Strasbourg, 4 February 2022

To the attention of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity,

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| **Ref:** | **Contribution of the Sexual Orientation and Gender Identity Unit of the Council of Europe to the report on the realisation of the right of persons affected by violence and discrimination based on sexual orientation and gender identity to the enjoyment of the highest attainable standard of physical and mental health, in relation to SDG3** |

Dear Victor Madrigal-Borloz,

I am pleased to hereby respond to the call for inputs for your thematic report on the realisation of the right of persons affected by violence and discrimination based on sexual orientation and gender identity to the enjoyment of the highest attainable standard of physical and mental health, in relation to SDG3.

Please find attached the contribution of the Sexual Orientation and Gender Identity Unit of the Council of Europe to the above-mentioned report.

The Sexual Orientation and Gender Identity Unit of the Council of Europe remains at your disposal for further assistance in this matter.

Yours sincerely,

Eleni Tsetsekou

Head of Sexual Orientation and Gender Identity Unit

**Contribution of the Sexual Orientation and Gender Identity Unit of the Council of Europe to the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on the realisation of the right of persons affected by violence and discrimination based on sexual orientation and gender identity to the enjoyment of the highest attainable standard of physical and mental health, in relation to SDG3**

The Council of Europe is an intergovernmental organisation aimed at promoting the respect of human rights, democracy and the rule of law among its member States. According to its standards, member States have an obligation to provide access to the highest attainable standard of health. The principle of non-discrimination requires that this must be provided to all persons under a state’s jurisdiction irrespective of, among other grounds, their sexual orientation, gender identity or expression and sex characteristics.

This contribution reviews the most relevant health-related standards of the Council of Europe (I), presents the relevant findings of the reviews of the implementation of the Recommendation CM/Rec(2010)5 to member States on measures to combat discrimination on grounds of sexual orientation or gender identity (II) and provides a selective overview of the conclusions, recommendations and case-law of its monitoring mechanisms (III).

1. **Health-related standards of the Council of Europe**

The [European Social Charter](https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=163) (the Charter), the human rights treaty on social and economic rights, guarantees the right to protection of health in Article 11 which complements Articles 2, 3 and 8 of the [European Convention on Human Rights](https://www.echr.coe.int/Documents/Convention_ENG.pdf), as interpreted by the European Court of Human
Rights[[1]](#footnote-1), by imposing a range of positive obligations designed to secure its effective exercise.States Parties to the Charter must ensure the best possible state of health for the population according to existing knowledge and must provide access to health care to everyone on a non-discriminatory basis[[2]](#footnote-2).

In addition, Article 3 of the [Convention on Human Rights and Biomedicine](https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=164)[(the Oviedo Convention),](https://www.coe.int/en/web/bioethics/home)aims at ensuring equitable access to health care, which is particularly relevant in the light of the COVID-19 pandemic.

The [Recommendation CM/Rec(2010)5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a) to member States on measures to combat discrimination on grounds of sexual orientation or gender identity[[3]](#footnote-3) (the Recommendation), which is the first instrument in the world dealing specifically with one of the most persistent and difficult forms of discrimination, contains a chapter dedicated to health[[4]](#footnote-4). Member States are requested to adopt measures ensuring effective enjoyment of the highest attainable standard of health care without discrimination on grounds of sexual orientation or gender identity.

In its resolutions, the Parliamentary Assembly of the Council of Europe (PACE) has also called on member States to provide effective protection against discrimination on grounds of gender identity in access to health care[[5]](#footnote-5) and to ensure that intersex people have effective access to health care throughout their lives[[6]](#footnote-6). Furthermore, PACE called on member States to ensure access by LGBTI children to quality education by promoting respect and inclusion of LGBTI persons and the dissemination of objective information about issues concerning sexual orientation and gender identity[[7]](#footnote-7).

1. **Reviews of the implementation of the Council of Europe’s Recommendation CM/Rec(2010)5 to member States on measures to combat discrimination on grounds of sexual orientation or gender identity**

When adopting the Recommendation, the Committee of Ministers agreed to periodically review its implementation. A comprehensive review of the implementation of the Recommendation is carried out every four years (A). In addition, since 2021, the Steering Committee on Anti-discrimination, Diversity and Inclusion (CDADI) has decided to complement the comprehensive reviews of the implementation of Recommendation with annual thematic reviews of one of the twelve themes covered by it (B).

1. **Second comprehensive review of the implementation of the Recommendation (2018)**

The Steering Committee for Human Rights (CDDH) adopted the first report on the implementation of the Recommendation in 2013[[8]](#footnote-8) and the second report in 2019[[9]](#footnote-9).

The second review covering 2014-2018 examined the extent to which legislation of member States complies with the Recommendation and considered the measures (or lack thereof) implemented in the fields of access to high-standard health care and transgender specific health care and intersex rights protection.

A majority of 34 responding States reported having measures in place to ensure the enjoyment of the highest attainable standard of health without discrimination on grounds of sexual orientation and gender identity (SOGI), in comparison with 22 States in the 2013 Review. Nevertheless, only a few States had adopted measures specifically referring to SOGI. In practice, non-discriminatory and effective access to health care for LGBT persons seemed to remain a challenge in all member States.

25 States indicated that the specific needs of LGBT persons were taken into consideration in national health plans. These included suicide prevention measures (Belgium – depending on the community, France, Ireland, Norway and the United Kingdom), health surveys, medical curricula and training courses, and materials (Belgium – depending on the community, Denmark, France, Germany, Ireland, the Netherlands, Norway, Poland and Sweden).

Transgender specific health care services were reported as existing by 26 States. Finland and the United Kingdom mentioned the existence of specialised transgender specific health care providers. However, in most States, specialised mental health, endocrinological and surgical services appeared to be inadequate in terms both of quality and availability, often having personnel lacking specific training on transgender persons’ requirements. Positive measures were adopted by France, Ireland, the Netherlands, Norway, Portugal and Sweden. However, there were discrepancies between State replies and other monitoring reports, particularly regarding asylum seekers.

Most responses argued that specific cost coverage required diagnosis of an “illness” condition. However, specific health care needs of transgender persons can and should be met, similarly to other non-pathologising codes which do not require a diagnosis of ill health, such as preventive health care interventions, vaccinations or pregnancy. By 2018, reimbursement of transgender specific health care was guaranteed in 17 member States and partially in six others.

Generally, responses highlighted the existence of legislation providing that no medical intervention should be performed without written, free and informed patient consent. However, specific legal regulations on patient consent to sex-reassignment surgery appear to be non-existing in the majority of responding States. In addition, access to transgender specific health care in most countries is conditional on the health care providers’ criteria, rather than the patient’s decision and informed consent. In regard to underage persons, the right of the child to participate in decisions according to their age and maturity often conflicts with parental rights. A worrying consequence is the rights of underage transgender persons not being respected and their access to care being denied.

13 countries[[10]](#footnote-10) still required sterilisation as a precondition to legal gender recognition procedures. This requirement directly affects transgender persons’ rights, equally in relation to transgender specific health care, as it often determines how transgender specific health care is set up and reimbursed.

The practice of “sex-normalising” surgeries on intersex children is still a particularly problematic issue. By 2018, such surgeries have only been banned in Malta, Portugal and Spain (regionally)[[11]](#footnote-11). In the vast majority of countries, no explicit prohibition to perform the surgery without the child’s consent exists.

Concerning conversion therapies, Ireland, Norway, Spain and the United Kingdom[[12]](#footnote-12) submitted specific remarks on this issue in their replies, while no specific prohibition or criminal or civil sanction appears to be in place in the large majority of States.

1. **Thematic review of the implementation of the Recommendation (2021)**

The first thematic review focused on legal gender recognition. It gathered in-depth information and opened up an informed dialogue on legal gender recognition at national level thanks to the drawing up of national reports, the holding of multi-stakeholders roundtables and the issuance of recommendations in each of the participating countries. In addition, a thematic report on legal gender recognition in Europe has been prepared and will be examined for adoption by the CDADI at its next plenary meeting in March 2022[[13]](#footnote-13).

The draft report provides an overview of the state of play of national legislation on legal gender recognition in Europe, a summary of the development of international standards and examples of good practices to empower stakeholders in addressing the human rights concerns of LGBTI persons. It also highlights some issues for further attention, such as the pathologisation of the legal gender recognition procedures in the majority of the member States and, provides recommendations to the attention of the member States. In line with these recommendations, member States should ensure that transgender specific health care (hormonal treatment, surgery and psychological support) is accessible and are invited to ensure that it is reimbursed by the public health insurance schemes.

1. **Conclusions, recommendations and case-law of the Council of Europe’s monitoring mechanisms**

The [European Court of Human Rights](https://echr.coe.int/Pages/home.aspx?p=home) (ECHR) has developed a significant body of case-law determining the nature and scope of LGBTI persons’ rights under the European Convention on Human Rights (the Convention) and the duties of the domestic authorities in their regard[[14]](#footnote-14).

The ECHR has examined the largest number of cases involving the problems faced by transgender persons whose right to personal development and to physical and moral security is guaranteed by Article 8 of the Convention[[15]](#footnote-15). In particular, the ECHR held that making the recognition of transgender persons’ gender identity conditional on sterilisation surgery or treatment constitutes a violation of the right to respect for private life[[16]](#footnote-16). Furthermore, in its most recent judgment on this matter, *X. and Y. v. Romania[[17]](#footnote-17)*, the ECHR provided one step towards granting autonomy to transgender persons: it established that conditioning legal gender recognition to sex reassignment surgery in a case where the applicants refused such surgery on the ground of the invasiveness of the medical procedure itself, regardless of its impact on fertility, breaches Article 8 of the Convention.

The [European Committee of Social Rights](https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights) (ECSR) has issued important conclusions and decisions on member States’ obligations with respect to the rights enshrined in the Charter, including on the right to protection of health. In its Conclusions 2017[[18]](#footnote-18), the ECSR mainly assessed the right to protection of health of transgender persons. Recently, during its 325 session (24-28 January 2022), the ECSR adopted new conclusions on the right to protection of health which will be made public at the end of March 2022[[19]](#footnote-19).

By decision of 30 March 2009, on the merits of the complaint *Interights v. Croatia[[20]](#footnote-20)*, the ECSR found a violation of Article 11§2 of the Charter due to the discriminatory statements in the educational material used in the ordinary school curricula which contained homophobic statements. Furthermore, by decision of 15 May 2018, on the merits of the complaint *Transgender Europe and ILGA-Europe v. the Czech Republic*[[21]](#footnote-21), the ECSR concluded that there was a violation of Article 11§1 of the Charter due to the requirement of sterilisation imposed on transgender persons wishing to change their personal documents so that they reflect their gender identity.

The [European Commission against Racism and Intolerance](https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/home) (ECRI) has been addressing discrimination against LGBTI persons in the context of its country monitoring work since 2013, when it initiated its fifth country monitoring cycle. In its reports, ECRI recommended, *inter alia*, that the authorities draw up and adopt action plans to combat homophobia and transphobia in all areas of everyday life, including health care, and that they provide awareness-raising and training for health care staff enabling them to deal with the specific questions raised by LGBTI persons[[22]](#footnote-22).

ECRI also recommended that intersex children’s right to physical integrity and bodily autonomy should be effectively protected. Medically unnecessary sex-“normalising” surgery and other treatments of the kind should be prohibited until such time as the child is able to participate in the decision, based on the right to self-determination and on the principle of free and informed consent. Where it does not already exist, the authorities should swiftly enact legislation that prohibits unnecessary surgery and therapies on intersex persons. They should also establish services with
low-threshold access that provide counselling and assistance to intersex persons and their parents[[23]](#footnote-23).

In her latest issue paper[[24]](#footnote-24), the [Commissioner for Human Rights](https://www.coe.int/en/web/commissioner) (the Commissioner) noted that LGBTI persons experience multiple, diverse barriers to accessing health care throughout Europe, which exacerbate inequalities and discrimination, ultimately impacting negatively on both their physical and mental health. LGBTI persons are at higher risk of poor mental health including higher rates of suicidal thoughts, anxiety and deliberate self‐harm stemming from intersecting vulnerabilities and discrimination. Therefore, the Commissioner recommended member States to proactively remove existing barriers to inclusive and non-discriminatory access to health with a view to safeguarding effectively the health rights of all persons.

Furthermore, the Commissioner also emphasised that comprehensive sexuality education is a powerful tool to combat violence, abuse and discrimination and to promote respect for diversity. By providing factual, non-stigmatising information on sexual orientation and gender identity as one aspect of human development, comprehensive sexuality education can help save lives. It can contribute to combating homophobia and transphobia, at school and beyond, and to creating a safer and more inclusive learning environment for all[[25]](#footnote-25).

1. While the European Convention on Human Rights does not specifically guarantee a right to health, health-related cases have been brought before the European Court of Human Rights and have most frequently been argued under Article 2 (right to life), Article 3 (prohibition of torture and inhuman and degrading treatment or punishment) and Article 8 (right to respect for private life). [↑](#footnote-ref-1)
2. See also, European Committee of Social Rights, *Statement of interpretation on the protection of the right to health in times of pandemic*, 21 April 2020, available at: <https://bit.ly/3L0JUlB> [↑](#footnote-ref-2)
3. Adopted by the Committee of Ministers on 31 March 2010. [↑](#footnote-ref-3)
4. See also, Steering Committee for Human Rights, *Explanatory Memorandum to the Recommendation CM/Rec(2010)5*, Chapter VII on Health, available [here](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf450). [↑](#footnote-ref-4)
5. PACE, [Resolution no. 2045 (2015)](https://pace.coe.int/en/files/21736/html), *Discrimination against transgender people in Europe*, 22 April 2015. [↑](#footnote-ref-5)
6. PACE, [Resolution no. 2191 (2017)](http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232), *Promoting the human rights of and eliminating discrimination against intersex people*, 12 October 2017. [↑](#footnote-ref-6)
7. PACE, [Resolution no. 2097 (2016)](http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22510), *Access to school and education for all children*, 29 January 2016. [↑](#footnote-ref-7)
8. CDDH, 77th meeting (19-22 March 2013), CM(2013)36-add2, available [here](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c859a). [↑](#footnote-ref-8)
9. CDDH, 92nd meeting (26–29 November 2019)**, CM(2020)4-final, available** [here](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809f9ba0)**.**  [↑](#footnote-ref-9)
10. The current number of member States requiring sterilisation stays the same. [↑](#footnote-ref-10)
11. In addition, Germany has also banned such surgeries in 2021. [↑](#footnote-ref-11)
12. More recently, Germany, Albania and France have banned conversion therapies. [↑](#footnote-ref-12)
13. Once the report has been adopted, it will be made available to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. [↑](#footnote-ref-13)
14. Registry of the European Court of Human Rights, *Guide on the case-law of the European Convention on Human Rights: LGBTI rights*, 31 December 2021, available at: <https://echr.coe.int/Documents/Guide_LGBTI_rights_ENG.pdf> [↑](#footnote-ref-14)
15. See, *inter alia*, *[Van Kück v. Germany](https://hudoc.echr.coe.int/eng?i=001-61142)*, no. 35968/97, 12 June 2003, § 69; *[Schlumpf v. Switzerland](https://hudoc.echr.coe.int/eng?i=001-90476)*, no. 29002/06,
8 January 2009, § 100; *[Y.Y v. Turkey](https://hudoc.echr.coe.int/eng?i=001-153134)*, no. 14793/08, 10 March 2015, § 58. [↑](#footnote-ref-15)
16. ECHR, *[A.P., Garçon and Nicot v. France](https://hudoc.echr.coe.int/eng?i=001-172913)*, nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, §§ 131-135. [↑](#footnote-ref-16)
17. ECHR, *[X. and Y. v. Romania](https://hudoc.echr.coe.int/eng?i=001-207364)*, nos. 2145/16 and 20607/16, 19 January 2021, §§ 161-167. [↑](#footnote-ref-17)
18. Available at: [HUDOC-ESC (coe.int)](https://hudoc.esc.coe.int/eng/%22%20%5Cl%20%22%7B%22sort%22%3A%5B%22ESCPublicationDate%20Descending%22%5D%2C%22ESCArticle%22%3A%5B%2211-00-000%22%2C%2211-01-000%22%2C%2211-02-000%22%2C%2211-03-000%22%5D%2C%22ESCCycle%22%3A%5B%222017%22%5D%2C%22ESCDcType%22%3A%5B%22Conclusion%22%5D%7D) [↑](#footnote-ref-18)
19. Please consult this webpage: <https://bit.ly/3s8nwhc> [↑](#footnote-ref-19)
20. ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, complaint
no. 45/2007, 30 March 2009, available at: <https://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en> [↑](#footnote-ref-20)
21. ECSR, *Transgender Europe and ILGA-Europe v. the Czech Republic*, complaint no. 117/2015, 15 May 2018, available at: <https://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en> [↑](#footnote-ref-21)
22. See, for example, ECRI, *Compilation of ECRI country reports recommendations pertaining to LGBT persons*
(5th monitoring cycle), available at: <https://bit.ly/3IXD5iV> and ECRI, *Factsheet on LGBTI issues*, 1 March 2021, available at: <https://bit.ly/3IPc0OL> [↑](#footnote-ref-22)
23. ECRI, 6th cycle report on [Switzerland](https://rm.coe.int/ecri-report-on-switzerland-sixth-monitoring-cycle-/16809ce4bd), § 23; ECRI, 6th cycle report on [Austria](https://rm.coe.int/report-on-austria-6th-monitoring-cycle-/16809e826f), § 31; ECRI, 6th cycle report on [Germany](https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be), § 34; See also, Commissioner for Human Rights, Issue paper, *Human rights and intersex people*, 2015, available at: <https://bit.ly/3Hi55gC> [↑](#footnote-ref-23)
24. Commissioner for Human Rights, Issue paper, *Protecting the right to health through inclusive and resilient health care for all*, February 2021, pp. 20-21, available at: <https://bit.ly/34kAdNR> [↑](#footnote-ref-24)
25. Commissioner for Human Rights, Human Rights Comment, *Comprehensive sexuality education protects children and helps build a safer, inclusive society*, 21 July 2020, available at: <https://bit.ly/3ugrqHS> ; See also, Venice Commission, *Opinion no. 1059/2021 regarding Hungary on the compatibility with international human rights standards of Act LXXIX amending certain acts for the protection of children*, 13 December 2021, available at: <https://bit.ly/3gcOXkx> [↑](#footnote-ref-25)