Implementation of the Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Rec(2010)5)

Summary Report

ESTONIA
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Implementation of the CoE Rec(2010)5 on measures to combat LGBT discrimination

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I. Executive Summary

This report is the result of extensive analysis of the national law and practice in Estonia in the light of the Council of Europe Recommendation to member states “on measures to combat discrimination on grounds of sexual orientation or gender identity” and its Appendix laying down the specific obligations Estonia has in regard to LGBT persons as recognised by the current international human rights standards. The report is divided into twelve specific topics in addition to the general legal and institutional framework.

There are a few general over-arching issues that tend to characterise all topics covered by this report. First, the public authorities lack, in general, comprehensive information on the situation of LGBT people in almost every area but especially so on hate crimes and hate speech, armed forces, sports, education and health. There is no monitoring and subsequent analysis taking place in these specific topics. Second, there has been no regular training of public officials on LGBT issues in any of the areas or no training at all. Public officials are not provided with any guidance as to what is expected of them and what is not acceptable in regard to LGBT people. Third, in many instances, the inherent vulnerability of LGBT people in certain areas is not recognised and thus special measures specific to their situation are not adopted. For example, bullying in school, the practice in armed forces or detention facilities.

There is a lack of comprehensive state-wide strategies on the fight against discrimination in general or specifically in regard to LGBT persons that is especially harmful. The current legislation has not been properly reviewed and no awareness-raising action plan has been developed. Different public institutions support different activities but the support is sporadic, dependent on the particular circumstances and, more often than not, concern isolated activities by non-governmental organisations. Ministries themselves are rarely initiating any activities.

Passivity of ministries and high-ranking officials can be attributed to the lack of political will to deal with LGBT issues. This is clearly demonstrated by continuing low resources made available to the main anti-discrimination body, the Gender Equality and Equal Treatment Commissioner. It is also demonstrated by the difficulties that ministerial officials face when attempting to initiate amendments to the current legislation. Illustrative is the continuing failure to adopt a comprehensive legal act that would regulate different issues linked to a transgender person having undergone a gender reassignment surgery. The proposal for this law has been under preparation (to a certain extent) but because there is no political will, the draft is sitting in the Ministry.

The more recent initiatives are a proposition to amend the Penal Code to widen the scope of protection for hate speech and adding hate-related motivation as one of the aggravating circumstances, which are long overdue. Yet each year when officials tried to initiate the amendments, the issues never reached further than a statement in the press or in front of different international organisations. It finally took a form of an actual draft law in autumn 2012 but received wide range of criticisms. The final outcome of the proposal is still open-ended at the time of the compilation of the present report.

It is clear that changes in legislation or practice in Estonia on LGBT issues are not usually a result of an initiative from the parliament or parties. Thus, it would be important to bring about change through case-law of courts and practice by non-judicial institutions. For example, the preparatory work for a Cohabitation Act addressing the issue of insufficient protection currently available to same-sex couples, is largely a consequence of a recommendation from the Chancellor of Justice. Indeed some preparation was done already before that but the pressure from the Chancellor ensured that the plans continue. However, even though building the case-law and practice is a necessity in bringing about change, the low number of complaints filed to courts and anti-discrimination bodies turns this opportunity into a limited tool.
II. Recommendations to government

The recommendations build on the findings of the attached Compliance Documentation Report and provide advice to the Estonian government based on the standards of the Council of Europe Recommendation to member states “on measures to combat discrimination on grounds of sexual orientation or gender identity”. ¹

The government should:

1. **General legal and institutional framework on equal treatment and prohibition of discrimination**
   a. Conduct a comprehensive review of existing legislative and other measures to ensure that they do not result directly or indirectly in discrimination based on sexual orientation or gender identity.
   b. Amend the Equal Treatment Act to extend protection from discrimination based on sexual orientation from the area of employment also to areas of services, education and social security.
   c. Increase financial resources available to the Gender Equality and Equal Treatment Commissioner in order to increase the effectiveness of Commissioner’s work.
   d. Monitor and analyse the reporting of discrimination incidents to appropriate authorities and, based on the conclusions, to develop a plan to encourage greater reporting.
   e. Develop a comprehensive strategy of education and awareness raising of the general public on the issues of discrimination, including on grounds of sexual orientation and gender identity.

2. **Right to life, security and protection from violence, incl. asylum**
   a. Adopt legal measures, including in regard to sexual orientation and gender identity, that would make hate motivation an aggravating circumstance, add criminalisation of organisations, whose aim is to incite hatred or conduct hate-related crimes and would effectively combat with incitement to hatred irrespective of threat to life, health or property of another person.
   b. Collect and analyse data on crimes and expressions motivated by hate, including based on person’s sexual orientation or gender identity.
   c. Conduct trainings to law enforcement and prison staff and judiciary on hate crimes and hate speech, including based on person’s sexual orientation or gender identity.
   d. Conduct LGBT-specific asylum trainings to the officials processing asylum applications.
   e. Encourage media to promote a culture of respect, tolerance and diversity and to avoid negative and stereotyped representations of LGBT people.
   f. Develop policies and guideline to discourage public officials from hate speech, including based on sexual orientation and gender identity.

3. **Freedom of association, expression and peaceful assembly**
   a. Create a supportive environment for the effective functioning of LGBT organisations.
   b. Create an environment of pluralism and non-discrimination encouraging freedom of expression on LGBT issues in a society.

¹ 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).
4. Respect for private and family life

a. Adopt a legal framework that would provide equal and sufficient protection to same-sex partners by either attaching rights and obligations to non-married couples or allowing same-sex couple to enter into some sort of legal union.

b. Adopt a sufficient legal framework and develop practice that would ensure the rights of the child who is raised by same-sex couple, specifically in cases where the biological parent passes away.

c. Abolish a discriminatory practice in single-parent adoption proceedings whereby an openly homosexual person is currently actively discouraged to continue with adoption plans.

5. Transgender persons

a. Develop a comprehensive law or laws that regulate gender reassignment surgeries and appropriate gender reassignment services, including psychological, endocrinological and surgical.

b. Include into appropriate law a clear position and wording that after the gender reassignment has been completed and legally recognised, the person can enter into marriage with a person of the sex opposite to their reassigned sex.

c. Modify the Estonian Government Regulation on the Statute and Formats of Primary and Secondary School Leaving Certificates and the State-examination Certificate so that the issuing of a duplicate with changed personal data after the gender reassignment has been completed and legally recognised is obligatory.

d. Convene a roundtable, consisting of state representatives and advocacy and human rights organizations to discuss other issues not currently sufficiently covered by law, such as gender reassignment effects on the parent-child relationship and status of marriage after one of the spouses changes their gender.

6. Employment

a. Adopted concrete measures to promote equal treatment of LGBT persons in employment.

b. Monitor and analyse the practice in armed forces in regard to LGBT persons.

7. Education

a. Conduct a country-wide comprehensive research on school bullying and social exclusion and possible humiliating treatment based on sexual orientation and gender identity that would serve as a basis for future action plans by the government.

b. Assemble a working group of education officials, school representatives and advocacy organisations in order to make clear suggestions to the curricula and school programs on the topic of LGBT. Responsible ministry: Estonian Ministry of Education and Research.

c. Initiate country-wide anti-bullying programs and fund grass-roots initiatives with a special focus on school bullying based on sexual orientation and gender identity.

8. Health

a. Make LGBT related health issues a compulsory part of any medical profession curriculum.

b. Allocate funds for trainings on LGBT-related health issues for already practicing medical doctors, health-care and social workers.
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9. **Housing**

a. Inform the LGBT community about the services and rights any citizen has in Estonia when in need of temporary housing or shelter.

10. **Sports**

a. Collect and analyse data on LGBT-related issues in sports and addressing them by specific measures.
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, Thorburn 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”.

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 Estonian authorities in implementing the Recommendation, and to highlight the areas were 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, the political leaders and civil servants at national level who are responsible for implementing the Recommendation. 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.
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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 the Estonian Human Rights Centre has compiled in order to assess progress in implementation of the individual measures of the Recommendation, are set out in Appendix 3 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 to letters from the Estonian Human Rights Centre 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 Estonia 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 the Estonian Human Rights Centre and other non-governmental organisations.
- Information gathered in course of any other monitoring work done by the Estonian Human Rights Centre.
IV. Main part of summary report

The Recommendation

The operative text of the Recommendation includes four main requirements: 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.

Legal framework

Estonian anti-discrimination legislation is based on §12 of the Constitution, which prohibits discrimination on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. It also prohibits incitement of hatred. The principle in the Constitution is applied when there is not a more specific law.2

By adhering to the relevant EU Directives3 Estonia has adopted the Gender Equality Act (hereinafter: GEA)4 and the Equal Treatment Act (hereinafter: ETA). While the GEA deals with discrimination based on gender (including gender identity),5 the ETA deals with discrimination based on racial or ethnic origin, colour, religion or belief, age, disability and sexual orientation.6 These Acts or the principles of equal treatment, equal opportunities or equality are also mentioned in the Employment Contracts Act,7 the Public Service Act,8 the Working Conditions of Workers Posted in Estonia Act,9 the Child Protection Act10 and the Administrative Procedure Act.11 Additionally, the Penal Code12 includes provisions, which prohibit incitement of hatred (§ 151, see more below in I.B.) as well as violation of equality (§ 152) in general and discrimination based on genetic risks (§ 153).

Contrary to Recommendation 1, there has been no comprehensive review of existing legislative and other measures. Each Ministry is responsible for ensuring respect of equal treatment principles within its area of competence. The Sotsiaalministeerium (Ministry of Social Affairs), through the Gender Equality Department, is tasked with coordinating the activities of other state authorities relating to equal treatment in general.13 Additionally, any

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8 Avaliku teenistuse seadus, RT I 1995, 16, 228 … RT I, 2011, 1. The relevant reference was added to the Act in 2009 with the entering into force of ETA.
new legal Act or amendment to existing Acts must, in principle, take into account the requirements of the equal treatment principle. For example, the new Public Assemblies Act adopted in 2008, included sexual orientation as a prohibited ground for an incitement to hatred during a public gathering.14

Nevertheless, the legal framework for equal treatment has been heavily criticised, specifically due to differences in scopes of protection provided by the GEA and the ETA.15 The GEA prohibits discrimination, which is based on gender (and gender identity) in all areas of life (except in professing and practising faith or in working as a minister of a religion in a registered religious association and within family or private life), while the ETA divides the protected areas depending on the basis of discrimination. It covers discrimination based on religion or belief, age, disability and sexual orientation only in the area of employment (as required by Directive 2000/78/EC), while discrimination based on racial or ethnic origin and colour is additionally covered in the areas of services, education and social security (as required by Directive 2000/43/EC). The two acts have effectively created a hierarchy of protection depending on the ground of discrimination. Therefore, protection from discrimination on grounds of gender identity is on the highest level of hierarchy, providing protection in nearly all areas of life, while protection from discrimination on grounds of sexual orientation is on the lowest level of hierarchy covering only the area of employment.

Institutional framework

The GEA and the ETA refer to courts as one of the main institutions solving discrimination disputes. Courts deal with civil, administrative and criminal cases and have the scope of activity covering all areas of life, whether covered by specific Acts, such as the GEA and the ETA, or only by the Constitution. Criminal courts apply just the Penal Code (§§ 151-153).

Another dispute resolution body referred to by the GEA and the ETA is töövaidluskomisjon (labour dispute committee). These quasi-judicial bodies solve disputes in private employment relations, including non-discrimination issues. They are created by local branches of Tööinspektsioon (Labour Inspectorate) and are composed of a Labour Inspectorate official and representatives of trade union and employers’ union (Individual Labour Dispute Resolution Act – ILDRA –, § 11(2)).16 The decisions of the committees are legally binding and enforceable in the same way as court decisions are (ILDRA, § 26 (2)). The decision can be appealed to a court.

Persons also have non-judicial options to check whether a particular legal act conforms to equal treatment principles or not. Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik (Gender Equality and Equal Treatment Commissioner, hereinafter: Equal Treatment Commissioner or Commissioner) was founded by the Equal Treatment Act (hereinafter: ETA).17 She accepts applications from individuals and provides her opinion and recommendations on discrimination issues. She is also authorised to act on her own initiative.

16 Individuaalse töövaidluse lahendamise seadus, RT I 1996, 3, 57 … RT I, 30.06.2011, 1.
Persons can also turn to Õiguskantsler (Chancellor of Justice), an independent institution created in accordance with the Constitution (§ 139). In addition to accepting applications on possible infringements of fundamental rights and freedoms by a public authority, he also accepts applications regarding constitutionality or legality of legal acts. Recent amendment to the Chancellor of Justice Act gave the Chancellor a legal basis for acting on his own initiative (§ 15 (2)). However, the amendment also gave the Chancellor the right to refuse an application on certain grounds. Among these grounds is absence of public interest (§ 15(1)) and the option of filing a challenge or can resort to other legal remedies (§ 25(3)). The impact this has on persons’ ability to challenge legal acts through inexpensive non-judicial means is yet to be seen. In regard to discrimination disputes between private persons, the Chancellor can only initiate mediation proceedings that require consent from both sides.

Neither the Commissioner nor the Chancellor can give legally binding opinions, neither is there an enforcement mechanism for them. They can both make recommendations. More importantly, unlike the Commissioner, the Chancellor can raise matters before the Supreme Court if the adopting institution has refused to amend the act (Chancellor of Justice Act, § 18). Indeed, the Chancellor has done so on several occasions, although not in relation to LGBT discrimination.

Remedies

The greatest concern in relation to effectiveness of the protection mechanisms is the lack of resources available to the Equal Treatment Commissioner. Regardless of the estimation on the budget needed for the Commissioner to be able to fulfil her tasks (4.4 million kroons – ca 281,330 EUR), it has remained around 60,000 euros from 2008 through 2012. As stated in the shadow report to the UN Human Rights Committee, first, “the appropriate authorities do not have enough resources to actually do effective work and, second, giving very little resources to these authorities demonstrates clearly the perspective of the government about the issues (lack of political will), which in itself also sends a message to the public (that these are unimportant issues).” The government has reported the allocation of 2 million euros to the Commissioner for the period of 2012-2015 from the Norwegian Financial Mechanism. There are no indications that financing from state budget would increase.

In addition to the problems on finances available to the Equal Treatment Commissioner, the effectiveness of remedies is also limited in regard to compensation payable to the victims. The aim of compensation in Estonian legal system has long been to place the victim in a situation, which would be as close to one where the victim would have been in had the violation of his/her right not taken place (Law of Obligations Act, § 127(1)). In general, compensation was never meant to have a punishing or dissuasive effect.

According to the GEA (§ 13) and the ETA (§ 24) the victims can demand both that the infringing party ends the discrimination and also compensates the damages caused, both material and moral damages. The scope, duration and nature of the discrimination is taken into account in determining the amount of compensation (GEA § 13(3), ETA § 24(3)). In case of non-proprietary (or moral) damage, the victim can ask for ‘a reasonable amount of money’

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18 Õiguskantsleri seadus, RT I 1999, 29, 406 … RT I, 29.05.2012, 2, §§ 36-42.
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as compensation (GEA § 13(2), ETA § 24(2)). In case of moral damages, if the exact amount of the damage cannot be established or if the establishment thereof would involve major difficulties or unreasonably high costs the court will assess the amount of compensation according to its discretion.\textsuperscript{23}

The recent amendment of the Law of Obligations Act remedies the situation somewhat. The new regulation allows taking into account the need to persuade the violating party from future violations, i.e. compensation having a dissuasive effect (Law of Obligations Act, § 134 (6)). Court practice is yet to develop on this new regulation. Courts have been conservative in granting non-pecuniary damages in discrimination cases so far. For example, the court granted half of the salary of the applicant (791.35 EUR) as a compensation for non-pecuniary damages in one of its gender discrimination cases.\textsuperscript{24} The labour dispute committees have been more generous, granting compensations in the amount of 2000 euros.\textsuperscript{25}

Victims’ low regard of the legal remedies and their lack of faith in their adequacy is demonstrated by the low number of cases that reach the relevant institutions. The mechanisms are substantially under-used. This problem concerns every institution.

The Equal Treatment Commissioner, which is the main institution to turn to in case of discrimination, has seen a steady rise in the number of communications, although the number is still very low when it comes to sexual orientation (see table 1). The number of applications concerning discrimination by a public authority to the Chancellor of Justice is also remarkably low (see table 2). Mediation has proved to be merely a theoretical tool against discrimination. Statistics available on the website of the Labour Inspectorate also indicate a small number of cases. According to the statistics, the labour dispute committees have had no cases at all on discrimination based on sexual orientation.\textsuperscript{26} It is clear that the effectiveness of the institutions in combating discrimination based on sexual orientation and gender identity is low.

| Table 1. Statistics of applications received by the Equal Treatment Commissioner (2005-2011). |
|--------------------------------------------------|--------------------------------------------------|--------------------------------------------------|--------------------------------------------------|
| communications/complaints in total | communications/complaints on sexual orientation | communications/complaints on gender identity | percentage of LGBT-related communications |
| 2005 | 12/10 | 0 | 0 | 0.00% |
| 2006 | 32/17 | 0 | 0 | 0.00% |
| 2007 | 78/24 | 0 | 0 | 0.00% |
| 2008 | 82/25 | 0 | 1/1 | 1.22% |
| 2009 | 161/51 | 8/5 | 0 | 4.97% |
| 2010 | 288/47 | 11/3 | 0 | 3.82% |
| 2011 | 358/90 | 15/5 | 0 | 4.19% |

\textsuperscript{24} Case no 2-09-63411, 14 June 2011, Harju County Court.
\textsuperscript{25} M. Midila-Vanatalu, Ebavõrdse kohtlemise tuvastamise nõuded töövaidluskomisjonide menetluses (Claims in the practice of the labour dispute committees requesting the identification of unequal treatment), e-mail correspondence, Labour Inspectorate, 10 January 2012.
Table 2. Statistics of procedures by the Chancellor of Justice regarding discrimination or equal treatment (2005-2011).

<table>
<thead>
<tr>
<th></th>
<th>procedures concerning legal acts or actions by public authority</th>
<th>procedure concerning discrimination by private person</th>
<th>percentage of LGBT-related applications in total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>in total</td>
<td>concerning sexual orientation</td>
<td>concerning gender identity</td>
</tr>
<tr>
<td>2005</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2006</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>52</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>26</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>43</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>42</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

The same trend continues with courts. The Estonian Human Rights Centre is not aware of any cases on discrimination based on sexual orientation and gender identity that have reached courts. With respect to criminal cases, no cases have reached courts during the period of 2006-2009 and prior to this period there was only one case concerning incitement to hatred and that did not concern LGBT persons.27 It is interesting to note that the Equal Treatment Commissioner has identified possible violations in its own practice but for different reasons none of these cases have ended up in court.

Awareness raising on LGBT issues

One of the measures that could assist in regard to the problem of under-reporting of discrimination cases could be a more effective awareness-raising – firstly on the rights persons have under the ETA and the GEA and, secondly, on the different legal remedies available to them. Despite the near lack of official statistics on discrimination, surveys show that the problem is significant.

Numerous surveys and research demonstrate the low awareness of the general public on LGBT issues and a resultant discrimination that LGBT people experience in the society. For example, the 2007 qualitative research conducted by University of Tartu showed that LGBT community experienced discrimination and stereotyping in all areas of life. The 2008 Eurobarometer survey revealed that 32% of the population believed that LGBT persons have under the ETA and the GEA and, secondly, on the different legal remedies available to them. Despite the near lack of official statistics on discrimination, surveys show that the problem is significant.

27 Case no 3-1-1-117-05, 10 April 2006, Criminal Chamber of the Supreme Court.
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conducted in summer 2012 by Turu-uuringute AS and Tallinn University of Technology.\textsuperscript{31} According to the survey, only 38\% of the respondents considered homosexuality acceptable, of which only 10\% considered it completely acceptable (57\% considered it unacceptable, while 34\% considered it completely unacceptable).\textsuperscript{32} Most common reasons for unacceptability were its unnatural nature (28\%), abnormality and unpleasantness (22\%) and homosexuality being a taboo or it being alien (14\%).\textsuperscript{33} It is clear from the above that awareness-raising among the general public is necessary in order to educate people on the nature of and reasons for homosexuality.

However, no strategies have been developed or implemented in order to tackle discrimination or biased attitude and behaviour towards LGBT persons. There have been several isolated actions and publications with no basis in any comprehensive strategies. International organisations have routinely criticised Estonia for the lack of awareness-raising activities on discrimination issues.\textsuperscript{34} Yet, the actions of the Ministry of Social Affairs, which is responsible for general promotion of equal treatment through its gender equality department, have been far from satisfactory. Although the ETA has been in force since 2009, it was not until 2011 that the Ministry’s task to increase tolerance towards LGBT people was stated in its Development Plan.\textsuperscript{35} However the next Development Plan reduced LGBT persons into one of the many other protected groups in regard to the separate strategic aim to work on equal treatment.\textsuperscript{36}

Even more troubling is the fact that LGBT-related activities are not mentioned in any of the annual action plans of the Ministry of Social Affairs.\textsuperscript{37} LGBT-related activities coordinated or supported by the Ministry have mainly been funded from European Union funds, such as PROGRESS programme\textsuperscript{38} or the European Social Fund, as a part of the European Equal Opportunities Year 2007 activities. Beyond the above-mentioned activities the Ministry’s involvement in LGBT awareness-raising is minimal. It is clear that awareness-raising of LGBT issues is not a current political priority reflected in political strategies but without political will there is only so much the public officials are able or willing to do on their own.

\textsuperscript{31} L. Grünberg, \textit{LGBT teemaline avaliku arvamuse uuring} [Study on public opinion of LGBT people], Turu-uuringud and Tallinn University of Technology, available at: \url{http://www.erinevusrikastab.ee/files/LGBT-avalik-arvamus/LGBT_aruanne.pdf}.

\textsuperscript{32} \textit{Ibid.}, p 20.

\textsuperscript{33} \textit{Ibid.}, p 22.


\textsuperscript{37} Action plans available at: \url{https://www.eesti.ee/portaal/Itpis.taitmine_valjund_avalik} (visited at 22 August 2012).

\textsuperscript{38} Erlenheim, supra note 13, p 2.

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The Appendix

I. Right to life, security and protection from violence

A. “Hate crimes” and 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 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.

Legal framework

There is no specific law prohibiting hate crimes. Hate-motivated criminal incidents are investigated and prosecuted under the general provisions of the Penal Code. The Code does include a provision prohibiting hate speech (see below in I.B.). Bias, whether related to sexual orientation and gender identity or not, is ignored by the Code. Interestingly, the authorities have stated that such bias motive is included in § 58(1) as "self interest or other base motive" (in Estonian: omakasu või muu madal motiv). However, there is no court practice to confirm this interpretation.

As a result of the lack of proper legislative framework there is no effective system for recording and publishing statistics on hate crimes and hate-motivated incidents related to sexual orientation and gender identity. The database used by the police for registration of criminal incidents – public e-file system (e-toimik) includes classification of a motive of a crime, such as sexual orientation. However, there is no concrete method or obligation to use these classifications. Registering applications on crimes might very well occur without a motive being added to the registration and thus it is, in fact, impossible to give exact statistics on crimes with LGBT motivation. As a result the authorities can claim a low occurrence of hate-motivated crimes while in reality there is no reliable data to support or deny this claim.

The lack of proper legislative framework is also recognised by the Ministry of Justice. The Ministry has drafted an amendment to the Penal Code, which is currently in the round of consultations with other ministries and relevant stakeholders, such as local LGBT and human rights organisations.

The draft law would significantly amend the hate-related regulation in criminal law. In particular, according to the initial draft, it would bring one significant amendment – a hate motivation also in relation to sexual orientation and gender in general but not gender identity in particular as a general aggravating circumstance for any crime. The draft law is at the time of compiling the report in its initial stage. It is, therefore, difficult to predict in which form the amendment will be eventually adopted and when it could happen.

Training

The latest report by the ECRI on Estonia was especially concerned with the lack of cases under criminal law and expressed an opinion that it can be explained by lack of training provided to police officers, prosecutors and judges in criminal law concerning discrimination

39 ECRI Report, supra note 15, paras 38 and 43.
40 Ministry of Justice, e-mail correspondence, 21 September 2011.
43 The draft law is available on the public database of draft laws: <http://eelnoud.valitsus.ee/>. The number of the file is 12-0999.
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and incitement of hatred. Other international organisations have also recommended systematic training of law enforcement officials and judiciary “in order to ensure that they are aware of their responsibility to identify and sentence” hate-motivated crimes. The Ministry of Interior Affairs confirmed that no special training has been organised on this topic to the law enforcement bodies. The Ministry of Justice stated the same in regard to the prison staff and judges. Equal treatment and vulnerable groups are issues, which are usually dealt with as part of training of a wider scope.

Investigation

The Ministry of Interior Affairs has stated that crimes conducted by police officials are usually investigated by the Internal Audit Bureau, while other possible violations are investigated in accordance with supervisory control by the officers’ direct superior and disciplinary proceedings. Prosecutors also accept complaints against police officers but they are usually then referred to the Internal Audit Bureau or “if the matter is serious, turn it over to the security police.” The work of the Bureau has not received any public criticism and the Estonian Human Rights Centre has also not received any such complaints.

The prisons department of the Ministry of Justice also includes the Internal Audit Division that is responsible for preventing and handling violations by the prison staff. The prisoners can, however, file complaints to administrative courts as well as to the Chancellor of Justice who has supervisory and monitoring powers over the prison system in Estonia. Prisoners are active users of complaint mechanisms available to them. For example, “[i]n 2008, 40 per cent of all the cases before the Tartu Administrative Court had been brought by prisoners” as the Tartu prison is located within jurisdiction of that court. In 2008 Estonia reported that 65 disciplinary procedures were commenced against prison staff while in 2009, the number was

45 FCNM Advisory Committee, Third Opinion, supra note 34, para 82, also para 41. Also CERD, CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination. Estonia, CERD/C/EST/CO/8-9 (23 September 2010), para 18.
46 T. Türkson, e-mail correspondence no 2-1/188-3, 18 July 2012, p 1.
47 M. Aavik, Justitsministeeriumi haldusalas kohustuste rakendamine vastavalt Euroopa Nõukogu soovitustele seksuaalvähemuste diskrimineerimise vastu võitlemise meetmete osas (Implementation of the Council of Europe Recommendation on measures to combat discrimination on grounds of sexual orientation within the area of competence of the Ministry of Justice), e-mail correspondence no 9-2/5396, 26 June 2012, p 2.
49 ECRI Report, supra note 15, para 172.
52 Human Rights Committee, Summary record of the 2715th meeting, supra note 51, para 13.
According to the Committee, statistics show “that prisoners were fairly well informed of the remedies available to them and of how to make effective use of them.”

**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, guidelines to government officials to refrain from such speech and to promote respect for the human rights of LGBT people.

### Legal framework

The Penal Code prohibits activities, which publicly incite hatred, violence or discrimination on the basis of ... sex, ... sexual orientation ... if this results in danger to life, health or property of a person (§ 151). Although the provision includes punishment of legal persons and it also includes incitement to discrimination - both are relatively novel, the positive aspects are nullified by its ineffectiveness. Since the amendment in 2006, to add the requirement to prove “danger to life, health or property”, there have been no convictions. Before 2006, only one case ended up in court; it concerned incitement to hatred against Jews, Christians and democrats and called for armed terror against them. Amendment to § 151 was apparently made “to avoid liability in situations where persons publicly express their opinion.” As a result, acts with elements of incitement to hatred are “usually classified either as offences against persons or property, or as breaches of public order”. It cannot thus be claimed that Estonia has taken appropriate measures to combat hate speech.

Several attempts have been made to apply § 151 in these cases but because of the high threshold requiring to prove “danger to life, health or property”, the cases have failed. For example, lawyer Reimo Mets had initiated a case against the Police in court for not commencing criminal proceedings in regard to a comment “Burn queers!” posted as a comment on a news portal www.delfi.ee. The court upheld the decision by the Police because there had not been any physical attacks as a result of that comment.

As stated previously, the lack of proper legislative framework is also recognised by the Ministry of Justice. The proposed amendment to the Penal Code would bring three changes in relation to hate speech: it (1) widens protection from hate speech; (2) criminalises a denial of reliably attested international crime; and (3) criminalises organisations, whose aims are not necessarily financial gain but could also be incitement to hatred or conducting other hate-


54 Human Rights Committee, Summary record of the 2715th meeting, supra note 51, para 20.

55 Case no 3-1-1-117-05, supra note 27 – the accused was found not guilty in the crime of incitement to hatred. There is also another case concerning freedom of expression and it concerned the “distribution of a publication, which contained uncealed hatred and was oriented at inciting hatred against the Jewish people”. However for some reason it was prosecuted under the “violation of equality” provision rather than incitement to hatred.


57 CERD, Summary record of the 2038th meeting held on 19 August 2010, CERD/C/SR.2038 (25 May 2011), para 7.

58 Estonian Human Rights Centre, Global Rights, ILGA Europe and Seksuaalvähemuste Kaitse Ühing, supra note 2, p 11.
related crimes.\textsuperscript{59} If the draft were to be adopted in this format, the change would be significant.

**Media**

Media has not been encouraged to promote a culture of respect, tolerance and diversity and to avoid negative and stereotyped representations of LGBT people. Estonian media is largely self-regulated and as such has subjected itself to two self-regulating organisations, \textit{Avaliku Sõna Nõukogu} (the Estonian Press Council)\textsuperscript{60} and \textit{Pressinõukogu} (the Press Council of Estonia).\textsuperscript{61} The Estonian National Broadcasting organisation has additionally subjected itself to the control of the Media Ethics Ombudsman. They implement the Code of Ethics.\textsuperscript{62} Although it does include a recommendation not to “emphasize nationality, race, religious or political persuasion and gender, unless it has news value” there is no reference to sexual orientation or gender identity in this paragraph (4.3) or any other. There have been no successful cases in regard to LGBT issues in any of the self-regulating bodies.

**Public officials**

There have been no policies or guidelines developed to discourage public officials from hate speech. The situation can be characterised as passive in general regarding hate speech. The Estonian Human Rights Centre could find only one instance where a minister expressed concern over a homophobic statement by an official of the Health Board.\textsuperscript{63}

It cannot be claimed that incidents where representatives of public authorities make statements that could reasonably be understood as legitimising such hatred or discrimination occur often. But such incidents do occasionally occur. It is noteworthy that many such statements or promotional activities are by persons connected to education sector.\textsuperscript{64} They have mostly been low profile statements. Perhaps the most high profile statement was made by the former Minister of Education and Research in 2010.\textsuperscript{65} He stated at a press conference that homosexuality will not be promoted in Estonian schools, as a response to a news item in media notifying that Holland had added same-sex marriages to study materials for schools. The statement was not in response to any comments or questions from the press or other governmental officials; it was made out of context. It was ignored by the rest of the members of the government at the press conference and no public apology followed. Only young social

\textsuperscript{59} The draft law is available on the public database of draft laws: \textit{<http://eelhould.valitsus.ee/>}. The number of the file is 12-0999.


democrats demanded his resignation from the ministerial position, a demand which was left without a response.\textsuperscript{66}

\section*{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.

Establishing and registering of NGOs is mainly governed by two legal Acts – the Non-profit Associations Act and the Foundations Act.\textsuperscript{67} These Acts are based on the provision in the Constitution that stipulates: “Everyone has the right to form non-profit associations and federations” (§ 48). The Constitution only stipulates restriction to associations with military aims, requiring prior authorisation, and prohibits associations, which aim to change the constitutional order of Estonia by force. In line with the Constitution, neither the Non-profit Associations Act nor the Foundations Act stipulates any restrictions in regard to the subject matter of an association.

There are no specific measures to protect, facilitate or encourage LGBT organisations; general measures apply. Although no special measures have been taken, there are incidents of discrimination or other problems encountered by the LGBT organisations in Estonia. For example, The Estonian Gay Youth (now Estonian LGBT Association – ELGBTA) reported having been refused premises to rent after the owners found out what the organisation’s name was.\textsuperscript{68} Once they had found rooms to rent, the owner caused a series of problems in order to encourage them to leave the premises.\textsuperscript{69} They have also been requested to take down the rainbow flag from the façade of the building. They did not proceed with the matter to court or the Chancellor of Justice, the only measures available to them under current legislation.

The LGBT organisations have not reported any problems in regard to cooperation with public authority. They have been involved in framing public policies and drafting laws and amendments concerning LGBT-issues when they have expressed such interest.\textsuperscript{70} Also public funding has been available to them on equal terms with other non-governmental organisation.

Public institutions have not taken any special measures to protect LGBT organisations from hostility or aggression. Usual measures can be employed. They have also not made any attempts to create an environment conducive to the work of such organisations with one exception – the Minister of Social Affairs attending the opening of OMA Keskus, an LGBT information and activity centre.\textsuperscript{71} Although it is somewhat clouded by the fact that there is no mention of attending this event on the Ministry’s official website.

\begin{itemize}
\item \textsuperscript{66} M. Sillaots, ‘Noorsotsid: Lukas tõestas tâna lõplikult, et ei sobi ministriks’ (Young Socialists: Lukas proved today conclusively that he is not suitable as a minister), \textit{ohtuleht.ee}, 12 August 2010, available at: <http://www.ohtuleht.ee/390349> (visited at 22 August 2012).
\item \textsuperscript{68} H. Talalaev, \textit{Aruande jaoks} (For the report), e-mail correspondence, 20 September 2011.
\item \textsuperscript{69} K. Grossthal, Interview with Jaan Kroon, in Tallinn, 4 May 2012.
\item \textsuperscript{70} H. Talalaev, \textit{Re: kolm küsimust} (Re: three questions), e-mail correspondence, 23 July 2012.
\end{itemize}
III. Freedom of expression and peaceful assembly

Section III of the Appendix requires member states to guarantee freedom 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 freedom of expression and peaceful assembly by LGBT people.

Freedom of expression

The state has not attempted to set any obstacles to freedom to receive and transmit information and ideas relating to sexual orientation and gender identity. Indeed, the Ministries have published their own social research or legal analysis on the subject-matter themselves\(^{72}\) and the Ministry of Social Affairs has also supported publications and other activities by non-governmental organisations.\(^{73}\)

At the same time, the state has also not done much to actively encourage pluralism and non-discrimination. LGBT-activists within religious organisations, however, encounter significant problems. One of the most recent cases, which was also widely covered by the media, concerned Heino Nurk who was defrocked from his clergy position due to his gay activism, specifically for establishing the Association of Gay Christians.\(^{74}\) Later he was also dismissed from a lecturer position in the Estonian Evangelical Lutheran Church Institute of Theology for being gay. The reasons for the dismissal are apparently extensively documented, as none of the participants in any of the relevant meetings found it necessary to disguise them.

Freedom of assembly

In general, the freedom of assembly is guaranteed. The Public Assembly Act also states inciting hatred, violence or discrimination on grounds of sexual orientation as a basis for prohibiting a demonstration (§ 3(3)).

The history of Pride events has been somewhat complicated. None of the Pride events have been banned but the organisers of Pride parades (2004-2007) struggled with higher demands (e.g. obligation to hire a private security company) from the police on security


\(^{74}\) K. Grossthal, Interview with Heino Nurk and Meelis Süld, Tallinn, 3 May 2012.

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measures that the organisers should provide themselves.\textsuperscript{75} The Chancellor of Justice and international organisations have criticised the police in regard to its lack of understanding of its positive obligations.\textsuperscript{76} There have been no parades since 2007. Instead there was a concert and several corresponding events in 2011 under the Baltic Pride umbrella. No problems from the Police were encountered during these events.

An addition to the Public Assembly Act in 2008 can be considered a positive development. According to the new amended Act, public “officials no longer have the duty to prohibit a meeting if it contradicts provisions of Public Assemblies Act, but they are given a certain amount of discretion to decide and even make proposals to the organisers of the meeting in order to bring the assembly into conformity with the law (§ 8).”\textsuperscript{77} Instead of getting an automatic refusal, “the organiser is advised to choose another time for the assembly if another public assembly has already been registered at the requested place and time. If in that case the public meeting loses its meaning, a new place must be chosen in the vicinity, however, not in the immediate vicinity of the assembly that had been registered earlier.”\textsuperscript{78} It is now clear that even if a demonstration is planned for the same day and place as another demonstration, public authorities cannot automatically refuse to register it on grounds of public safety. They must try to find a compromise, which would least restrict the freedom of assembly of the persons involved.

IV. Respect for private and family life (excluding specific transgender issues)

Paragraphs 18-19 and 23-27 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.

Private life

When Estonia regained its independence, the Criminal Code of the Estonian SSR was amended (on 1 June 1992) and the article punishing anal sex between men was deleted.\textsuperscript{79} The current Penal Code includes no provisions that could be considered discriminatory based on sexual orientation or gender identity (incl. no differences in the age of consent).

In regard to collection and maintenance of data on person’s sexual orientation or gender identity, the Estonian public authorities are guided by § 4(2) of the Personal Data Protection Act. That provision classifies information about an individual’s sex life as sensitive personal


\textsuperscript{76} Human Rights Committee, Summary record of the 2716th meeting, supra note 48, para 47 and 51.


\textsuperscript{79} B. Davidjants (ed), Kapiuksed valla: arutlusi homo-, bi- ja transseksuaalsusest (MTÜ Eesti Gei Noored, Tallinn, 2010), p 82.
data and can thus be collected and processed only upon consent from the person.\(^\text{80}\) In addition, the person must be informed that data to be processed is sensitive personal data and the data subject's consent has to be obtained in a format that can be reproduced in writing. Access to information is also covered by the Public Information Act, where § 35 (1.11) states that a holder of information is required to classify information that contains sensitive personal data as information intended for internal use.\(^\text{81}\)

### Same-sex couples

The rights and obligations of unmarried couples are largely unregulated under Estonian legislation with the exception of a few isolated references, which essentially amount to a marginal regulation.\(^\text{82}\) Such regulation might also exist on local level, eg granting the right to social benefits from local municipality. State social assistance in Estonia is provided based on the household and not the legal status of the relationship, and rights and obligations towards children also depend on the filiation with the child and not the legal status of the relationship between parents.\(^\text{83}\) However, the application of these provisions can be erratic, as is demonstrated with the recent case concerning same-sex partners and their children in Viimsi local municipality. One of the partners applied for a social benefit (transport compensation for children). The response from the municipality was negative, stating that same-sex cohabitations are not considered families for the purposes of this local social benefit. The Chancellor of Justice found the refusal to be void as the decree regulating social benefits did not reserve it to married couples and their common children.\(^\text{84}\) The local municipality then amended the decree so that it excluded same-sex cohabiting partnerships and rejected the couple’s application again. The applicant turned to the court and the refusal was overturned by it.

Estonian legislation foresees marriage as the only partnership form that produces rights and freedoms to the persons in partnership. However, marriage is reserved for heterosexual couples (Family Law Act, §1). In fact, the recently adopted new Family Law Act provides explicitly that a marriage between same-sex partners is invalid (§10(1)), which EU Fundamental Rights Agency (hereinafter: FRA) has interpreted as a step back since the previous Family Law Act did not include such a provision. The Chancellor of Justice has repeatedly maintained that limiting access to marriage in such a way is constitutional and in accordance with human rights.\(^\text{85}\)

The opinion of the public has changed considerably in recent years. While in 2011, it was reported that only 21% of the population of Estonia support same-sex marriage, then in


\(^{81}\) Avalku teabe seadus, RT I 2000, 92, 597 … RT I, 22.03.2011, 1.


\(^{83}\) Järviste et al, supra note 72, p 12. Also see Olm, supra note 82, pp 78-79.

\(^{84}\) Chancellor of Justice, Ettepanek rikkumise kõrvaldamiseks Viimsi vallavalitsusele (Suggestion to Viimsi rural municipality government to remove an infringement), no 7-5-090297/0903201, 19 May 2009. For a full description of the case see Käspere and Meierg, Human Rights in Estonia 2010, supra note 78, pp 144-147. Also see Government of Estonia, National Report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1. Estonia, Human Rights Council, A/HRC/WG.6/10/EST/1, 8 November 2010, para 61.

\(^{85}\) Chancellor of Justice, Seisukoh samasooliste peresuhete seadustamise kohta (Position on the legalisation of same-sex family relations), no 6-1/060166/0600782, January 2006, and Chancellor of Justice, Seisukoh vastuolu mittetuvastamise kohta (Position on non-recognition of conflict), no 6-1/100737/1102413, 23 May 2011, para 47.

2012, the support was 34\%\textsuperscript{87}. The study in 2012 also demonstrated that 46\% of Estonian residents support same-sex partnership.\textsuperscript{88} A simple survey conducted by the Estonian Human Rights Centre in the beginning of 2011 demonstrated that only one of the political parties represented in the parliament supports same-sex marriage and two support registered partnership.\textsuperscript{89} However, it did indicate that three quarter of the parties represented in the parliament see the need for some sort of regulation.

The need for some sort of regulation to same-sex couples was also recognised by the Chancellor of Justice since under the current legal framework they are in many cases left without protection.\textsuperscript{90} These instances include property rights, rights and obligations in regard to children, maintenance, residential lease relations, right of succession, taxes and immigration. As a result the Ministry published a concept of the Cohabitation Act in August 2012, which proposes a dual solution.\textsuperscript{91} First, it provides for a formal registration and second, it provides for a regulation of rights and obligations in certain unmarried and unregistered couples. The feedback to the concept has been from one extreme to the other, which means that it is difficult to foresee what the final concept and the eventual draft law will be.

**Parental rights (incl adoption)**

The situation of parental rights of LGBTI persons in Estonia is controversial. Artificial insemination is available.\textsuperscript{92} Its use is unrestricted for lesbian couples and it is thus widely used as a means to complement the family.\textsuperscript{93} The possibility to exercise custodial rights seems to be somewhat more complicated but there is not enough information to conclude that problems are systematic. The Constitution provides two general principles relevant to parental rights and responsibilities: equality before law and prohibition of discrimination (§ 12) and for the right and duty of parents to raise and care for their children (§ 27). The Family Law Act explicitly notes that the rights and obligations towards a child are determined based on the child’s filiation (§ 82) and parents have equal rights and obligations towards the child, regardless of whether parents are married or not (§§ 116-117). But there are no court cases or cases processed by non-judicial institutions that have involved custody issues in the light of a parent’s sexual orientation. LGBT organisations and activists have not observed a general practice of discrimination, although a couple of isolated cases have been referred to.\textsuperscript{94} However, none of them have reached the court or other state institutions.

The problem can be greater in instances where the same-sex couple have effectively raised a child who is a product of one of the partner’s previous heterosexual relationships or of artificial insemination or single-parent adoption. The second, non-biological or non-adopting

\textsuperscript{87} Grünberg, supra note 31, p 42.
\textsuperscript{88} Ibid.
\textsuperscript{90} Chancellor of Justice, 6-1/100737/1102413, supra note 85, para 48. See for more detail, Olm, supra note 82, pp 73-80.
\textsuperscript{91} V. Laur, Justiitsministeerium ootab arvamus kooseluseaduse konseptsiooni kohta (Ministry of Justice is waiting for opinions on the concept on cohabitation act), Ministry of Justice, 28 August 2012, available at: <http://www.just.ee/57148> (visited at 9 October 2012).
\textsuperscript{92} Artificial Insemination and Embryo Protection Act, §§ 21-22 – Kunstliku viljastamine ja embrüokaitse seadus, RT I 1997, 51, 824 ... RT I, 03.03.2011, 1.
\textsuperscript{93} M. Meiorg, Interview with Lisette Kampus, 26 January 2012; M. Meiorg, Telephone interview with Kristel Sit, 26 January 2012.
\textsuperscript{94} Meiorg, supra note 93.
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partner has no parental rights or responsibilities towards the child. He or she also loses certain tax exemptions and social benefits.\textsuperscript{95}

Adoption, joint or single, by openly homosexual persons is not possible in Estonia. Joint adoption by a same-sex couple is not provided for by law.\textsuperscript{96} The Family Law Act allows adoption by a single person of at least 25 years of age (§§ 148, 150) but in practice it has proven to be impossible for openly homosexual persons.\textsuperscript{97} Usually adoption procedures have not even been initiated after the social workers responsible have warned that they would probably not succeed. No cases have reached the court.

V. Respect for private and family life and access to health care – specific transgender issues

Paragraphs 20-22 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 that are abusive (including any of a physical nature), and ensure that transgender persons are able to marry once gender reassignment has been completed. Paragraphs 35-36 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.

It is important to highlight that the topic of gender reassignment is utterly unexamined both in the Estonian societal debate as well as academic research. Even the annual human rights reports, with one exception, have not explored the topic; the Annual Report of the Estonian Human Rights Centre from 2010 states that transgender persons in Estonia and their situation in the country has not received any attention.\textsuperscript{98} This means that the sources of information are limited, often only restricted to legislation and its interpretation by the executive bodies of the government.

The only organisation that has collected information on real-life cases and problems faced by transgender people in Estonia is Gendy, an NGO which advocates for transgender issues and supports people with alternative gender identities and their families. As this is a voluntary NGO, the data and case collection has not always been systematic and sufficiently detailed.\textsuperscript{99}

Next to the lack of systematic research, the legislation on the topic is scarce. The basis for all medical and legal acts regarding gender reassignment in Estonia are covered in the regulation ‘The common requirements for medical acts of sex change’ by the Minister of Social Affairs that was adopted already in 1999 and has remained basically unchanged ever since.\textsuperscript{100} According to the regulation, the Minister of Social Affairs assembles a committee of medical experts competent to decide about a person’s gender, they also grant permission for medical and surgical procedures necessary for gender reassignment. Furthermore, the decision of the committee will be the basis for legal change of gender and name. It is not clear, however, whether a completed surgery is a precondition.

\textsuperscript{96} Family Law Act, § 148. Also see Council of Europe, supra note 86, pp 97-98.
\textsuperscript{97} Meiorg, Interview with Lisette Kampus, supra note 93.
\textsuperscript{98} Käsper and Meiorg, Human Rights in Estonia 2010, supra note 78, p 142.
\textsuperscript{99} K.Grossthal, Telephone interview with Kristel Sitz, 29 July 2012.
\textsuperscript{100} Soovahetuse arstlike toimingute ühtsed nõudet, Regulation no 32 of the Minister of Social Affairs, RTL 1999, 87, 1087.
It is important to highlight that the regulation on ‘The common requirements for medical acts of sex change’ is somewhat contradictory, since § 4 explicitly states that the committee will make its decision regarding a person’s gender change after two years have passed since the beginning of the medical acts of sex change, yet § 3(2) states that gender reassignment surgery is not compulsory. In practice, this kind of vague and contradicting wording has given wide power to the committee to decide about a specific case and person.

Change of name is possible under § 15 of the Names Act that provides assigning a new name due to change of gender of a person. An individual who has undergone gender reassignment has the right to get a new personal identification code and new identity documents under the Identity Documents Act (§ 13(1.3)). In case of certificates of employment and insurance or banking documents, the new identification document is the basis for making changes in the documents at the person’s request.

The same kind of gray area exists regarding marriage According to the Family Law Act (§ 1(1)) marriage is contracted between a man and a woman.

The situation is more complicated for diplomas that have already been issued and for diploma duplicates with the changed personal data. The leaving certificates for primary and secondary schools are regulated by the Estonian Government Regulation on the Statute and Formats of Primary and Secondary School Leaving Certificates and the State-examination Certificate.101 The duplicate is issued by the headmaster of the school where the applicant was granted the leaving certificate. The leaving certificate with changed personal data could, according to some interpretations, be issued according to § 17(1.2) of the same regulation, which states that the owner can ask for the annulment of the original and request a duplicate if inaccuracies or errors in the formalization of the original document are established. At the same time, practice has not unequivocally favoured transgender people because the content of the provision leaves room for interpretation and there have been cases where the headmaster has not issued a duplicate with the new name.102

According to the Family Law Act (§ 1(1)) marriage is contracted between a man and a woman. The Ministry of the Interior has taken the stance that upon gender reassignment surgery and after a new identification document has been issued, marriage to a person of the opposite sex is possible.103 Neither the Human Rights Centre nor Gendy have information regarding the day-to-day practice or the refusal of right to marry.

The status of marriage after one of the spouses changes their gender can be argued, but the general interpretation is that according to the Family Law Act (§ 10 (1)) a marriage is void if persons of the same sex are married.

In respect of access to healthcare and possible limitations for gender reassignment procedures, the situation is somewhat conflicting between the legislation and practice. Estonian health insurance relies on the principle of solidarity. If a person is covered by health insurance, he or she has access to all health services according to the same conditions as everyone else.104 This means that ideally transgender people have access to services on the same basis as everyone who is covered by the Estonian Health Insurance Fund; this includes access to specialists according to the general waiting list. In reality, according to Gendy, there have been cases where individuals wishing to have gender reassignment surgery have been refused the procedure on the grounds that it was an aesthetic, not a medical matter.105

102 Grossth, Telephone interview with Sitz, supra note 99.
103 Erlenheim, supra note 13.
104 Ibid.
105 Grossth, Telephone interview with Sitz, supra note 99.
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.

LGBT people have extensive protection in the area of employment. Both ETA and GEA apply to this area, in addition to the Public Services Act and the Employment Contract Act. Protection covers access to employment, promotion, dismissals, pay, harassment and victimisation. The 2009 Eurobarometer demonstrated that 14% of the respondents believed that a candidate’s sexual orientation would influence his/her chances of getting hired by a company. It is therefore evident that the situation of LGBT persons in employment sector is in great need of a more forceful intervention. The Ministry of Social Affairs has not yet acted on the need to promote equal treatment.

No comprehensive review has been conducted or is planned to be conducted of laws, regulations and practices in armed forces in regard to LGBT discrimination. The Estonian Human Rights Centre is not aware of any measures, codes of conduct or training that would address specific protection needs of, and discrimination against, LGBT persons. In fact there is no information on the actual practice in armed forces and LGBT organisations have not received any complaints. There is not enough known of this area of employment to draw conclusions.

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.

There has been little research done on education and schools in relation to LGBT issues. LGBT issues are not directly part of the curriculum and schoolteachers have rarely been trained on the matter. Only some materials touch upon the subject of sexuality where different sexual orientations and gender identity issue is discussed.

Furthermore, school bullying and social exclusion have seldom been the topics of academic research in Estonia. By that reason there is a limited amount of information on the extent and causes of bullying and exclusion. Nonetheless, the media in Estonia has repeatedly covered the harshest instances of school and cyber bullying where young people have suffered from extended periods of humiliation or at extreme cases taken their own lives.

106 Special Eurobarometer 317, supra note 30.
In a recent study carried out among Estonian students (elementary and upper secondary school) more than 40% of the respondents stated that they have been victims of school bullying (twice the EU average). This 40% includes any kind of bullying.

The state has not paid special and systematic attention to bullying or possible humiliating treatment based on sexual orientation and gender identity; solving the situations has been left up to the teachers and schools. Currently there is no comprehensive strategy or action plan for resolving the situations. From the state side there are neither comprehensive trainings nor guidelines for teachers on how to recognize homophobic bullying and how to tackle it in order to guarantee the security and high quality of school life of the LGBT students. Even so, there are some examples of small yet much needed undertakings, for example the Education Department of the city of Tallinn has published comprehensive materials for teachers on what school bullying is and how to recognise it, briefly mentioning sexual harassment on the basis on sexual orientation on its website. Another positive trend is seen in the increasing number of schools that are interested in cooperation with ELGBTA, including participating in trainings and receiving materials provided by the organization.

VIII. Health - other than transgender specific health issues

Paragraphs 33-34 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 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.

In Estonia the approach that LGBT people could be of special interest within the topic of health, is relatively new. The official stance is that health-care and social workers are encouraged to take into consideration the individual needs of every person. Similarly, in general the Estonian medical system operates on the principle of non-discrimination based on the Constitution as well as the Equal Treatment Act. This means that all health-care services must be available to patients and respect everyone’s needs, no distinctions are made based on sexual orientation, but also that LGBT people are not specifically addressed nor dealt with.

This has led to the situation where LGBT organisations have basically been the only ones covering the topic of health of LGBT individuals (incl. sexual and reproductive health). Gendy has translated, compiled and collected materials on various health topics relating to transgender individuals and published these on their homepage. ELGBTA has published booklets on the health of lesbian and bisexual women (in Russian and Estonian) and sent it to various women’s and youth clinics. Although these bottom-up initiatives have been well received by the medical community, accepting and using these documents is voluntary and

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109 K. Grossthal, Interview with Helen Talalaev, 9 May 2012.
111 Grossthal, Interview with Talalaev, supra note 109.
112 See Section V above.
113 Erlenheim, supra note 13.
114 Ibid.
may leave many people in the target group out of the loop. For example, East-Tallinn Central Hospital replied to ELGBTA that they have no interest in receiving the booklet in question.116

According to the Health Services Organization Act § 41(2) data relating to the state of health of a data subject who is in hospital may be transmitted to or accessed by those closest to him or her, and the restriction is not connected to family or marital status, but only stipulated by the same paragraph and subsection in section 1 if the data subject has prohibited access to the data or transmission of data.117 It is the individuals not legal acts that define persons’ next of kin for medical emergencies. The Ministry of Social Affairs also states that no rules exist that would exclude someone as their “next of kin” based on sexual orientation or gender identity of either of them.118

In everyday life, according to representatives from SEKÜ, same-sex partners are rarely recognised as “next of kin” and there are specific problems regarding lesbian couples expecting children. Cases include a second mother being prohibited from being present at birth and a doctor stating that it was probably good that a miscarriage occurred since the baby would have had a difficult life with homosexual parents.119 Hence the problem in Estonia partly lies not with legislation but with the daily practices that still include prejudice among the highly educated medical personnel.

There are currently no legal Acts in Estonia that classify homosexuality as a disease and according to Estonian legislation sexual orientation or gender identity is not a medical diagnosis and, therefore, medical institutions have no right to confine anyone for that reason.120

IX. Housing

Section VIII of the Appendix requires that access to 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 provision of loans for purchase of housing, in recognition of the rights of a tenant’s partner, and in the case of evictions; also, 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.

The main issue regarding housing and LGBT in Estonian legislature is the existing difference between married spouses and partners who live together but are not married. In case of spouses, their rights and obligations are stated in the legislature. Non-married partners usually have no automatic rights or obligations towards each other and they must possess the same knowledge when dealing with their property and assets as any other participants in the legal system (i.e. contractual partners) who are not personally connected to each other.121

The Equal Treatment Act prohibits discrimination of persons on the grounds of nationality (ethnic origin), race or colour regarding access to and supply of goods and services, which are available to the public; this also includes housing. The problem is that this protection does not extend to sexual minorities.

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116 Grossthal, Interview with Talalaev, supra note 109.
118 Erlenheim, supra note 13.
119 FRA, supra note 75.
120 Erlenheim, supra note 13.
121 Olm, supra note 82, p 59.
Contractual obligations are covered under the Law of Obligations Act. In case of leases, the Act grants relevant legal rights only to spouses (§§ 289 and 321) but in Estonia, marriage can only be contracted between a man and a woman. Hence, it is problematic to protect the partner and children in a de facto partnership and one’s rights to continue the lease, if the partner mentioned in the lease should pass away.

Even though there are no provisions targeting the LGBT community in particular, to a certain extent, Estonian legislature protects people who cannot afford housing for economic reasons or who need temporary housing or shelter for socio-economic or other reasons. Under the Social Welfare Act, local government authorities are required to provide dwelling for persons or families who are unable or incapable of securing housing for themselves or their families, and to create, if necessary, the opportunity to lease social housing. The rural municipality council or city council establishes the procedure for provision and use of social housing. Persons who have difficulties moving about, caring for themselves or communicating in a dwelling are assisted by the rural municipality government or city government in adapting their dwelling or in obtaining a more suitable dwelling.

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.

Estonia has not adopted any LGBT-specific measures in the area of sports. Neither the Sports Act nor any other legal measure mentions such equal treatment or discrimination. The Kultuuriministeerium (the Ministry of Culture) has assured that all sports, sporting facilities, competitions and opportunities to sport are open to everyone regardless of their sexual orientation or gender identity. There is also no specific regulation on discriminatory insults during and in connection with sports events or homophobic and transphobic chanting at or around sports events. The general rules on incitement of hatred apply and Estonia has ratified the European Convention on Spectator Violence and Misbehaviour at Sports Events, which makes the Convention part of the Estonian legal system. Here again the Ministry assured that if homophobic and transphobic chanting occurs at or around sports events, the organisers of the sporting event and the Police or security firm would interfere and the offenders would be called to order or removed from the event. The Estonian Human Rights Centre has no information to confirm or deny the statements by the Ministry. There is a complete lack of statistics and case law on this topic. This has not been a priority for LGBT organisations so far.

XI. 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
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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 Act on Granting International Protection to Aliens does not explicitly mention sexual orientation or gender identity although nothing prevents these from being included in ‘a particular social group’. Indeed, the Ministry of Interior Affairs has, on multiple occasions, confirmed that sexual orientation and gender identity are recognised as a basis for well-founded fear of persecution, even though the Act itself fails to mention them. However, the officials at the International Protection Division of the Status Determination Bureau of the Police and Border Guard Board have not received any information on training specifically dedicated to LGBT issues.

The Act on Granting International Protection to Aliens does not allow an expulsion of asylum seekers to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment (§ 17 (1)). This general rule applies also to LGBT people. Estonian Human Rights Centre has no information on the occurrence of such prohibited expulsion of LGBT persons.

As a rule, asylum seekers in Estonia are not deprived of their liberty. They are generally placed into the reception centre as soon as possible, and as residents of the centre they are relatively free in their movement. The asylum seekers may only be temporarily detained under limited circumstances. The Act on Granting International Protection to Aliens foresees such detention either in the initial reception centre (which has not been established so far) or in the offices of the Police and Border Guard Board (§ 32). Asylum seekers can also be detained at the expulsion centre, the prison or the arrest chamber if he or she was there at the time of submitting the application for asylum (§ 33). None of the regulations applicable in these detention facilities include rules protecting from discrimination or physical and verbal violence based on person’s sexual orientation or gender identity.

XII. National Human Rights Structures

There are no national human rights institutions as accredited by the United Nations under the Paris Principles. The Chancellor of Justice and the Equal Treatment Commissioner are human rights institutions created by law and mandated to address discrimination.

128 Türkson, supra note Error! Bookmark not defined., p 3. See also Estonian Human Rights Centre, Global Rights, ILGA Europe and Seksuaalvähemuste Kaitse Ühing, supra note 2, p 12; FRA, Thematic Legal Study, supra note 75, para 58.
129 Türkson, supra note Error! Bookmark not defined., p 3.
Appendices

Appendix 1 – Definitions

Gender identity – person’s understanding and deeply felt experience of one’s gender, which may or may not correspond with the birth-sex. It includes the personal sense of the body and other expressions of gender such as dress, speech and mannerisms.

Hate crimes are crimes committed on grounds of the victim’s actual or assumed membership of a certain group, which is most commonly defined by race, religion, sexual orientation, gender identity, nationality, ethnicity, disability etc.

Hate-motivated incident is any incident or act – whether defined by national legislation as criminal or not – against people or property selected because of its real or perceived connection to a group. The term is broad enough to cover a range of manifestations of intolerance: from low-level incidents motivated by bias to criminal acts.

Hate speech is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including discrimination and hostility against minorities. It covers all forms of hate-motivated expression, irrespective of means of expression used, including the Internet and any other new media.

LGBT people or persons – lesbians, gays, bisexuals and transgender persons.

Sexual orientation refers to person’s emotional, affectional and sexual attraction to individuals of different gender (heterosexual) or the same gender (lesbian, gay) or to both (bisexual).

Transgender person – person whose gender identity does not correspond to the birth-sex.

Transsexual – widely used term to refer to transgender persons.

Transvestite (cross-dresser) – person who wears clothes associated with the opposite gender to his or her birth gender.
Appendix 2 – Text of the Recommendation

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.
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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.
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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,
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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.
Appendix 3 – The Compliance Documentation Report

The Compliance Documentation Report, which is the basis to the current report is available in full on the homepage of the Estonian Human Rights Centre at: http://humanrights.ee/en.
Appendix 4 – About Estonian Human Rights Centre

Estonian Human Rights Centre (EHRC) was established in October 2007 in the International University Audentes which then merged with Tallinn Law School, Faculty of Social Sciences, Tallinn University of Technology. It was established with the support of the Estonian Minister of Population Affairs. In January 2011 the EHRC became independent from the university as a public interest foundation dedicated to the advancement of protection of human rights in Estonia and abroad. The non-profit foundation was founded by Kari Käsper and Marianne Meiorg, who currently serve as Members of Executive Board of EHRC.

The mission of EHRC is to actively promote respect for human rights in Estonia. EHRC advocates the improvement of policy and law concerning human rights through awareness-raising, public debate, advice, lobbying and strategic litigation. EHRC is an independent, reliable and professional partner to individuals, government, local governments, companies and non-governmental organisations both inside and outside of Estonia.

The vision of EHRC is to become a comprehensive and sustainable national human rights NGO. It will be a contact-point both inside as well as outside Estonia in human rights issues concerning primarily Estonia.

EHRC develops its activities according to thematic programmes depending on the societal need. These thematic programmes and main activities within them currently are:

- **Equal treatment and non-discrimination programme**, including providing regular advice to individuals, providing trainings, conducting thematic studies and multi-year major public-awareness campaign "Diversity enriches" (in cooperation with Tallinn University of Technology);
- **Refugee programme**, including legal clinic providing legal aid and representation in court during asylum procedures as well as participating in and initiating public debates;
- **Human rights education programme**, including Human Rights Week in November/December annually since 2007, providing trainings and human rights courses at Tallinn University of Technology, cooperation with UNESCO Associated Schools Project Network (ASPnet).
- **Access to justice programme** will be developed in 2012 to monitor and advocate better access to justice, including state legal aid, length of proceedings and provide information and advice on access to justice in the Russian language.

The activities so far have also included the following cross-cutting actions:

- **Monitoring the situation of human rights in Estonia** - eg. publication of annual human rights report on Estonia. First one covered 2007, next 2008-2009 and third one 2010, the report on 2011 is expected to be published in March 2012. Studies on specific topics (such as homophobia, child trafficking, data protection, racial discrimination, return of irregular immigrants) of fundamental rights for the EU Fundamental Rights Agency and participation in ELDIA (European Language Diversity for All) project on minority languages.
- **Exchange of information among different stateholders** - eg. EHRC participating in the roundtable gathering different human rights organisations in Estonia and different consultative bodies, EHRC commenting on the drafts of state reports for UN and Council of Europe, EHRC cooperating with different Estonian and international organisations acting on specific areas of human rights;
- **Topical advocacy activities** - eg. participating in public discussions with human rights aspects, supporting initiatives such as legal regulation of same-sex partnerships, compiling shadow reports to state reports where necessary and
otherwise providing information on the situation of human rights to international organisations and other states.