**The Expert Group on Health and Rights of Gays and Other MSM in Ukraine**

**Human Rights Violations**

**on the Grounds of Sexual Orientation and**

**Gender Identity in Ukraine**

**Shadow Report**

**To the UN Human Right Committee for consideration at 127th session**

**List of issues to be taken up in connection with the consideration of the eighth periodic report of Ukraine**

**Submitted by**:

The Expert Group on Health and Rights of Gays and Other MSM in Ukraine (EGHR-Ukraine)

**Contact person**:

Andrii Zarytskyi

E-mail: andrii.zarytskyi@gmail.com

Phone: +380 50 3189696

**Kyiv, Ukraine, August 2019**

Contents

[**List of terms and abbreviations** 3](#_Toc18073839)

[**I. Introduction** 4](#_Toc18073840)

[**II. List of issues** 4](#_Toc18073841)

[**Article 2, Article 26 of the ICCPR** 4](#_Toc18073842)

[**Article 2, Article 17, Article 21 of the ICCPR** 10](#_Toc18073843)

# **List of terms and abbreviations**

**Action Plan** – the Action Plan to Implement the National Strategy on Human Rights for the Period until 2020 approved by the Ukrainian Government

**CCU** – the Criminal Code of Ukraine

**EGHR-Ukraine** – the Expert Group on Health and Rights of Gays and Other MSM in Ukraine

**ICCPR** – International Covenant on Civil and Political Rights

**LGBT** – lesbians, gays, bisexuals, and transgender persons

**MSM** – men who have sex with men

**SOGI** – sexual orientation and gender identity

# **I. Introduction**

1. This report is prepared by the Expert Group on Health and Rights of Gays and Other MSM in Ukraine (EGHR-Ukraine). The document describes the current situation with ensuring and observing the human rights of LGBT people in Ukraine provided for in the International Covenant on Civil and Political Rights.

2. The Ukrainian Government has achieved a significant success in ensuring protection of LGBT people's rights in recent years. For instance, the general anti-discrimination legislation has been adopted in 2014 with several amendments made in the next years. Since November 2015, any discrimination on the grounds of SOGI in employment has been prohibited. The Ministry of Health in 2016 adopted a series of documents that repealed most abusive or disproportionate requirements for legal recognition of a gender reassignment and limited medical procedures for transgender people by their own choice.

3. However, some of the recommendations made by the Human Rights Committee for the Ukrainian government to ensure protection of LGBT people's rights have not yet been implemented. To solve problems in ensuring and observing human rights in Ukraine, in November 2015 the Government of Ukraine adopted the Action Plan[[1]](#footnote-1) on Human Rights which includes about 20 provisions specifically relevant to rights and interests of LGBT people. The Action Plan as a whole was supposed to be implemented by the end of 2020, and its LGBT components – by the end of 2018, but to date only about 25-30% of those provisions have been implemented. Moreover, the Government has repeatedly tried to adopt amendments to the Action Plan that would formally or effectively repeal many of those provisions which remain still unimplemented.

4. In cases when sources are not indicated in the report, information was provided by the experts who are the members of the EGHR-Ukraine.

# **II. List of issues**

## **Article 2, Article 26 of the ICCPR**

5. In Para. 8 of Concluding observations on the seventh periodic report of Ukraine (CCPR/C/UKR/CO/7)[[2]](#footnote-2),

*the Committee is concerned that sexual orientation and gender identity are not explicitly included in the non-exhaustive list of grounds of protection in the anti-discrimination law […] The State party should explicitly list sexual orientation and gender identity among the prohibited grounds for discrimination […]*

6. Similar recommendations were given to the Ukrainian government during the previous sessions of the Universal Periodic Review, second[[3]](#footnote-3) and third[[4]](#footnote-4) cycles, which Ukraine has not implemented to the date.

7. The Government of Ukraine has repeatedly ignored this recommendation that was made not only by the Committee but also by other international organizations, particularly by experts of the European Commission against Racism and Intolerance.[[5]](#footnote-5) Though the Government included in the Action Plan a provision on amending the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine" to bring the list of grounds on which discrimination is prohibited, including the prohibition of discrimination on grounds of SOGI etc., in line with the provisions of the EU legislation (Action 1, Para. 105), it has not been implemented yet. In its official replies, the Ministry of Justice informed that they did not plan to introduce in the parliament a bill that would explicitly include grounds of SOGI in the list of characteristics prohibited from discrimination in the basic anti-discrimination law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine".

8. The Ukrainian Government in its Eighth periodic report (CCPR/C/UKR/8) claims that[[6]](#footnote-6)

*In accordance with the Constitution of Ukraine, there shall be no privileges or restrictions based on race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence, linguistic or other characteristics.*

*[…]*

*Article 161 of the Criminal Code of Ukraine establishes responsibility for violation of citizens’ equality based on race; colour of skin; political, religious and other convictions; sex; ethnic and social origin; property status; place of residence; and linguistic or other characteristics.*

9. However, even the above-mentioned open list of protected characteristics (taken from Article 24 of the Constitution of Ukraine[[7]](#footnote-7)) does not mean that any characteristic, which is not included in this list explicitly, is protected from discrimination. For instance, there is a Judgement No. 8-рп/2007 from 16 October 2007 of the Constitutional Court of Ukraine[[8]](#footnote-8), which states (Para. 3.4) that the characteristic of age (not mentioned in the Article 24) may not be regarded as one of "other characteristics" mentioned in the Constitution. In Ukraine, only the Constitutional Court has the right to obligatory interpretation of the constitutional provisions.

10. Draft law 3501[[9]](#footnote-9) of 20 November 2015 “**On Amendments to Certain Laws of Ukraine (regarding harmonization of legislation in the field of preventing and counteracting discrimination with the Law of the European Union)**”, which is mentioned in Para. 6 of CCPR/C/UKR/8, also does not include explicitly grounds of SOGI in the list of protected characteristics.

**11. Thus, considering the absence of explicit mentioning of SOGI characteristics in Article 24 of the Constitution, the general anti-discrimination legislation, or a decision of the Constitutional Court, these characteristics may not be considered as legally protected from discrimination (taking into account an example about age characteristic mentioned above).**

12. Meanwhile, discrimination on the grounds of SOGI is considered by society as one of the most widespread forms of discrimination in Ukraine. For instance, in sociological survey conducted by the Ilko Kucheriv Democratic Initiatives Foundation in cooperation with the Human Rights Information Centre and with support from the United Nations Development Programme in Ukraine, 24.9% of the respondents chose sexual orientation as a ground on which people usually experience discrimination in Ukraine – the third most frequently mentioned ground after age (39.7%) and disability (32.1%).[[10]](#footnote-10)

13. In Para. 10 of CCPR/C/UKR/CO/7,

*The Committee is concerned at reports of discrimination, hate speech and acts of violence directed at lesbian, gay, bisexual and transgender (LGBT) persons and violation of their rights to freedom of expression and assembly. […] The State party should therefore state clearly and officially that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transsexuality, or hate speech, discrimination or violence against persons because of their sexual orientation or gender identity. The State party should provide effective protection to LGBT persons and ensure the investigation, prosecution and punishment of any act of violence motivated by the victim’s sexual orientation or gender identity. It should also take all necessary measures to guarantee the exercise in practice of the rights to freedom of expression and assembly of LGBT persons and defenders of their rights.*

14. The Ukrainian Government in CCPR/C/UKR/8 replies that

*In 2012, three criminal cases committed on the basis of racial, national, religious violence and hatred were investigated. In 2015–2017, the number of criminal cases opened in this category increased to 229. Of these, 11 were sent to the court as indictments. In 2018, 154 cases of alleged crimes committed on the basis of hatred are currently in progress, covering alleged crimes committed in previous years. Since 2015, five convictions have been made.*

*[…]*

*The Kyiv Pride equality march, initiated by Ukrainian Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) activists, has been held in Ukraine every year since 2012[[11]](#footnote-11). Seven criminal cases have been initiated on the basis of suspected offences committed in 2017: one of these is pending before court and three are at the stage of pre-trial investigation.*

15. According to the definition proposed by the OSCE, "Hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people."[[12]](#footnote-12) Hence, a hate crime is an ordinary criminal offence but committed because of prejudice against a particular group of people united by some common characteristics (and not against some specific or, conversely, any random person). The reason for the allocation of hate crimes as a separate category of offences is their special danger, therefore, their more serious consequences for their victims and society as a whole.

16. The specific penalties for hate crimes are contained in the Criminal Code of Ukraine. Parts two of Articles 115 "Murder", 121 "Intended grievous bodily harm", 122 "Intended moderate bodily harm", 126 "Beating and torments", 127 "Tortures", and 129 "Threats of murder" provide enhanced penalties for committing the corresponding offences "under motives of race, national or religious intolerance" – thus, they criminalize hate crimes, but only on three, so to speak, "standard" grounds.

17. Paragraph 3 of Part 1 of Article 67 "Aggravating circumstances" recognizes as such circumstances "committing crime on basis of racial, national or religious enmity or discord, or on basis of sex." This allows to consider such an act as a hate crime and to assign enhanced penalties for any crime (other than those provided for in the above-mentioned articles of the Criminal Code) committed under motives of bias to the same three standard characteristics of "race", nationality (ethnicity) and religious beliefs, as well as characteristic of sex (i.e. gender).

18. Motives of intolerance on grounds of SOGI are not mentioned in the Criminal Code of Ukraine (CCU)[[13]](#footnote-13) as aggravating circumstances in committing a crime. Thus, crimes motivated by homo/transphobia are not recognized as hate crimes in the Ukrainian criminal legislation and do not inflict enhanced penalty for the perpetrator.

19. Meanwhile, crimes motivated by intolerance on SOGI grounds are among the most widespread forms of hate crimes in Ukraine according to the data reported both by the police and independent observers. Thus, in 2017 the National Police of Ukraine reported to the OSCE about 17 hate crimes on SOGI grounds while independent observers reported about 110 of such incidents.[[14]](#footnote-14)

20. The only possible way to take motives of homo/transphobia into account in the Criminal Code of Ukraine is Article 161 "Violation of citizens' equality based on their race, nationality, religion, disability, and other grounds" that provides for the punishment for incitement of national, racial or religious hatred (closed list of grounds) as well as discrimination – "direct or indirect restriction of rights or direct or indirect establishment of privileges on grounds of race, skin colour, political, religious and other beliefs, sex, disability, ethnic or social origin, property status, place of residence, language or other characteristics" (open list of grounds). Considering that the hate crimes may be regarded as an extreme form of direct or indirect restriction of rights, investigators, courts and, very rarely, prosecutors can conduct investigation of motives of bias (intolerance) on grounds, which are explicitly protected from crimes in Article 161 as well as on other grounds that the wording of this provision allows. This wording, however, does not allow to prosecute for incitement of hatred of SOGI grounds.

21. The Ukrainian police and courts sometimes try to investigate bias motivation in such hate crimes, but it happens very rarely under the initiative of the police and judiciary themselves – usually, it requires persistent efforts by the victims or human rights activists who help them. As an example, we can mention the investigation of the beating of two young gay men in Kyiv Hidropark in summer 2017. To protect the rights of the attack's victims, NGO LGBT Human Rights Nash Mir Center hired a lawyer who along with the Center's experts were involved in the investigation of the case and subsequent trial. During the investigation of the case, the investigators obviously did not want to consider possible homophobic motives of the crime or to qualify it properly. Only after lodging a complaint to the investigative judge the corresponding decision was taken and the relevant information was introduced into the Unified Register of Pre-trial Investigations, whereby a criminal proceeding has commenced under Article 161 of the CCU. The investigator, who was assigned to conduct the investigation under the mentioned article in a separate proceeding, took no steps to verify the information present (at least, neither victims nor their lawyer was informed of such steps). Repeated complaints of the victims’ lawyer about the inaction of the investigator to his leadership and the local Prosecutor's Office remained without proper replies.

22. There has been no precedent when investigation of crimes motivated by homo/transphobia under Article 161 of the CCU led to conviction of the accused persons.

23. The Action Plan contains Action 3 of Para. 105 which provides for, in particular, till the 2nd quarter of 2016

*developing and submitting to the Cabinet of Ministers of Ukraine a bill to amend the Criminal Code of Ukraine regarding:*

*deletion of the part that criminalizes discrimination (direct or indirect restrictions of the rights or establishment of direct or indirect privileges on grounds) from Article 161 of the Criminal Code of Ukraine along with appropriate amendments to the Code of Administrative Offences of Ukraine and to the Civil Code of Ukraine providing for fines, compensation of losses, etc.*

*providing punishment for crimes committed under motives of intolerance on such grounds as race, skin colour, religious beliefs, sexual orientation, transsexuality, disability, language (amendments to Paragraph 3 of Article 67, Parts 2 of Articles 115, 121, 122, 126, 127, 129, Article 293)*

24. It is worth to note that while the above-mentioned Draft law 3501 makes amendments in Article 161 that decriminalize discrimination, to date no bill has been developed and introduced in the parliament to criminalize hate crimes on grounds of SOGI. Thus, if Draft law 3501 is adopted by the Verkhovna Rada of Ukraine, it will remove the only possible way to prosecute crimes motivated by homo/transphobia as hate crimes under Ukrainian legislation.

***25. Considering the abovementioned issues, the EGHR-Ukraine recommends the Committee to:***

* **request whether the State party plans to explicitly include sexual orientation and gender identity as protected grounds in the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine";**
* **request whether the State party plans to amend the Criminal Code providing punishment for crimes committed under motives of intolerance on grounds of SOGI.**

## **Article 2, Article 17, Article 21 of the ICCPR**

26. While the police quite effectively protect from homophobic violence such noted LGBT events as the Equality Marches in Kyiv and Odesa, they often ignore attacks on lesser events as well as LGBT organizations and individual activists. The cases of violence and attacks on LGBT activists and organizations are still at large in Ukraine. Investigation of such assaults is usually conducted as ineffectively as in cases of other crimes on the grounds of homo/transphobia.

27. For instance, the main office of LGBT Association ‘LIGA’ (from Mykolaiv, South of Ukraine) was twice visited by aggressive nationalist youth in 2019 – on 21 February and 2 May. In February, four young men from supposedly the youth department of the nationalist organization Right Sector came to the community centre of LIGA demanding to give them any national and LGBT-related symbols and clothes which might have been in the organization’s possession claiming that LGBT people are humiliating dignity of a Ukrainian citizen and should not exist in Ukraine. Any violence and property damage were avoided thanks to the vigilance of the staff who immediately called the police. In May, two men came and tried to get into the LIGA’s community centre, but when the organization’s staff could not obtain a clear indication of purposes for the visit and did not let the men in, they have deformed the gates to the yard where the community centre is situated.

28. LIGA reported these incidents to the police and provided the law enforcement officers with the videos of the attacks from the security cameras installed by the organization. Nevertheless, the police department did not start any investigation and did not register these cases in the Unified Register of Pre-trial Investigations. The police did not explain officially why they had not started investigations, but in private communication they said that there was no motive for a hate crime or discrimination in the actions of the perpetrators, the attempts of attacks did not have signs of violence or any damages for property or physical assaults. This made the organization to appeal to the court to enforce legal proceedings on these cases. The court ruled that the cases should be properly investigated but there were no further actions from the police department since the court’s decisions.

29. Other similar incidents include threats to LGBT activists in social media. For example, a group was created in Telegram messaging service and Instagram social network where anti-LGBT activists in Odesa posted and still post pictures of LGBT people who took part in the KyivPride’s Equality March 2019 with links to their personal profiles on Facebook or Instagram and calls to physical violence. After one of the victims complained to the cyber police in Kyiv about this incident, no action to eliminate such threats were performed by the police forces, and threats continue, especially now before the OdesaPride LGBT event (planned for 27-31 August 2019). Moreover, complainant has received no reply from the cyber police about actions undertaken or even about receipt of this complaint after more than two months.

30. It should be noted that in many cases of LGBT events’ disruptions by homophobic aggression (for instance, in 2018, the Equality Festival in Chernivtsi, round tables on LGBT topics in Uzhhorod and Vinnytsya, Trans\*march on the Transgender Day of Remembrance in Kyiv and so on) the police acted very passively and did not prevent aggressive blocking of these actions by radical homophobic groups. The police limited themselves only to physical protection and evacuation of events' participants. In the case of the mentioned transgender action in Kyiv, the police failed to ensure its holding even on the site that the police themselves had chosen and recommended to the event's organizers. According to their observations, the police did not even try to resist the aggressive opponents of the action, but rather backed the opponents' requirements to prevent its holding.

***31. Considering the abovementioned issues, the EGHR-Ukraine* recommends the Committee to request*:***

* **The State party to provide information on measures it takes to eliminate cybercrimes and hate speech online against LGBT activists and human rights defenders;**
* **how the State party plans to ensure the right to peaceful assembly for LGBT organizations and activists, and in particular to effectively protect them from aggression by far-right groupings;**
* **the State party to provide information about measures it undertook and/or plans to undertake elimination of homo/transphobia and violence against individual LGBT activists and LGBT community as a whole.**
1. The text of the order can be accessed following the link: <https://www.kmu.gov.ua/ua/npas/248740679> (the page has an attachment with the full text of the Action Plan, in Ukrainian) [↑](#footnote-ref-1)
2. ##  Full text of the Concluding observations on the seventh periodic report of Ukraine: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmmmCeqXycPDoV5Gxrp8KtsHy5GodES9JN160zvbTpKt9tFNcLy3UfJ8sprv1qKbOuTFEfz8FwX%2bJW7yhAVTY8h%2bmdQjf2Ov6ZqsZ1azOcbe>

 [↑](#footnote-ref-2)
3. Access to the document with recommendations on 2nd cycle, 2012: <https://www.upr-info.org/sites/default/files/document/ukraine/session_14_-_october_2012/recommendationsandpledgesukraine2012.pdf> [↑](#footnote-ref-3)
4. Access to the document with recommendations on 3rd cycle, 2017: <https://www.upr-info.org/sites/default/files/document/ukraine/session_28_-_november_2017/responses_to_recommendations_upr28_ukraine.pdf> [↑](#footnote-ref-4)
5. C. Åhlund, W. Sorgdrager, *Comments on the draft law On the Principles of Prevention and Combating Discrimination in Ukraine*, 2012, para. 7. [↑](#footnote-ref-5)
6. The text of the full report can be accessed here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmmmCeqXycPDoV5Gxrp8Ktu9TTGzh7MJ16mRNnqIX7VNB5mNezra0301RzNv3X7xTMzVRe0SfQW%2bSRrSQWIAhSNxroFRkStM6IkCHRohgaGC> [↑](#footnote-ref-6)
7. The official text of the Article 24 can be accessed following the link: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#n4239> (in Ukrainian) [↑](#footnote-ref-7)
8. The full text of the Judgement can be accessed following the link: <https://zakon.rada.gov.ua/laws/show/ru/v008p710-07> (in Ukrainian) [↑](#footnote-ref-8)
9. The page of the Draft Law on official website of the Parliament of Ukraine: <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57162> [↑](#footnote-ref-9)
10. <https://www.undp.org/content/dam/ukraine/docs/DG/HR4U/TablesEn.pdf> p. 30 [↑](#footnote-ref-10)
11. In fact, the Equality March was not conducted in 2012 and 2014, but other events of the KyivPride were held by the organizers. [↑](#footnote-ref-11)
12. Definition of a hate crime by the OSCE: <http://hatecrime.osce.org/what-hate-crime> [↑](#footnote-ref-12)
13. Official text of the Criminal Code can be accessed following the link: <https://zakon.rada.gov.ua/laws/show/2341-14> (in Ukrainian) [↑](#footnote-ref-13)
14. <http://hatecrime.osce.org/ukraine?year=2017> [↑](#footnote-ref-14)