. Despite numerous appeals of Ukrainian LGBT organisations, their opinions have never been requested let alone taken into consideration in this connection. On behalf of the Council of LGBT Organisations of Ukraine in January-May 2012 there were sent enquiries about plans of the state bodies for implementation of the CMCE Recommendation and propositions for co-operation to 7 relevant ministries, 3 state departments or services, the Prime Minister, the Vice Prime Minister responsible for European integration, the President, the Ombudsman, and the corresponding parliamentary committees. All those institutions are directly responsible for implementation of the Recommendation and none of them has ever held consultations with any LGBT organisation (although the new-elected Ombudsman recently expressed her willingness for co-operation). None of those requested informed us about their plans towards implementation of the Recommendation. Of 10 mentioned parliamentary committees there replied 4 and all of them stated that implementation of the Recommendation is not a subject of responsibility of those committees.

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.

- i. *Have the authorities ensured the freedom to receive and transmit information and ideas relating to sexual orientation and gender identity, including:*
- *activities that support the human rights of LGBT persons*
 - *publication of material*
 - *media coverage*
 - *organisation of/participation in conferences*
 - *dissemination/access to information on safe sexual practices?*
- ii. *Or, on the contrary, have there been cases where restrictions have been placed on freedom of expression?*

The Ukrainian legislation contains general guarantees of freedom of expression but the public policy and the practice are inconsistent. Art. 34 of the Constitution of Ukraine guarantees the right to freedom of thought and speech, and to the free expression of views and beliefs. *De jure* this constitutional provision protects the freedom of expression of LGBT people to the same extent as that of other citizens of Ukraine. In the context of homophobia/transphobia in Ukraine the only problematic aspect of the article is that it establishes the possibility of restricting freedom of expression for the reason of protecting the health of the population. While this provision is not necessarily restrictive in itself, the

absence of a working legal interpretation of “health of the population” in the context of this right raises concerns that it could be interpreted broadly, for example, going beyond physical or mental health, to include the moral well-being of the population. Although so far there have been no court rulings or orders by other governmental agencies that would directly appeal to this article in order to prohibit or in any other way interfere with activities undertaken by LGBT organisations, this provision has been invoked indirectly by the National Expert Commission on the Protection of Public Morals to instigate restrictions on LGBT materials – for instance, this Commission decided that films *Brokeback Mountain* and *Bruno* can inflict harm to the audience, especially young, and eventually the first motion picture was prohibited by the State Television and Radio Broadcasting Committee to broadcast on TV until 11 p.m., and screening of the second in Ukrainian cinemas was totally forbidden by the Ministry of Culture²⁷.

Generally dissemination of information on LGBT topics is permitted but not encouraged. LGBT organisations are allowed to carry out their work more or less freely but meet a total unwillingness on the part of the authorities to provide assistance and support for their work. The mass media coverage of LGBT issues is quite free but there are absent any conventional standards in this field.

But recently events have started to develop in a very alarming way. In May 2012 the parliamentary Committee on Freedom of Speech and Information approved two draft laws (No. 8711 and No. 10290) which prohibit public dissemination of any positive information on homosexuality that can be available to minors. On 7 Jul 2012 there was registered the third similar draft law (No. 10729). At the time of writing first two bills await debate in plenary sessions of the Ukrainian parliament where there is a significant risk that they will be supported by a majority of deputies. If either is adopted it will effectively block freedom of expression related to LGBT issues because most of openly disseminated information can be easily accessed by minors. It will be particularly detrimental to the interests and rights of LGBT teenagers.

iii. Have the authorities encouraged pluralism and non-discrimination in the media in respect of issues of (a) sexual orientation or (b) gender identity?

Our World Centre has never observed any such initiatives. On the contrary the State Committee on Television and Radio Broadcasting approved the above mentioned homophobic draft law No. 8711. It confirmed its support for this bill even after the Council of LGBT Organisations of Ukraine had acquainted this state body with contents of the Committee of Ministers’ Recommendation and had pointed out that the bill openly contradicts this Recommendation as well as Ukraine’s constitutional principles²⁸.

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.

i. Have the authorities ensured freedom of peaceful assembly for LGBT people?

Ukrainian law regulating the right to freedom of assembly is extremely inadequate. There is currently no single legislative act that would give legal definition to meetings,

²⁷ Ponomaryov, supra note 1, paras. 68, 69, 186

http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

²⁸ The letter of the Council of LGBT Organisations of Ukraine dated 28 Mar 2012 and the reply of the State Committee on Television and Radio Broadcasting dated 26 Apr 2012 are available at Our World Centre.

demonstrations, manifestations, pickets and distinguish between them, detail rules and procedures for organising and holding peaceful assemblies, and clearly and unambiguously establish the rights and responsibilities of parties involved. The only legal document that guarantees the right to freedom of peaceful assembly is the Constitution of Ukraine, namely Art. 39. Restrictions on the exercise of this right may be established only by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons. These reasonable restrictions, however, are widely used by the local authorities for prohibition of events considered undesirable. A common practice includes local courts prohibiting LGBT related public events at the suggestion of local government officials and/or after an unofficial restrictive order has been issued by the local authorities²⁹. The decision of a local court may be appealed in the corresponding court of appeal yet in practice there remains no time for it. Closed LGBT events (like trainings, conferences, meetings of self-assistance groups etc.) do not meet with hindrances yet open public activities are often banned under various pretexts, usually of public morals and the protests of other people, including religious believers. In these cases freedom of expression is infringed along with the freedom of peaceful assembly. For instance, in recent years the City Councils of Mykolaiv³⁰ and Kharkiv³¹ banned public events planned by LGBT groups on the pretext of public opposition.

2012 saw a positive development in this field when Kyiv City State Administration decided not to prohibit the Gay Pride march planned for May of this year, and co-operated with the organisers of this event for its protection from homophobic violence, despite numerous protests and appeals to forbid the event from religious and nationalist groups. Finally the organisers decided to cancel the march because of an unexpectedly high degree of activity by opponents of the march, and the very serious risk for its participants. Nonetheless, the authorities of the Ukrainian capital had, for the first time, tried to assist rather than prevent such an event.

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.

- i. If there has been hostility to LGBT freedom of assembly events, have the law enforcement authorities taken reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully?*
- ii. In particular, have the police protected participants in peaceful LGBT demonstrations effectively?*

In 2010 there were reported at least three cases of assault upon LGBT events (including peaceful demonstrations) by persons presumed to be from right-wing nationalist groups. In all cases the police failed to protect participants of these events and in any ways avoided investigating the incidents³².

²⁹ Ponomaryov, supra note 1, paras. 47, 48.

http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

³⁰ Ibid., paras. 55, 57.

³¹ Overview of LGBT situation in Ukraine in 2010, supra note 24, p. 3.

http://gay.org.ua/publications/gay_ukraine_2010-e.doc

³² Ibid., pp. 5, 6.

In 2009 at a public LGBT event in Lviv agreed with the local authorities the police assigned obviously inadequate number of guards. When there happened homophobic attack against participants of the event, those police officers preferred to calmly look at what was going on rather than to stop the assault. The similar situations took place in the same year at presentations of the book “120 pages of Sodom” in Lviv and Kyiv³³.

In May 2012 Amnesty International blamed the Kyiv police for unwillingness to protect the Gay Pride march from homophobic violence³⁴. Finally, on 6 Jun 2012 picketing of the Ukrainian Ministry of Foreign Affairs by a small group of LGBT activists was disrupted by a group of young Ukrainian far-right nationalists in presence of considerable number of the special police forces. Direct appeals of LGBT activists to the police for protection were ignored right in full view of continuing violence³⁵.

- iii. *Have the police acted with integrity and respect towards LGBT people and their supporters when policing LGBT freedom of assembly events?*

For some recent years the behaviour of the police at such events was generally correct.

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.

- i. *Have the authorities placed restrictions on freedom of assembly events? If so, what have been the grounds?*
- ii. *Have conditions been placed, for example, with regard to the route or timing of demonstrations, which are not generally applied to other demonstrators?*
- iii. *If restrictions have been placed on freedom of assembly events, has it been possible to challenge them in the courts or through other independent review mechanisms?*

The Ukrainian local authorities would rather forbid a public event totally than put some restrictions on it. Usually the pretexts for prohibition are public displeasure, outrage against public morality or believers' feelings, impossibility to ensure public order. See also section 14 above.

Because under the law restrictions (in fact, rather total prohibition) of a public event may be placed only by a court decision, it is possible to challenge them also only in the courts. For instance, in 2009 the local court in Mykolaiv banned LGBT festival Rainbow Spring under the suit of the City Council (one of the cases mentioned in section 14 above). The organiser of this event – LGBT organisation LiGA – appealed against this decision in Odessa Appellate Administrative Court and won the case in 2010³⁶. As far as is known to Our World Centre it was the only case when a Ukrainian LGBT organisation appealed decision of the court on prohibition of a public event. However it should be noted that such way is rather ineffective; in practice organisers of the event just have no time for appeal consideration. For instance, in the mentioned Mykolaiv case the appellate court delivered its judgement more than a year

³³ *Observance of human rights towards LGBT in Ukraine in 2008-2009*, p. 7, in Russian.

http://gay.org.ua/publications/gay_ukraine_2009-r.doc

³⁴ See <http://www.amnesty.org/en/for-media/press-releases/ukraine-fist-ever-kyiv-pride-cancelled-face-ultra-right-threat-2012-05-20>

³⁵ See for instance <http://www.nr2.ru/kyiv/394071.html> – in Russian.

³⁶ See for instance <http://nikvesti.com/news/16872> – in Ukrainian.

after lodging the appeal. Besides the appellate court decision was based on purely technical ground – wrong court jurisdiction – but not on the infringement of human rights, that leaves open the question whether Ukrainian courts really protect freedom of peaceful assembly for LGBT events.

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.

- i. If there have been unlawful interferences with the right to freedom of expression and peaceful assembly,*
 - a. Has there been encouragement to public authorities to condemn such interferences?*

Except for general wording in support of human and citizen rights and freedom (never explicitly mentioning LGBT people) there have been no any concrete directions to public authorities on this issue.

- b. Have public authorities actually condemned such interferences?*
- ii. Where there has been public hostility towards the exercise of freedom of assembly by LGBT people, have the authorities upheld this right publicly?*
- iii. Or, on the contrary, have the authorities endorsed or supported hostility towards LGBT freedom of assembly events?*

There has been no example of a representative of any state or local authority openly condemning homophobic assaults at LGBT events or against an LGBT person. When the Kyiv Pride march was cancelled in May 2012 because of hitherto unseen surge of homophobic activity and undisguised threats (which eventually resulted in real violence towards the Pride organisers), there was no statement or even commentary on these events from any official. The appeal of Ukrainian LGBT organisations to leading political and governmental figures to express their attitude towards this obvious infringement of human rights met total silence³⁷.

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.

- i. Does legislation criminalise same-sex sexual acts? Are there any differences in the age of consent? If either applies, what steps are the authorities taking to repeal the legislation?*

³⁷ The open letter of Ukrainian LGBT organizations to the President, Prime Minister and leaders of the main political parties. http://www.gay.org.ua/documents/openletter-e_22-05-2012.doc

- ii. *Are there any criminal law provisions which, because of their wording or scope are liable to be applied in a discriminatory manner regarding*
 - (a) *sexual orientation or*
 - (b) *gender identity?*
- iii. *If so, what steps are the authorities taking to remedy this situation?*

The Ukrainian legislation does not criminalise same-sex sexual acts *per se* and examination of the law shows that the age of consent (16 years old) is equal both for heterosexual and for homosexual contacts.

Art. 152 of the *Criminal Code* (“Rape”), according to the legal interpretation of this provision, criminalises only forcible vaginal sexual acts between man and woman. The other variations of sexual abuse, including same-sex rape, fall under Art. 153 “Forcible satisfaction of sexual desire in unnatural way”. The expression “in unnatural way” can look quite archaic and even derogatory, yet aside from that the provisions of this article on the whole repeat those of Art. 152. The same wording is also found in Arts. 22, 115 and 154 of the *Criminal Code*.

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.

- i. *What steps have been taken to ensure that public authorities comply with this requirement, in respect of (a) sexual orientation and (b) gender identity particularly with regard to records held by law enforcement authorities?*
- ii. *What steps have the authorities taken to ensure that existing records are destroyed?*

The national legislation contains provisions prohibiting collection and storing of data of this kind. The law *On Protection of Personal Data* (namely, Art. 7) specifically prohibits processing of personal data concerning health and sexual life without the consent of the subject of these data. This prohibition does not apply to data that were made public by the subject of these data and for legal purposes explicitly indicated in the law and also this law does not apply to professional journalistic activity which is regulated by the law *On Information* and other acts. Violation of these laws can entail legal sanctions, usually under administrative law (imposition of a fine). In practice data on a person’s sexual orientation and gender identity may be obtained by police or medical personnel and stored in the respective databases. Under the law *On Protection of Personal Data* a subject of personal data has a right to know about the existence of such databases and their content and may require that these data be destroyed (if she/he wish, in her/his presence) when the legal purpose of such database’s existence is exhausted.

For a long time in Ukraine there was in force the police instruction on collecting lists of so-called groups at risk for HIV/AIDS, gay men in particular. In practice the collecting of such statistics was quite formal and ineffective and was abolished in 2008. The police assure that previously existing databases were destroyed but there is no practical way to verify these assertions.

iii. Have these steps been effective?

Is there any evidence of:

- *the continued existence of such records*
- *the continuing collection of such data?*

There is some evidence of continuing collecting and storing of data on sexual orientation in police databases compiled in the course of criminal investigations and police actions, although the police persistently deny their existence. The present legal prohibition on processing of personal information is rather nominal and ineffective. Particularly the police have a continuing reputation for collecting information about sexual orientation of people coming to their attention and even using it for blackmailing these persons. For instance, survey of Our World Centre for 2010-2011 revealed that police officers blackmailed 24% of LGBT people, who faced infringement of their rights from the police³⁸. Instances of evidently illegitimate actions related to collection of personal data were noticed in 2009 during police operation in popular gay club Androgin in Kiev and similar police action in Lviv³⁹.

Quite recently there appeared a new serious problem – provocative actions of police officers who hunt for gay men in Internet social networks, dating websites and suchlike. They ask gays to show their intimate photographs or porno materials and/or offer to pay for sex and then suggest personal meeting. On the meeting the disguised police officers inform the victim of provocation that he is charged with distribution of pornography or prostitution, or just threatens him with outing. The next step may be blackmailing for bribe or forced co-operation with the police, or fabrication of criminal or administrative case. It has to be noted that these police actions are illegal because provocation of such kind are legal only if the police carry out investigation and search operations within the frameworks of a concrete case. This requirement is never observed, however it is very hard to prove because the police command usually covered up their subordinates. Despite illegality and groundlessness of such actions they became epidemic in last two years throughout Ukraine. Additional information on this subject may be obtained from Our World Centre and will be covered in its future reports. Currently Our World Centre closely follows the case of a gay man from Crimea region who is already sentenced to 3 years' imprisonment with probation period 2 years for distribution of pornography after he was provoked by police officers through Internet but refused to co-operate with the police for further provocations of other gay men⁴⁰. His case currently is under review according to the decision of the appellate court. It is quite obvious that in such cases the police carry out purposeful tracing of gay men who just look for dating in the Internet.

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.

i. Has a review of such prior requirements been conducted?

The last revision of such prior requirements was conducted in 2011 (the previous edition of the corresponding document was dated by 1996). This new edition of the requirements was substantially modified, in particular the minimum age for gender reassignment was reduced from 25 to 18 years, and demand for presence of suicidal danger was removed.

³⁸ Zinchenkov et al., supra note 13, p. 64, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

³⁹ Ponomaryov, supra note 1, paras. 203-206.
http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

⁴⁰ Krasnoperekopsk City and Raion Court of AR Crimea, case No. 0112/2008/2012, 17 May 2012
<http://www.reyestr.court.gov.ua/Review/24023037> – in Ukrainian

- ii. *Are there still requirements which might be considered disproportionate or even abusive⁴¹, such as:*
- *irreversible sterilisation,*
 - *hormonal treatment,*
 - *preliminary surgical procedures, or proof of a person's ability to live for a long period of time in the new gender?*

Some requirements of such kind remain in force. Legal recognition of a gender reassignment in Ukraine is implemented according to a certificate issued by a special commission of the Ministry of Health Care after completion of diagnostic and medical treatment which is recommended by the commission. Non-agreement of a transgender person with these recommendations is a legal reason for denial of such recognition. The operative order of the Ministry of Health Care of Ukraine specifies in particular such preliminary requirements for a person applied for gender reassignment as:

- having no children younger than 18;
- being not married at the time of consideration of the patient's application;
- absence of homosexuality or transvestism against a background of sexual role transformation;

Note: *This point is formulated very unclearly in the text of the order and in practice enables the Commission to refuse gender reassignment to transgender persons if they recognise their homosexuality (bisexuality) in any way. The Council of LGBT Organisations of Ukraine proposed (16 May 2012) to the Ministry of Health Care to correct this point of the order and to eliminate entirely the first mentioned point (having no children younger 18). In his reply dated 4 Jun 2012 the representative of the Ministry promised to take into account this proposal when reviewing the operative order on gender reassignment.*

- absence of any sexual perversions;
- absence of morphological peculiarities which complicate adaptation for desired sex (hermaphroditism, sexual organs development disorder etc.);
- absence of severe somatic diseases which make impossible hormonal or surgical gender reassignment.

In addition, to diagnose transsexualism the applicant must undergo permanent psychiatric expertise in a mental hospital no less than for 30-45 days that may not be replaced with expertise in outpatient medical establishments. At least for a month the transgender applicant must voluntarily live amidst people with various (possible severe) mental disorders.

It should be noted that the mentioned list contains only preliminary medical and psychological requirements for gender reassignment but not for legal recognition of it. The latter is performed by the state registrar on the basis of certificate on change (correction) of sex issued by the special commission of the Ministry of Health Care. Since the order of the Ministry, which regulates activity of the Commission, provides issuing of this certificate only after surgical correction, in fact in order to complete legal recognition of a gender reassignment transgender persons are required to undergo a gender reassignment surgery (that also implies sterilisation). For more details please see section 21 below.

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

⁴¹ The Explanatory Memorandum draws attention to Committee of Ministers Recommendation Rec(2007)17 on gender equality standards and mechanisms, which affirms that "both women and men must have a non-negotiable right to decide over their own body, including sexual and reproductive matters. Such acknowledgement must be reflected in the development, implementation, access to, monitoring and evaluation of health-care services and in research priorities."

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.

- i. *Are there procedures in operation which ensure the full legal recognition of a person's gender reassignment?*
- ii. *Do these make possible the change of name and gender in official documents including birth certificates, identity papers, driving licences, passports, social insurance cards and numbers, electoral, land and text registers in a quick, transparent and accessible way?*
- iii. *Are there procedures to ensure corresponding changes in key documents originated by non-state actors, such as*
 - *diplomas,*
 - *certificates of employment, and*
 - *insurance or banking documents?*
- iv. *If yes, do these procedures include the protection of the person's private life, so that no third party can become aware of the gender reassignment?*

Issues of gender reassignment in Ukraine are regulated first of all by the Order No. 60 of 3.02.2011 "On improvement of medical assistance to persons needing change (correction) of sex" of the Ministry of Health Care. According to p.13 of the *Procedures for observation of persons needing change (correction) of sex*, set forth by this Order, after surgical correction the Commission [on change (correction) of sex] would issue to the patient a medical certificate on change (correction) of sex which is a ground for amending the entry in the person's official registry of birth and issuing a new birth certificate and further change of relevant documents. The changes to the birth certificate and the register and further change of relevant state documents are made according to the regular rules and procedures on making changes in documents.

Non-state actors however are not legally obliged to make corresponding alterations in document issued by them. They carry out this procedure under their internal regulations and there is no guarantee against undesirable disclosure of a person's gender history. In practice transgender persons often meet unwillingness of corresponding establishments to make necessary corrections and rude treatment⁴².

"The analysis shows that the main legal problem of transgender persons in Ukraine is that the law does not recognise their right to have their gender marker changed in the birth registry, birth certificate and passport without invasive reassignment surgery. It also does not provide possibility to officially start endocrine correction without authorisation for subsequent surgical change (correction) of sex. Under these conditions and given that no temporary documents signifying a person's diagnosis of transsexualism are issued at any time during the transition, the requirement that the gender reassignment surgery should be conducted no earlier than a year after diagnosing the person's transsexualism puts an undue burden on transgender persons who have to live and adapt in the society when their physical appearance may no longer be in line with their legal gender after the start of corrective hormonal therapy that precedes surgery"⁴³.

⁴² S. Ivanchenko et al., *The Situation of Transgender Persons in Ukraine – a research report*, (NGO Insight, Kiev, 2010), pp. 43, 47, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

⁴³ Ponomaryov, supra note 1, para. 197. http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

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.

- i. Is the right of a legally recognised transgender person to marry a person of the sex opposite to their reassigned sex effectively guaranteed?*

After completion of gender reassignment and subsequent change of birth certificate and national passport there are no legal obstacles in Ukraine for a transgender person to marry a person of the sex opposite to his/her reassigned sex.

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.

- i. Does legislation confer rights and obligations on unmarried couples? If so, have steps been taken to ensure that these rights and obligations apply to same-sex couples?*

The Ukrainian legislation does not recognise the legal status of same-sex couples in any way. The *Family Code of Ukraine* and the other laws do not recognize legal status for any unmarried couples as well, however there are some family related rights and obligations that are provided exclusively for different-sex cohabitants. Namely, Art. 74 of the *Family Code* reads that if a man and a woman live together as a family not being officially married, the property they acquired in such cohabitation is owned by them as common joint property. Also Art. 211 of this Code prohibits joint adoption of a child by persons of the same sex, but permits adoption by two cohabitating persons of different sexes.

Propositions of Ukrainian human rights and LGBT organisations to provide same-sex partners with the same property rights, which different-sex partners have under Art. 74 of the *Family Code*, were ignored by both legislators and government⁴⁴.

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.

- i. Does legislation recognise registered same-sex partnerships? If so, have steps been taken to ensure that their legal status and rights and obligations are equivalent to those of heterosexual couples?*

The Ukrainian legislation does not recognise same-sex partnerships in any way and the Ukrainian authorities refuse even to discuss legal steps towards possibility of such recognition.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states

⁴⁴ The latest such proposal was made in the letter of the Council of LGBT Organisations of Ukraine to the Ministry of Justice dated 10 Apr 2012 that is available at Our World Centre.

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.

- i. If same-sex couples enjoy no rights or obligations, either through access to registered partnership or through their status as unmarried couples, have the authorities considered the possibility of implementing legal or other means to address the practical problems arising from this lack of recognition?*

Despite LGBT organisations constantly drawing the attention of the state authorities to the everyday problems of Ukrainian LGBT people, until now the only reaction to these submissions was a letter from the Ministry of Justice of 24 Oct 2006 which recommended to LGBT people that they themselves seek alternative to legislative ways to solve the existing problems⁴⁵.

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.

- i. What steps have been taken to ensure that decisions regarding the parental responsibility for, or guardianship of a child, are taken without discrimination based on (a) sexual orientation or (b) gender identity?*
- ii. In practice, are such decisions taken on a non-discriminatory basis?*

The *Family Code of Ukraine*, as well as the other documents relevant to parental responsibility for, or guardianship of a child, does not contain any provisions mentioning sexual orientation or gender identity. Thus decisions regarding such issues are taken according to understanding of child's best interests by the corresponding state body. In absence of known case law it is impossible to estimate the real level of protection from discrimination on grounds of sexual orientation or gender identity in this area. It should be also noted that transsexualism *per se* is a legally recognised mental disorder which makes impossible adoption of a child by an openly transgender person (see section 27 below). This circumstance cannot but influence the decision of corresponding state bodies regarding the parental responsibility or guardianship of a child in case of a transgender applicant.

The Ministry of Justice did not answer questions of this section in its reply and Our World Centre has no information that the above-mentioned steps have been taken. To all appearances no corresponding measures have ever been taken or planned.

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.

- i. What steps have been taken to ensure that decisions regarding adoption of a child by a single person (where such adoption is permitted by national*

⁴⁵ A. Maymulakhin et al., *Ukrainian homosexuals and society: A reciprocation* (Our World Centre, Kiev, 2007), p. 71. http://gay.org.ua/publications/gay_ukraine_2007-e.pdf

legislation), are taken without discrimination based on (a) sexual orientation (b) gender identity?

II. In practice, are such decisions taken on a non-discriminatory basis?

Adoption in Ukraine is regulated primarily by the Chapter 18 of the *Family Code of Ukraine* which does not contain any provisions plainly mentioning sexual orientation or gender identity of a single individual wishing to adopt a child (that is possible under the Ukrainian law). Art. 211 of the Code (“Persons who may be adoptive parents”) and Art. 212 (“Persons who may not be adoptive parents”) do not contain any demands to candidates concerning their sexual orientation *per se*, though p. 2 of Art. 212 read that adoptive parents may not be “... persons whose interests contradict interests of the child” that leaves room for arbitrary interpretation of this provision including references to possible homo- or bisexual orientation of a candidate for adoptive parent. Meanwhile, p. 1.8 of Art. 212 prohibits adoption by persons suffering from diseases specifically listed by the Ministry of Health Care. This list is approved by the Order No. 479 of the Ministry dated 20 Aug 2008 and among those diseases mentions code F64 under the current edition of the International Statistical Classification of Diseases which includes transsexualism, thus prohibiting transgender persons from adopting children in Ukraine altogether. Unfortunately there is currently no case law in this area.

The Ministry of Justice did not answer questions of this section in its reply and Our World Centre has no information that the above-mentioned steps have been taken. To all appearances no corresponding measures have ever been taken or planned.

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.

- i. What steps have been taken to ensure that access by single women to assisted reproductive treatment (where permitted by national legislation), is without discrimination based on sexual orientation?*
- ii. In practice, is such access granted on a non-discriminatory basis?*

Assisted reproductive treatment in Ukraine is regulated by the Art. 48 of the *Fundamentals of the Ukrainian Law Concerning Health Care and Instructions on the Procedure of Reproductive Technologies Application* set by the Order No. 771 (dated 23 Dec 2008) of the Ministry of Health Care. These documents do not forbid access to such treatment for single women and do not contain any provisions regarding their sexual orientation even in indirect way. Contra-indications for the treatment may be only specifically listed diseases. Mass media coverage confirms that single women in Ukraine have access to assisted reproductive treatment in practice. Ukrainian LGBT organisations inquired by Our World Centre have not noticed any denials of such treatment based on sexual orientation of a woman.

The Ministries of Justice and of Health Care did not answer questions of this section in their replies. Meanwhile, Our World Centre could not find evidences that there have been taken any steps ensuring non-discrimination in this matter on ground of sexual orientation. To all appearances no corresponding measures have ever been taken or planned.

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.

- i. *Does legislation⁴⁶ exist which prohibits discrimination in employment in the public and private sector on grounds of (a) sexual orientation and (b) gender identity?*
- ii. *Does it cover:*
 - *access to employment (including recruitment); promotion,*
 - *dismissals,*
 - *pay,*
 - *harassment and other forms of victimisation?*

The Ukrainian labour legislation does not list either sexual orientation or gender identity as protected grounds under non-discrimination articles (Art. 2-1 of the *Code of Labour Laws of Ukraine*, Art. 4 of the law *On Civil Service*). The wording of the aforementioned articles, as is the case with many similar generic non-discrimination norms in Ukrainian legal system, allows understanding sexual orientation and/or gender identity as included under “other circumstances”. In the area of labour relations such inclusion, however, is predominantly hypothetical and purely declarative as the Ukrainian legal system does not provide for effective mechanisms for proving cases of discrimination and resolving the problem⁴⁷. On the other hand, Art. 22 of the *Code of Labour Laws of Ukraine* “Safeguards for conclusion, change and termination of the labour contract” contains close list of anti-discrimination grounds which does not include either sexual orientation or gender identity. There is known just one precedent when a gay man fired by the reason of his sexual orientation was able to prove the real motive of his dismissal in court and reinstate his rights. It happened because his employer admitted to dismissal on ground of sexual orientation of the employee and the court decided that it contradicts the law⁴⁸. Nevertheless, since details of the court’s decision are unknown, one cannot assert that the court really used antidiscrimination provisions as a basis in this case.

The draft of a new *Labour Code of Ukraine*, submitted to the national parliament in 2007, had contained Art. 4 which included sexual orientation as one of protected grounds. However, later it was revised, and this provision was dropped. All proposals to reinstate it in the text of the draft Code were rejected by the Parliamentary Committee concerned.

- iii. *Have the authorities promoted other measures to combat discrimination, harassment and victimisation, in both the public and private sectors, for example:*

⁴⁶ Under the European Social Charter this legislation should cover both direct and indirect discrimination. It should also provide for the burden of proof in discrimination cases to rest with the employer. (See the Digest of Case Law of the European Committee of Social Rights -- Interpretation of the Different Provisions -- Article 1 -- right to work -- http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf). The EU Employment Directive provides the following definition of indirect discrimination: "where an apparently neutral provision, criterion or practice would put persons having a ... particular sexual orientation at a particular disadvantage compared with other persons ...".

⁴⁷ Ponomaryov, supra note 1, paras. 133-135.

http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

⁴⁸ Zinchenkov et al., supra note 13, p. 103, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

- *adoption of codes of conduct for both employers and employees;*
- *training and awareness raising programmes for both employers and employees;*
- *distribution to employees of materials explaining their rights, complaints mechanisms and remedies;*
- *recruitment efforts directed at LGBT persons;*
- *the adoption of non-discrimination policies explicitly referencing sexual orientation and gender identity;*
- *co-operation with and support for employee groupings of LGBT persons?*

A letter of the Ministry for Social Policy dated 21 Mar 2012, together with other information available to Our World Centre, indicates that the only step ever taken by the Ukrainian authorities to combat discrimination on grounds of sexual orientation in employment was the publication of the draft law No. 8487 of 12 May 2011. The Ministry asserts that this bill would amend the *Code of Labour Laws* by introducing prohibition of the mentioned discrimination, but the text of this bill was changed after discussion in the Parliamentary Committee on Human Rights and currently does not contain such provision. In the field of employment there is no evidence of any other measures taken by the Ukrainian authorities specifically in the interests of LGBT persons.

iv. Have steps been taken to abolish laws, regulations and practices which discriminate on grounds of (a) sexual orientation and (b) gender identity in access to and career advancement within certain professions and occupations, including particularly the armed forces?

Letters from the Ministry for Social Policy dated 21 Mar 2012 and 25 Jun 2012 responding to the Council of LGBT Organisations of Ukraine's enquiry do not contain any information that such steps were taken, likewise such information is unavailable to Our World Centre. It should be noted that the Ukrainian law and official policies do not discriminate explicitly on grounds of sexual orientation or gender identity. However the numerous incidents of such discrimination documented by Ukrainian LGBT organisations are based rather on the personal homo- and transphobic views of managers than on formal written rules. A general idea of the current situation in this area can be formed, for instance, on the basis of the survey of Our World Centre⁴⁹.

v. Specifically in relation to the armed forces:

- *Have measures been taken to provide protection for LGBT persons against investigations, warnings, harassment, bullying, cruel initiation rites, humiliation and other forms of ill-treatment?*
- *Do codes of conduct and training address the need to combat discrimination against LGBT persons and promote tolerance and respect?*

The Council of LGBT Organisations of Ukraine addressed an enquiry to the Ministry of Defence as to whether any of the above measures have been taken. The reply dated 28 Feb 2012 asserted that various information and educational actions (lectures, training seminars etc.) are carried out in the armed forces under the gender equality and antidiscrimination programmes. But it failed to confirm whether these actions address issues of sexual orientation and gender identity, and in the absence of such confirmation, it must be assumed that they do not.

There is no information about recent incidents related specifically to sexual orientation or gender identity in the Armed Forces, yet mass media quite often report on cases of various

⁴⁹ Zinchenkov et al., supra note 13, pp. 102-104, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

forms of ill-treatment in general. The report of Our World Centre from 2005 stated that, of the 90 respondents who had served in the armed forces in the previous four years, more than half experienced some form of discrimination. 13 persons reported verbal harassment, 11 sexual harassment, 8 physical violence, and 6 (males) reported that they were raped⁵⁰.

vi. Do measures designed to combat discrimination in employment fully and effectively cover transgender persons?

As practice reveals, transgender persons in Ukraine are absolutely deprived of their rights in employment. They ordinarily face discrimination and transphobic treatment in recruitment, work activity, promotion and dismissal. Just one example: "There were cases when I passed all three main steps of the interviews, and then right before the contract-signing I came out. After that the employers turned me down. They were telling me that my documents cannot be approved by the security department or something else. And this happened more than once."⁵¹

It is obvious that the state authorities totally dissociate themselves from taking any measures in this respect and have no plans to change the situation. In above mentioned replies the Ministry of Social Policy completely omitted issues of gender identity talking exclusively about discrimination on ground of sexual orientation (though it was duly requested about implementation of all provisions of the Recommendation in the field of employment).

vii. Have employment programmes focusing specifically on employment opportunities for transgender persons been developed?

Judging from the replies of the Ministry and reports on the situation of transgender persons in Ukraine of NGO Insight, programmes of such kind have never been developed and still are not planned for the future.

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.

i. Have measures been taken to avoid disclosure of transgender persons' gender history or former name in the context of employment?

Judging from the replies of the Ministry and reports on the situation of transgender persons in Ukraine of NGO Insight, the specific interests of transgender persons in the context of employment are not taken into account in any way. There are no rules, set by the state, to provide necessary corrections in work record card and the other service documents ensuring protection of transgender persons' privacy in this field.

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

⁵⁰ A. Griбанov (ed.), *Gay Rights Are Human Rights* (Our World Centre, Kiev, 2005), pp. 37, 38.

<http://gay.org.ua/publications/report2005-e.pdf>

⁵¹ Ivanchenko et al., supra note 42, p. 45, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

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.

i. Have

- *equality and safety policies,*
- *codes of conduct and*
- *handbooks*

for educational staff been introduced or updated to ensure that LGBT pupils and students receive their education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment?

In its reply dated 15 Jun 2012 [**Note:** *The enquiry from the Council of LGBT Organisations of Ukraine was sent on 26 Jan 2012*] the Ministry of Education, Science, Youth and Sports entirely omitted this section of the Recommendation. Judging from the reply of the Ministry and evidences of gay and transgender pupils and students known to Our World Centre as well as to other Ukrainian LGBT organisations, none of the above listed measures has taken place.

According to information provided by Gay Credo, a Christian LGBT group, in 2011-2012 incidents of homophobic bullying towards an openly gay teenager were noticed in the Amvrosievka Boarding School for orphans and children whose parents were deprived of parental rights (Donetsk region). Also the Our World Centre survey of LGBT people in 2011 found that 31% of the respondents of known or suspected homosexuality faced harassment in schools, among those 34% experienced prejudiced attitude of teachers in schools, 25% met unwillingness of the school administration to protect them from homophobic bullying⁵².

ii. Do initial and in-service training programmes for teachers and other educational staff address the need for them to

- a. treat their LGBT pupils and students with respect*
- b. be able to detect, analyse and effectively respond to and combat discrimination on these grounds in schools?*

iii. Is there support for the mounting of school campaigns and cultural events against homophobia and transphobia, including the participation, where appropriate, of representatives of LGBT organisations?

In its reply the Ministry ignored these questions. Judging from this reply and evidence of gay and transgender students (including those in teachers' training colleges) known to Our World Centre and other Ukrainian LGBT organisations, none of the above listed measures is taken place.

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

⁵² Zinchenkov et al., supra note 13, p. 75, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

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.

- i. Is information on
 - a. sexual orientation
 - b. gender identityprovided in school curricula and sex and health education classes?*
- ii. Is it provided in a respectful and objective manner?*

In its reply the Ministry of Education, Science, Youth and Sports stated that “great importance is attached to issues of gender and legal education in general schools” but failed to confirm any mentioning of sexual orientation or gender identity in school curricula. As far as is known to Our World Centre in practice these topics are not touched on in any school subject. In addition, there is no mention of these topics in any school curriculum available at the website of the Ministry of Education. Accordingly, it must be assumed that this information is not provided.

The Council of LGBT Organisations of Ukraine by its letter dated 16 May 2012 proposed the Ministry to bring school and university training courses into line with modern scientific views towards issues related to sexual orientation and gender identity and also to include corresponding materials in in-service training courses for teachers and school psychologists. No reply had been received to this proposal by the time of completion of this report.

- iii. Are LGBT pupils and students provided with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity?*

Again, no information is available from the Ministry of Education on this question. Evidence provided to Our World Centre and other Ukrainian LGBT organisations by LGBT pupils and students indicates that such information and protection are not available in Ukrainian schools.

- iv. Are measures taken to adequately meet the special needs of transgender students in their school life, for example with regard to change of name or gender in school documents?*

Again, no information is available from the Ministry of Education on this question. A survey by Insight, a Ukrainian LGBT NGO, revealed that transgender students as a rule meet difficulties and transphobic attitudes from both schoolmates and teachers⁵³. No coordinated measures to change this situation have ever been observed.

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,**

⁵³ Ivanchenko et al., supra note 42, p. 45, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

training courses and materials, and when monitoring and evaluating the quality of health-care services.

- i. Do
- a. the design of national health plans,
 - b. health surveys,
 - c. suicide prevention programmes,
 - d. medical training programmes,
 - e. training courses and materials
 - f. the monitoring and quality assessment of health-care services
take into account specific needs in relation to (a) sexual orientation and (b) gender identity?

In his reply (dated 5 Mar 2012) to the Council of LGBT Organisations of Ukraine's enquiry, a representative of the Ministry of Health Care (the Chief Sexopathologist of the Ministry) omitted any reference to these issues. Meanwhile, the monitoring of Ukrainian LGBT organisations in this area reveals that problems related to medicine still take place, especially towards issues of gender identity, and specific needs of LGBT people are not taken into account except in the field of HIV/AIDS prevention. Also the reply from the Ministry of Defence dated 28 Feb 2012 to the Council of LGBT Organisations of Ukraine's enquiry asserts that provisions of the CMCE Recommendation have been taken into consideration in training programmes for military physicians on andrology, sexually transmitted diseases and HIV/AIDS but provides no evidence to support this statement. On the other hand in 2009 there was issued a textbook for colleges on formation of healthy lifestyles for military and law enforcement staff which considered homosexuality as a sexual perversion. The textbook was approved by the Ministries of Education, of Defence, of Internal Affairs and also by the State Border Service⁵⁴.

- ii. Do training programmes for health professionals enable them to deliver the highest attainable standard of health-care to all persons, with full respect for (a) sexual orientation and (b) gender identity?

The reply from the Ministry of Health Care did not answer this question. In practice behaviour of health professionals is determined by their personal views rather than some written documents. The monitoring of the situation shows that incidents of homophobic attitude of the medical staff are relatively rare but not unique⁵⁵, and transphobic attitudes are quite usual⁵⁶.

- iii. Are education, prevention, care and treatment programmes and services in the area of sexual and reproductive health available to LGBT people, and do they respect their needs?

The reply from the Ministry of Health Care asserts that all necessary public medical plans and programmes in this area take into account the specific needs of LGBT patients in full but provides no evidence to support this statement. Our World Centre knows of no public health-care programmes or services that respect the specific needs of LGBT people except in the field of HIV/AIDS prevention.

⁵⁴ See, for instance, <http://korrespondent.net/tech/932704-ukrainskij-uchebnik-oficialno-priznal-gomoseksualizm-v-armii-izvrashcheniem> – in Russian.

⁵⁵ Zinchenkov et al., supra note 13, pp. 87-89, 107, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

⁵⁶ Ivanchenko et al., supra note 42, p. 38, 44, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

- iv. *Are health professionals and social workers encouraged to create an environment that is reassuring and open to young LGBT persons, for example through information campaigns?*

The reply from the Ministry of Health Care did not answer this question. Our World Centre knows of no public medical and social services in Ukraine that have and implement a policy targeting LGBT people of any age except in the field of HIV/AIDS prevention. In this field there are some information activity provided mostly by means of NGOs and foreign charitable foundations.

- v. *Are patients in hospital or otherwise the subject of medical emergencies, free to identify their "next of kin", and are rules on issues regarding "next of kin" applied without discrimination on grounds of (a) sexual orientation and (b) gender identity?*

The Ukrainian law does not provide patients with the right to identify their “next of kin” as such, but instead uses the concept of “legal representatives” (Art. 43 of the *Fundamentals of the Ukrainian Law Concerning Health Care*) which is restricted to parents, guardians and representatives of guardianship institutions (p. 10 Art. 32 of the *Code of Criminal Procedure*). Some medical issues, especially for under-age patients, may also be consented to by members of the patient’s family who are defined under law as legal or *de facto* spouses, their children, persons under guardianship, and other relatives residing with the patient (Art. 1 of the law *On Family Violence Prevention*). In the case of an adult patient, in practice, this provision gives rise only to visiting rights. Because Ukrainian law does not define exactly the notion of “people who live as a family but are not spouses”, even this right is, in practice, rather doubtful and arbitrary for same-sex partners.

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.

- i. *Has homosexuality been removed from the national classification of diseases?*

Yes, in Ukraine homosexuality was removed from the national classification of diseases in accordance with the WHO standards in 1999.

- ii. *Have all policy documents, medical textbooks and training materials which may previously have treated homosexuality as a disease been corrected or withdrawn?*

The reply from the Ministry of Health Care asserts that all official medical documents issued in the recent time do not treat homosexuality as a disease. However, a quick search in the Internet revealed a recent publication, expressing extremely obsolete views for this topic, which was recommended by the Ministry of Health Care as a textbook for medical education – I. Mavrov, *Sexual Diseases* (Ukrmedknyha, Ternopil, 2005)⁵⁷.

Note: *This textbook openly classified homosexuality as a mental disorder – see Chapter 8.3 Sexual Perversions Section Homosexuality (Homoeroticism). Here are just two quotations for illustration (translated from Ukrainian, p. 116):*

... Medical treatment of homosexuality. The main way of treatment is systematic thorough discussion with the patient all features of the genesis of patient’s perverted inclination along with statement of the fact that patient’s “acquisitions” on this path are essentially losses.

⁵⁷ See http://intranet.tdmu.edu.te.ua/data/books/stat_chvor.pdf – in Ukrainian.

... In cases of homosexuality caused by expressed endocrinological malfunctions there are recommended use of hormones and transplantsations glands from same-sex persons.

It should be noted that this book is available at the official website of Ternopil State Medical University. Thus the information from the Ministry's reply seems at least doubtful and it seems quite possible that not only are all obsolete documents not corrected or withdrawn but that other officially approved publications of such kind are still being issued.

iii. Are measures in place to ensure that no one is forced to undergo any form of treatment, protocol or medical or psychological test or confined in a medical institution because of their sexual orientation or gender identity?

The survey of Our World Centre (2010-2011) found out that 3 respondents, whose homosexual orientation was known to medical staff, underwent attempts of involuntary "treatment for homosexuality"⁵⁸ even though in Ukraine it is not considered officially a disease or mental disorder. Transgender persons must undergo some tests and treatment if they want to receive permit for surgery and legal recognition of gender reassignment.

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.

i. Do transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise?

According to the reply from the Ministry of Health Care transgender persons in Ukraine have effective access to all necessary procedures. In fact, transgender people usually face inadequate services, especially outside of Kyiv and some other biggest Ukrainian cities⁵⁹. The most widespread problems are inadequate qualifications and offensive behaviour of medical staff, absence of necessary specialists, irregular functioning of the Commission on change (correction) of sex, high medical costs covered only by patient's own means.

ii. If it was the practice to make transgender persons undergo therapy to accept their birth gender, has this practice now been abandoned?

According to p. 3 of the *Procedures for observation of persons needing change (correction) of sex*, set forth in the Order No. 60 of 3.02.2011 of the Ministry of Health Care, transgender persons wishing to undergo gender reassignment surgery and hormonal treatment (that is necessary for legal recognition of gender reassignment) must firstly undergo intensive psychotherapeutic treatment aimed at reversal of their decision. They have to be under observation of a sexopathologist for a year at least. Only then the patient may apply to the special medical commission on gender reassignment. But there is no practice when transgender patients undergo the other forms of therapy without their free consent.

iii. Have measures been adopted to ensure that no child has their body irreversibly changed by medical practices designed to impose a gender identity without his or her full, free and informed consent, in accordance with his or her age and maturity?

⁵⁸ Zinchenkov et al., supra note 13, p. 89, in Ukrainian. <http://gay.org.ua/publications/report2011-u.pdf>

⁵⁹ Ivanchenko et al., supra note 42, p. 33, 34, 38, 39, 44, in Russian. http://insight-ukraine.org.ua/media/TRP_report.pdf

Ukrainian LGBT organisations questioned by Our World Centre confirmed that there is a policy of imposing a gender identity on intersex children as early as possible, including through surgery. The decision is made by the parents of a child according to recommendations of physicians and they always recommend not delaying surgery. In his letter dated 2 Aug 2012 the Chief Sexopathologist of the Ministry of Health Care informed that the decision on preference of sex is taken by physicians in a maternity hospital according to the development of sexual organs and genetic expertise. The representative of the Ministry also asserts that psychosexual orientation of the child is taken into account when deciding on correctional surgery, however it is not clear how is it possible to determine this orientation in the case of a newborn infant.

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.

- i. Where legislation provides for the coverage of necessary health-care costs by public or private social insurance systems, is such coverage for gender reassignment treatment ensured?*

The reality of the Ukrainian health-care system is that most medical costs are covered by patients themselves. Ukraine has been in the process of reforming its health-care system ever since becoming independent. The public health-care insurance system is more or less non-functioning, and alternatives are very difficult for ordinary people to access.

- ii. If yes, is it ensured in a reasonable, non-arbitrary and non-discriminatory manner?*

Ukrainian transgender persons wishing to undergo gender reassignment treatment do not even reckon on the help of the social insurance system. In all cases all costs are covered by the patients themselves.

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.

- i. Does legislation prohibit discrimination in such areas as:*
- *the sale or rent of housing;*
 - *the provision of loans for purchase of housing;*
 - *the recognition of the rights of a tenant's partner;*
 - *evictions*
- on the grounds of (a) sexual orientation and (b) gender identity?*

First of all, it should be noted that the Ministry of Housing and Communal Services in its reply (dated 29 Aug 2012) did not answer any concrete question asked according to the checklist. The First Deputy Minister simply stated that in opinion of his institution the existing Ukrainian housing legislation quite effectively guarantees protection from discrimination on

grounds of sexual orientation or gender identity, so there are no legal grounds for any activity of the Ministry on implementation of the CMCE Recommendation.

Whilst Art. 24 of the Constitution of Ukraine establishes a general principle of non-discrimination, the *Civil Code of Ukraine*, which regulates selling/buying/barter of property in Arts. 655-716 and tenancy agreements and relations between the landlord and the tenant in Arts. 731-743, does not contain a non-discrimination clause. This creates the system that sees selling/buying/barter of property and tenancy as *de facto* and *de jure* “private”, “interpersonal” relations in which the property owner or landlord has the right to select potential buyers and/or tenants according to his/her liking with no regard for the fact that discrimination on grounds of sexual orientation or gender identity, or any other ground for that matter is taking place⁶⁰. Similarly there are no anti-discrimination clauses in the legislation regulating relations between client and bank, though p. 3 of Art. 11 of the law *On Consumers’ Protection* disallows the bank to request from a client information not relating to the client’s creditworthiness.

More visible is discrimination in the context of property succession and related eviction, because the Ukrainian law does not recognise right of common joint property for same-sex couples by default whereas different-sex unmarried partners own their property acquired during living together as common joint property under Art. 74 of the *Family Code* and thus have automatic right for half of this property even if it was purchased only by one of them. They are also heirs of forth priority⁶¹ for the second half of their common joint property under Art. 1264 of the *Civil Code* if they have lived together no less than five years before death of the partner.

ii. Are provisions in place to ensure non-discriminatory access to shelter and other emergency accommodation is provided in regard to (a) sexual orientation and (b) gender identity?

In Ukraine all legal protection against discrimination on grounds of sexual orientation or gender identity in the area of housing is provided exclusively by anti-discrimination clause of the Constitution (Art. 24). There is no information about real cases of such discrimination related to emergency accommodation; on the other hand Our World Centre has no knowledge of any provisions ensuring that access to shelter and other emergency accommodation is provided on a non-discriminatory basis.

iii. Is information available to landlords and tenants aimed at preventing such discrimination?

As far as is known the Ukrainian authorities have never carried out information campaigns in the housing sphere of any kind, not to speak of anti-discrimination ones.

It should be noted that the Ukrainian housing legislation is extremely obsolete, the main law in this area is still the *Housing Code of the Ukrainian Soviet Socialist Republic* (sic!). The housing legislation in Ukraine does not reflect modern realities and just do not authorise the housing ministry to regulate issues beyond most general subjects mostly of technical character. Due to absence of general anti-discrimination state body in Ukraine, the rest remain beyond the scope of the existing governmental and communal services.

⁶⁰ Ponomaryov, supra note 1, paras. 146-150.

http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

⁶¹ “Priorities of inheritance” are legal categories in Ukrainian law that establishes order of succession. There are five priorities of inheritance, the first is highest and the fifth is lowest.

- iv. Are adequate and effective legal or other remedies available to victims of such discrimination?*

As was noted above the Ukrainian housing legislation as well as common practice does not provide effective protection against discrimination in sphere of housing rights.

- v. Are any awareness raising campaigns conducted among housing agencies in order to level-up their knowledge on anti-discrimination provisions?*

As far as is known the Ukrainian authorities have never carried out information campaigns of any kind in the housing sphere, not to speak of anti-discrimination ones.

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.

- i. Have social programmes, including support programmes, been established to address factors which increase the vulnerability to homelessness of LGBT people, especially children and young people, including schemes of neighbourhood support and security?*
- ii. Have the relevant agencies been provided with training and awareness-raising programmes to ensure that they are aware of and sensitive to the needs of LGBT people facing homelessness, particularly young persons?*

The Ukrainian authorities have never paid attention to such issues. To all appearances there are no social programmes of such kind and no plans for future.

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.

- i. What measures have been taken to prevent the risk of exclusion from participation in sports on grounds of (a) sexual orientation and (b) gender identity?*
- ii. By encouraging, for example:*
- the drawing up and dissemination of codes of conduct on questions relating to sport and sexual orientation or gender identity for sports organisations and clubs,*
 - partnerships between associations representing lesbian, gay, bisexual and transgender persons and sports clubs,*

- *anti-discrimination campaigns in the sports world,*
- *support for sports clubs set up by lesbian, gay, bisexual and transgender persons themselves.*

In its reply (dated 5 Mar 2012) to the information enquiry made in the course of working on this report the State Service for Youth and Sports did not provide information on any concrete question raised in the enquiry. One cannot find any information about existence of measures aimed at combating discrimination on grounds of sexual orientation or gender identity in Ukrainian sports. Such measures are evidently absent.

iii. Have effective measures been taken to prevent, counteract and punish the use of discriminatory insults during and in connection with sports events?

In the course of preparation to Football Championship Euro-2012 the authorities paid substantial attention to the problem of football fan hooliganism. In this connection there were adopted some programs and developed some recommendations on this subject according to the *Integrated Conception of Security and Public Order during Euro-2012*. However all these documents pay attention only to technical side of the issue – to prevent and suppress the acts of hooliganism by police forces but not to tackle the actual roots of the problem. Besides these documents address just concrete sports event but not sports in general. It should be noted that because of absence of openly homosexual athletes in Ukrainian sports homophobic chanting from sports stands is rather figurative (not meaning real homosexual orientation of concrete people but just generally offensive).

iv. In particular:

- *Has homophobic and transphobic chanting at or around sports events been made a criminal offence?*
- *Have the relevant provisions of the European Convention on Spectator Violence and Misbehaviour at Sports Events,⁶² the European Sports Charter⁶³*
- *and ECRI's General Policy Recommendation No.12⁶⁴ been implemented in respect of (a) sexual orientation and (b) gender identity?*

The Ukrainian legislation does not criminalise either homophobic or transphobic chanting. Theoretically such actions could be qualified as disorderly conduct under the Art. 173 of the *Code of Ukraine on Administrative Infractions* but such precedents are absent. Our World Centre knows of no measures at the present time to combat homophobia or transphobia in Ukrainian sport, whether at the level of the state or sports associations.

v. Have specific appropriate measures been taken to:

- *put an end to the exclusion of transgender persons from sports activity or competitions,*
- *remove the obstacles encountered by them in participating in sport (dressing room access),*

⁶² <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=120&CL=ENG> – see particularly Articles 2 ("Domestic coordination"), 3 ("Measures"), 5 ("Identification and treatment of offenders").

⁶³ [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(92\)13&Sector=secCM&Language=lanEnglish&Ver=rev&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(92)13&Sector=secCM&Language=lanEnglish&Ver=rev&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75);

See particularly: Article 1.1 (to enable every individual to participate in sport, in a safe environment); Article 3 (close co-operation with the non-governmental sports organisations); Article 4.1 (non-discrimination); Article 4.2 & 4.4 (accessed by disadvantaged persons).

⁶⁴ http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N12/e-RPG%2012%20-%20A4.pdf: Although this document relates specifically to racism and racial discrimination in the field of sport, the detailed measures set out in it are just as relevant to combating sexual orientation and gender identity discrimination in sport. Of the three documents listed above, this is the most useful in practical terms.

- *recognise their preferred gender?*

As is noted above, the State Service for Youth and Sports did not answer these questions. The information on this subject is absent. To all appearances no corresponding measures have ever been taken or planned.

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.

- i. Have steps been taken to encourage dialogue with, and support for sports associations and fan clubs in*
 - *developing awareness-raising activities,*
 - *condemning homophobic and transphobic behaviour during and in connection with sports events?*

As is noted above, the State Service for Youth and Sports did not answer these questions. The information on this subject is absent. To all appearances no corresponding measures have ever been taken or planned. It should be noted that in Ukraine there are no LGBT sports associations although there are sometimes private LGBT sports events.

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.

- i. Is a well founded fear of persecution based on (a) sexual orientation and (b) gender identity recognized as a valid ground for the granting of refugee status and asylum?*

In its reply (dated 7 Aug 2012) to the information enquiry made in the course of working on this report the State Migration Service did not provide information on any question raised in the enquiry.

Rules and regulations concerning the status of refugees in Ukraine are presented in the law *On Refugees and Persons Needing Additional or Temporary Protection*. Art. 1 of the Law defines a refugee as a person who is not a citizen of Ukraine and experiences a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group, or political opinion. Although the list of the grounds on which asylum may be requested does not explicitly mention sexual orientation or gender identity, they should fall under the “membership of a particular social group”⁶⁵.

Nevertheless judicial practice is inconsistent and whilst there are cases where such people are granted asylum, there are also cases where people were denied refugee status. Vinnytsia Human Rights Group in 2006 provided legal expertise to an asylum seeker from Turkmenistan fearing incarceration for his sexual orientation in his native country. They report a positive outcome on his case and that he received the refugee status in Ukraine.

⁶⁵ Ponomaryov, supra note 1, para. 101. http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

The State Committee on Nationalities and Religions reports that in 2008 a citizen of Azerbaijan was granted the refugee status in Ukraine owing to his sexual orientation. Finally, on 10 January 2008 the Kiev Circuit Administrative Court and later (23 April 2009) Kiev Administrative Appellate Court reviewed the case (No. 22-a-14610/08) of a citizen of the Democratic Republic of the Congo who had requested asylum in Ukraine for the fear of persecution due to her sexual orientation and had been denied the refugee status by the Department of Immigration Services⁶⁶. The first court established that the reasons that compelled the asylum seeker to leave her country of origin were “of personal nature”. The court argued that “non-traditional” sexual orientation does not constitute the ground for legal persecution in Congo, only the society condemns such relationships. In this light it ruled that there are no valid reasons to satisfy the complaint of the claimant and thus grant her refugee status in Ukraine. The appellate court upheld the decision of the lower court⁶⁷.

ii. Are staff responsible for processing asylum requests provided with training in the specific problems encountered by LGBT refugees or asylum seekers?

The State Migration Service of Ukraine did not answer any asked question in its reply to the information enquiry. Our World Centre has found no information that such training is provided to the staff responsible for processing asylum requests, and in the absence of a reply from the authorities, it must be assumed that it is not.

iii. Are asylum requests turned down on the ground that the claimant can escape persecution in the country of origin by keeping his or her sexual orientation or gender identity secret?

The information on this issue is absent. In Ukraine there were just a few asylum seekers fearing persecution on ground of sexual orientation and no known case on ground of gender identity.

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.

i. What procedures are in place to ensure compliance with this obligation?

The State Migration Service of Ukraine did not answer this question, and details of only known case of such kind (mentioned in section 42 above) is unavailable, that do not enable us to answer this question.

ii. Are there documented cases where asylum seekers have been returned to such a country?

Our World Centre is not aware of documented cases where asylum seekers have been returned to such country.

⁶⁶ Appeal of Congo asylum seeker, 10 Jan 2008, Kiev Circuit Administrative Court, case No. 22-a-14610/08 (in Ukrainian). <http://reyestr.court.gov.ua/Review/3690747>

The summary of this case in English is available in Ponomaryov, supra note 1, para. 216.

⁶⁷ Ponomaryov, supra note 1, paras. 109-111.

http://www.coe.int/t/Commissioner/Source/LGBT/UkraineLegal_E.pdf

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.

- i. What measures have been taken to comply with this requirement?*
- ii. In particular, have the staff of administrative detention centres, police and medical staff and voluntary organisations with access to such cases, received appropriate training and information on issues regarding (a) sexual orientation and (b) gender identity?*

The State Migration Service of Ukraine has not answered any concrete question. Judging from the experience of Ukrainian LGBT organisations, it seems highly improbable that corresponding measures have ever been taken or at least planned.

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.

- i. Are national human rights structures clearly mandated to address discrimination on grounds of (a) sexual orientation or (b) gender identity?*

The only national human rights structures existing in Ukraine are the institutions of the Parliamentary Commissioner for Human Rights (Ombudsman) and Presidential Commissioner for Children's Rights. The Ukrainian Ombudsman acts on the basis of the law *On Commissioner of the Verkhovna Rada of Ukraine for Human Rights*. Under Art. 3 of this law the purposes of the Ombudsman's activity are protection of human and civil rights proclaimed in the Constitution and laws of Ukraine and its international agreements, assistance in bringing the Ukrainian laws on human and civil rights into accord with the Constitution and international standards in this area, prevention of any discrimination in realisation of these rights etc. Although neither the Constitution nor the law on Ombudsman mention explicitly sexual orientation or gender identity, legal analysis shows that there are no provisions which could impede the Ombudsman from addressing these subjects.

In her reply (dated 8 Jun 2012) to the information enquiry the Ombudsman stated that the purpose of her supervisory functions is prevention of any forms of discrimination and representatives of LGBT community may apply to the Ombudsman for protection of their rights. In opinion of Our World Centre the Ukrainian Ombudsman is clearly mandated to address discrimination on any ground including sexual orientation and gender identity.

- ii. In practice do they*
 - *make recommendations on legislation and policies,*
 - *conduct awareness-raising among the general public,*
 - *examine individual complaints,*

- *participate in court proceedings,*
- *speak out in support of the exercise of rights by LGBT people, for example, when freedom of assembly events are opposed, in relation to (a) sexual orientation or (b) gender identity?*

Since the establishment of the position and until spring of 2012 the Ukrainian Ombudsman was Ms. Nina Karpachova who never stood up for rights and interests of LGBT people. Rather quite the contrary – in her last annual report on observance of human rights in Ukraine the only mentioning of LGBT issues was the sentence “The opinion of the Ombudsman is that society needs adequate protection from ... popularisation of sexual minorities’ club parties in mass media”⁶⁸. On 24 Apr 2012 there was appointed a new Ombudsman, Ms. Valeria Lutkovska, who immediately made some important changes in the work of her office, appreciated by Ukrainian human rights organisations, and invited representatives of Ukrainian LGBT organisations to co-operation. On the other hand, Ms. Lutkovska opposed explicit mentioning of sexual orientation and gender identity in the text of the anti-discrimination draft law by reason of negative reaction from broad society and members of the parliament that could impede adoption of this law. It is too early to estimate real progress of the new Ombudsman in issues regarding sexual orientation or gender identity though it should be noted that in September 2012 she wrote to the Chairman of the Verkhovna Rada opposing draft laws prohibiting “propaganda for homosexuality”.

⁶⁸ *The annual report of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights on observance of human rights in Ukraine*, p.111, in Ukrainian.
http://ombudsman.gov.ua/images/stories/07022011/Dopovid_8_1.pdf

About Nash Mir (Our World) Centre

OUR HISTORY

“Nash Mir” in Russian or “Nash Svit” in Ukrainian (“Our World”) Gay and Lesbian Centre was established in Luhansk (eastern Ukraine) in 1997 as a grassroots group. By our own initiative we took upon ourselves the responsibility for educating Ukrainian society about homosexuality, refuting settled stereotypes and prejudices against gays and lesbians, consolidating lesbian and gay community, and for advocating our rights.

The situation in Ukraine that we discovered: there “isn't a problem with homosexuality” as long as it went unseen. At first, local officials simply did not know what to do with our organisation. Interviewed by a national newspaper, one official said: *“How can we recognize them [the organization] on an official level, as a legal person? There is no legal basis, though this sort of orientation isn't forbidden, but there are no precedents... If I register them, excuse me, wankers will come, and someone else... And what about morality?”* Using far-fetched grounds, they refused our registration.

Certainly we did not let ourselves be humbled by such obvious discrimination. Nash Mir was eventually registered in the end of 1999. But successful registration became possible only as the result of a determined battle by the members of the organisation for their legal rights and the steadfast attention to this issue on the part of some international human rights organisations.

OUR GOALS

- Protection of human rights and freedoms for lesbians, gays, bisexuals and transgender people in Ukraine. Fighting against discrimination based on sexual orientation and gender identity.
- Improving Ukrainian society's attitudes towards homosexuality by challenging homophobia in the mass media.
- Supporting LGBT people and their self-consciousness and pride as equal and valuable members of Ukrainian society.

OUR CURRENT ACTIVITIES

Our projects are aimed at Ukrainian gay and lesbian community and society in general. At present we focus our activities on the following:

- Monitoring violations of LGBT rights.
- Initial legal help and counselling for victims of discrimination and hate crimes based on sexual orientation.
- Legal education of LGBT community.
- Joint actions with other organisations advocating equal LGBT rights on legislative and political levels.
- Supporting grassroots groups in their work of providing social and psychological services to LGBT, HIV/AIDS prevention among MSM, mobilization of the community on local level.
- Organising seminars and conferences.
- Public relations.

Nash Mir Centre is a founding member of the Council of LGBT Organizations of Ukraine (at present 24 NGOs are members). Andriy Maymulakhin, Coordinator of Nash Mir, is the Chairperson of the Council's Committee on Human Rights and Advocacy, Co-chair of the Council.