

RIGHTS AND INCLUSION OF LGBTI PERSONS IN LABOUR MARKET

GUIDE FOR EMPLOYERS



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Note: The opinions expressed in this publication do not necessarily represent opinions of the Ministry of Justice, Human and Minority Rights.

1. INTRODUCTION



All over the world, and unfortunately, also in Montenegro, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons face systemic stigma and discrimination in almost all aspects of their lives. For LGBTI persons access to employment, education, and health care are aggravated. They are the target of attacks solely based on their gender identity, perceived or real and publicly expressed sexual orientation. A large number of institutions and organisations have documented discrimination, and harassment of LGBTI persons at work and in employment, and the negative impact of these phenomena on the health and well-being of employees, as well as on the reduction of commitment and job satisfaction, has been repeatedly confirmed. In the entire cycle, from employment to performance evaluation and career development, LGBTI persons face barriers to exercising dignity in the workplace, which results in social exclusion, poverty, and poor health. LGBTI persons often experience workplace discrimination that includes lower incomes and fewer work benefits in comparison with their peers. Discrimination often prevents transgender people from accessing formal employment and pushes them into areas that do not provide conditions in line with the known and recognised standards, while intersex people experience marginalisation by being left out of laws and policies that protect against discrimination in employment.

The aim of this Guide is not only to present the different forms and methods of discrimination against LGBTI persons in the labour market in Montenegro and to define the legal mechanisms for the protection of LGBTI persons at work but also to introduce employers to the best practices when employing LGBTI persons, and the methods that will ensure full recognition of the importance

and use of the principles of inclusion and respect for diversity in the process of employment, work and functioning at work.

In December 2021, the Centre for Monitoring and Research (CeMi) started the implementation of the project titled **Contribution to the Inclusion of LGBTI persons in the Labour Market** with the Financial Support of the Ministry of Human and Minority Rights with the general goal of contributing to increasing the level of respect for the human rights of members of the LGBTI population in Montenegro. The stated goal will be achieved by reaching the specific objective of the project, which is reflected in the reduction of the degree of discrimination against LGBTI persons in employment through researching the position of the LGBTI population in the labour market, the creation of a guide for the protection against discrimination of LGBTI persons on the labour market, based on examples of good practice in the EU countries, and the organisation of educational meetings and presentations, and the implementation of a campaign to raise awareness about the position and rights of LGBTI persons with a particular emphasis on the rights of LGBTI persons on the labour market.

This Guide is one of the project's main activities.

2. TERMINOLOGY GLOSSARY¹



OUT: This term describes an individual who sexually/sex/gender-identifies in public and/or professional life.

OUTING: Exposing someone’s gay, lesbian, bisexual or transgender identity to others without their permission. It is the basic human right of every person to decide if, when and to whom they will talk about their sexual orientation/gender identity. Outing LGBTI persons without their knowledge and permission are not acceptable or, in any case, justified practice.

ASEXUALITY: Refers to the absence of sexual orientation or lack of interest and desire for sex. Asexual people have emotional needs like all other people and are just as capable of entering into intimate relationships. Asexuality is distinct from celibacy, which is a chosen behaviour or determined by a person’s situation.

BIOLOGICAL (CHROMOSOMAL) SEX: Refers to sex determined by chromosomes (XX, XY), which implies clearly defined external and internal genitalia and a specific male/female hormonal status.

BISEXUAL: Refers to an individual who has the capacity for attraction—physically, emotionally, sexually, and/or romantically to people with the same, and people with a different, gender and/or gender identity as themselves.

CISGENDER: Refers to an individual whose gender identity aligns with the one typically associated with the sex assigned to them at birth (see the explanation below).

¹ The terminology glossary was taken from the publications of NGO Juventas, LGBTIQ Association Queer Montenegro and the Spectra Association

DISCRIMINATION: Discrimination means any legal or factual difference or unequal treatment, i.e. failing to treat an individual or a group of individuals in relation to other individuals, as well as excluding, limiting or giving priority to an individual in relation to other individuals, which is based on race, skin colour, national affiliation, social or ethnic origin, belonging to minorities or minority national community, language, religion or belief, political or other opinions, sex, gender reassignment, gender identity, sexual orientation and/or sex characteristics, health condition, disability, age, financial condition, marital or family status, belonging to a group or assumption of belonging to a group, political party or other organisation, as well as other personal characteristics.

- » **Indirect discrimination:** This happens when an apparently neutral provision or practice places an individual at a particular disadvantage compared with other individuals (e.g. because of sexual orientation or gender identity).
- » **Multiple discrimination:** Any unjustified, legal or factual, direct or indirect distinction or unequal treatment based on more than one basis for discrimination enumerated in the previously given definition of discrimination.
- » **Institutional discrimination:** A system reflected in the fact that institutions of power (media, education, economy, religion, etc.) favour one group (or some characteristics) over others.
- » **Perceived discrimination:** The experience of a discriminated individual, his/her subjective experience. Experienced discrimination does not have to correspond to the legal definition of discrimination.

VICTIMISATION: Refers to a specific term meaning discrimination against a person for filing a lawsuit or participating in a process initiated by another person as a witness.

HARASSMENT: Refers to deliberate, continuous, systematic threats, insults or dehumanising attitudes through written, verbal or physical behaviour, as well as through modern electronic technologies (mobile phone, computer...). Harassment imminent:

1. causes fear in the pupil or injuring him/her or destroying his/her property;
2. significantly negatively affects the pupil's achievement at school, but also his/her opportunities and/or benefits;
3. significantly negatively affects the pupil's emotional or mental well-being;
4. has a negative impact on the daily functioning of the school.

GAY (MAN): The adjective used to describe man who is emotionally, sexually and/or romantically attracted to people of the same sex/gender.

HETEROSEXISM: An assumption that heterosexuality is the only legitimate form of human sexuality and ignores and disputes the existence of other sexual orientations.

HETEROSEXUAL MAN / HETEROSEXUAL WOMAN / HETEROSEXUAL INDIVIDUAL: An individual physically and/or emotionally attracted exclusively to people of the opposite sex. A heterosexual individual does not have to have sexual experiences with a person of the opposite sex to be defined as heterosexual.

HOMOSEXUAL: An individual physically, emotionally, sexually and/or romantically attracted exclusively to people of the same sex/gender.

HOMO-/LESBO-/BI-/TRANSPHOBIA: Means a form of cultural and social prejudice that manifests as fear, aversion, discriminatory behaviour and violence towards persons of homosexual or bisexual orientation and different gender identity or expression. Like all

phobias, it is an irrational fear. Institutional homo-/lesbo-/bi-/transphobia manifests through legal sanctions, pathologisation and the absence (or the existence of inadequate) mechanisms to suppress violence and discrimination. Social homo-/lesbo-/bi-/transphobia manifests in physical and other forms of violence, hate speech, discrimination, threats, marginalisation, social exclusion, ridicule and insults.

INTERSEX PERSON: An individual whose biological sex characteristics (internal and external sex organs, hormones, chromosome patterns and secondary sex characteristics) do not fit typical binary notions of male or female bodies or fall into both categories.

COMING OUT OF THE CLOSET/SHADOW/SILENCE (COMING OUT): Means the process of recognising, accepting, and revealing one's sexual orientation and/or gender identity to other people and identification with the homosexual/bisexual/trans community.

CROSS-DRESSING: The act of wearing items of clothing that traditionally or stereotypically belong to the other gender in a particular culture. There are variations in the degree to which a person changes clothes: from one to all items of clothing. People who identify as cross-dressers usually do not want to modify i.e. adapt their gender to gender expression, and are already completely satisfied with it.

QUEER: A term that denotes every form that falls outside of the usual social structures and norms of behaviour. The essence of queer theory is the deconstruction and rejection of imposed norms, whether it is about sexuality, gender, sex or other entities, and it starts from the fact that identity is not fixed but changeable, i.e. fluid. The term queer does not refer exclusively to LGBTI people.

LESBIAN: Refers to a woman who is emotionally, sexually and/or romantically attracted exclusively to other women.

LGBTIQ: An acronym that collectively refers to individuals who are

lesbian, gay men, bisexual, transgender, intersex and queer people.

NON-BINARY INDIVIDUAL: An individual who was born as a baby of any gender but who identifies as neither male nor female, nor identifies as being both male and female, somewhere in between, or as falling completely outside these categories.

AN INDIVIDUAL WHO COMMITTED DISCRIMINATION, HARASSMENT AND/OR ABUSE may be an employee of the school, a visitor, a pupil who has been reported for abuse, harassment or discrimination within the school premises, school yard and grounds, as well as ancillary school areas.

AN INDIVIDUAL WHO SUFFERED DISCRIMINATION, HARASSMENT AND/OR ABUSE is a pupil who has been reported to have been the subject of bullying, harassment or discrimination within the school premises, school yard and grounds, as well as ancillary school areas.

PRIDE: Refers to a manifestation that warns against prejudice, discrimination and violence experienced by people of non-heterosexual orientation and points to unequal treatment in society. Pride parades and marches date back to June 1969 when the Stonewall Riots were held, where LGBTI people from New York protested in the streets for several days against persistent police harassment. The following year, the uprising was marked by demonstrations in several American cities, and since then, annual demonstrations against homophobia have spread around the globe.

COMPLAINANT refers to a pupil or other person who formally or informally makes a report of bullying, harassment or discrimination in writing or verbally.

SEXUAL CHARACTERISTICS: physical characteristics of an individual related to sex, including genitalia, gonads and other sexual and/or reproductive anatomical structures, chromosomes, hormones and secondary sex characteristics, which do not necessarily reflect social norms or medical

definitions of male or female and may be present in varying degrees.

GENDER ADJUSTMENT implies physical and/or social interventions aimed at an individual living in accordance with his/her gender identity. It may involve taking hormone therapy, some of the surgeries (e.g. breast removal/breast implantation; surgeries to remove reproductive organs and/or reconstruction of sexual organs – a creation of a vagina or penis); it can mean all of these together, but also none of these, but only living in a society in line with one's own gender identity.

GENDER: A term that refers to the array of socially constructed roles, behaviours, activities and attributes that society ascribes appropriate for men and women. Also, this term implies an individual construct of one's own identity/expression that confirms, denies and/or overcomes the socially given and formed sex and gender roles of men and women, as well as the entire binary basis of "male" and "female".

GENDER IDENTITY: One's innermost concept of self as male or female, which may be the same or different from the sex assigned at birth. Gender identity concerns every person and does not mean only the binary concept of male or female.

GENDER EXPRESSION: Visual and external appearance of one's gender identity, usually expressed through clothing, body characteristics, haircut, behaviour and body language.

SEXUAL ORIENTATION: Emotional and/or physical attraction or affection towards people of the same and/or opposite sex. It includes heterosexuality, homosexuality and bisexuality. It should be noted that sexual orientation differs from sexual behaviour because people cannot choose sexual orientation, while behaviour can, and it may or may not be in line with our sexual orientation. Thus, people may, at some moment, decide on bisexual, homosexual or heterosexual behaviour regardless of their sexual orientation. On the other hand, it is possible for a person to feel attracted to the

same sex without ever taking action concerning that.

SEXISM: Discrimination and/or attitudes, conditions and behaviour that promote stereotypes and repressive social roles and norms based on sex and gender.

STRAIGHT: Slang term for heterosexuality/heterosexual person. First of all, this term refers to something straight that does not bend or curve but also something conventional, which does not differ from the norms that are accepted as usual.

TRANSGENDER (often shortened to TRANS): A catch-all term used to describe a variety of individuals, behaviours, and groups that have in common partial or complete opposing to imposed gender and sex roles. Transgenderism does not refer to a person's sexual orientation.

TRANSSEXUAL INDIVIDUAL: An individual who has a clear desire and intention to change their gender, as well as an individual who has partially or completely modified (including physical and/or hormonal therapy and surgery) their body and presentation, expressing their gender and/or gender identity and feeling myself.

TRANSGENDER INDIVIDUAL: An individual whose gender identity and/or gender expression doesn't match up with the sex assigned at birth.

TRIANGLE / BLACK TRIANGLE / PINK TRIANGLE: In the Second World War, the Nazis used a pink triangle in the concentration camps to identify gays, and a black triangle for lesbians, Roma women and sex workers. At that time, tens of thousands of same-sex-oriented persons were executed in Nazi camps.

RAINBOW FLAG: The most widespread symbol of the LGBTI community. The version that the LGBTI community uses today consists of 6 colours of the solar spectrum that symbolise diversity in the community. The flag was created by Gilbert Baker (in the 1970s in San Francisco), the original version had 8 colours, and

he assigned a specific meaning to each of the colours. According to Baker, the six colours used today symbolise:

- **Red** – life
- **Orange** – healing
- **Yellow** – sunlight
- **Green** – nature
- **Blue**- serenity
- **Purple** – spirit.

ABUSE implies the systematic intentional infliction of physical or psychological pain on one or a group of individuals, which repeats over time. Furthermore, it refers to any intentional written, verbal, non-verbal or physical behaviour, which includes a threatening, deliberate or dehumanising attitude by another person (peer and/or adult) in a manner that such behaviours:

1. cause an intimidating, hostile or hurtful environment or cause lasting harm;
2. cause discomfort or humiliation;
3. affect confidence and self-esteem;
4. affect school success

Some of the forms of harassment are the following:

1. teasing
2. threats
3. intimidation
4. persecution
5. Internet bullying
6. physical violence
7. theft

8. sexual harassment, or harassment based on religion, race...
9. public humiliation
10. destruction of school and/or personal property
11. social exclusion, including incitement and/or coercion
12. rumours or spreading falsehoods.

ABUSE / HARASSMENT THROUGH INFORMATION TECHNOLOGY (cyberbullying) is defined as the intentional and repeated intimidation of an individual using information technology including, but not limited to: phone calls, SMS or MMS messages, e-mails, blogs, social networks (Facebook, Twitter, Snapchat, Tik Tok, Instagram, etc.), chat rooms, websites, ads, forums, instant messengers.

It often includes:

1. revenge carried out by a pupil for reporting or declaring an act of discrimination, harassment and/or abuse.
2. harassment and/or abuse, which was done out of revenge and not an actual act.
3. repetition of behaviour described within the definitions of discrimination, harassment and/or abuse by an individual or group to humiliate, dehumanise, embarrass or cause emotional or physical pain in a particular pupil or employee.

LIFE PARTNERSHIP: a family life relationship between two persons of the same sex, concluded before a competent body, pursuant to the provisions of the Same Sex Life Partnership Law.

3. PROTECTION MECHANISMS



Although LGBTI persons are exposed to a significant degree of discrimination, international legal frameworks do not recognise the specific vulnerability of LGBTI persons on the labour market but the right to work for LGBTI persons is guaranteed by the same legal protection mechanisms as all other citizens regardless of any personal characteristics. In this chapter, an overview of relevant international and domestic documentation and regulations that contain the principle of prohibition of discrimination based on gender identity and sexual orientation is presented.


a) INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK

United Nations – United Nations Charter

The United Nations Charter guarantees respect for human rights and fundamental freedoms, the right to a dignified life and the value of a human being, as well as the equal rights of men and women. Article 55 item a) obligates all members to “raise the standard of living, full employment of the population and conditions for economic and social progress and development”, and item c) “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights stipulates that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection



against unemployment, as well as that Everyone, without any discrimination, has the right to equal pay for equal work (Article 23).²

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights and Freedoms stipulates in Article 26 that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³

Convention on the Elimination of All Forms of Discrimination Against Women

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (Article 1).

International Convention on the Elimination of All Forms of Racial Discrimination

Article 5 stipulates that States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the

² The Universal Declaration of Human Rights, UN, 1948

³ International Covenant on Civil and Political Rights, UN, 1966

right of everyone, without distinction as to race, colour, or national or ethnic origin. The same article (paragraph e-I) guarantees the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.⁴

Convention on the Rights of the Child

The Convention on the Rights of the Child also guarantees equal rights to everyone under the age of 18 without any discrimination, including the prohibition of discrimination based on sexual orientation. In Article 2, paragraph 2 of the Convention, the term “other status” includes the interpretation that discrimination based on the sexual orientation of children and adolescents, their parents and/or legal guardians shall be prohibited, which also implies their right to access appropriate information and enjoy protection from society to live freely in accordance with their sexual orientation.

United Nations Resolution on Sexual Orientation and Gender Identity

The Resolution calls for the respect of the human rights of all persons without discrimination in relation to sexual orientation and gender identity and, in particular, condemns the use of the death penalty and torture based on sexual orientation or gender identity and the denial of health care. The most important is Article 11 of the Resolution, which requires the signatory states to take all necessary measures, especially legislative and administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for imposing sanctions.

⁴ <https://unmik.unmissions.org/sites/default/files/regulations/05bosniak/BRacialdiscrimination.pdf>

International Labour Organisation Convention no. 111 (Discrimination Convention no.111) relating to discrimination in employment and occupation

Article 1 paragraph a) stipulates that for the purpose of this Convention, the term discrimination includes “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” Article 2 obliges “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”.

European Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention prescribes the prohibition of discrimination and the enjoyment of rights and freedoms 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 (Article 14). The same is stated in Protocol No. 12 to the Convention, which stipulates that “no one shall be discriminated against by any public authority on any ground” (Article 1 paragraph 2).⁵

⁵ European Convention on Human Rights, Council of Europe, 1950

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

The Committee of Ministers of the Council of Europe adopted a recommendation at the level of Member States on “measures to combat discrimination based on sexual orientation or gender identity”. The Recommendation was unanimously adopted by 47 Member states of the Council of Europe. Although it is not legally binding, as is the case with conventions, the Recommendation relies and is based on existing legally binding documents adopted by the Member States, thus imposing a clear obligation to implement its main elements. The Recommendation consists of three parts: the preamble, which outlines the context of its adoption and the basic principles based on which this document was created; the second, operative and concise part of the Recommendation, which states the comprehensive measures that should be taken, as well as the third part, which defines specific measures that enable the enjoyment of rights and the fight against their violation in various areas, and include: hate crime, hate speech, freedom of association, expression and peaceful assembly, the right to respect for private and family life, **employment**, education, health and housing, sports, the right to asylum, the issue of discrimination on multiple grounds, but also the role of national structures for human rights.

The Recommendation also contains Reasoning, which includes information on international instruments for human rights and legal precedents on which certain measures from the Recommendation and the Appendix are based.

The specific measure in the Recommendation related to employment reads “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. Also, member states should pay particular attention 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.”⁶

Civil society organisations prepared two reports that referred to the assessment of the progress achieved in the implementation of the Recommendation by the Montenegrin authorities and highlighted the areas in which it is necessary to put additional efforts in 2012 and 2018/2019.

The 2012 report concerning the mentioned measure from the Recommendation stated: “The Ministry of Labour and Social Welfare is the only state institution that did not provide us answers to the prepared list of questions, which indicates an ignorant attitude and inactivity regarding the human rights of LGBTI persons”.

According to available information, the Labour Law explicitly prohibits discrimination on the ground of sexual orientation. The Labour Law also prohibits sexual harassment. However, the Law does not explicitly prohibit discrimination based on gender identity.

The Law on the Armed Forces of Montenegro governs the general conditions for admission to the Armed Forces of Montenegro, among which there is no prohibition of military service for persons of a different sexual orientation. The Law on Civil Servants and State Employees, as well as the Labour Law, the provisions of which also apply to persons in military service, do not impose restrictions on persons of a different sexual orientation but confirm the principle

⁶ 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, Council of Europe, 2010 (chapter V paragraphs 29 and 30)

of equality in employment. According to the opinion of the Ministry of Defense of Montenegro, this principle prevents any form of negative selection or discrimination on any basis.

There are no restrictions or prohibitions for persons of different sexual orientations in the regulations of the Ministry of Defense on special conditions for enrollment and the method of examining the health capacity of candidates for military service. Although the prohibition of discrimination based on gender, race, skin colour, religion, nationality or other personal characteristics is mentioned in the laws that govern the Armed Forces of Montenegro (Law on the Armed Forces of Montenegro, Law on Military Ethics), these laws do not directly prohibit discrimination based on of sexual orientation and gender identity.

According to the available information, the Law on Prohibition of Discrimination is applied in cases of employment where there was discrimination based on gender identity.”⁷

2018/2019 Progress Assessment Report. states “There are no records on reported discrimination of LGBTI persons in employment. However, from the field experience of NGOs working on promotion and protection of human rights of LGBTI persons - NGO Juventas and Queer Montenegro - there have been some cases of LGBTI persons experiencing discrimination in the labour market, which remain unreported due to their fear of further discrimination. Data collected by the Spectra Association shows that trans persons face the majority of discrimination from employers, in most cases being denied access to work after revealing their gender identity, either by showing their personal documents or being outed by someone they know. Experience also shows that many employers are not familiar with LGBTI issues, especially transgender issues, often

7 Čolaković, J, Kalezić D. (2012) Report on the implementation of the Recommendations of the Committee of Ministers of the Council of Europe CM/Rec (2010)5 on measures to combat discrimination based on sexual orientation or gender identity in Montenegro. NGO Juventas, Podgorica.

stating that they can have problems if employing a trans person with personal documents which do not correspond with their perceived gender. This indicates a clear need for raising awareness among employees about the human rights of trans persons, as well as introducing some positive measures for employing transgender persons.”⁸

Charter of Fundamental Rights of the European Union

Article 21 paragraph 1 of the Charter of Fundamental Rights of the European Union forbids discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or other belief, political opinion, membership of a national minority, property, birth, disability, age or sexual orientation.⁹

The EU Charter guarantees the right to freedom of choice of occupation and the right to engage in work (Article 15, paragraph 1), so it states “everyone has the right to work and to the occupation that he/she freely chose or accepted” (Article 31), and guarantees the right to fair and just working conditions.

Yogyakarta Principles

The Yogyakarta Principles represent recommended standards of international law and issues related to sexual orientation and gender identity that all countries must agree to. Each principle is complemented by detailed recommendations addressed to the states. These principles establish basic standards by which

8 Ulićević, J. (2019) Montenegro report on the implementation of the Council of Europe Committee of Ministers Recommendation CM/REC (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, Submitted to the Council of Europe for the review process 2018/2019. The Spectra Association, Podgorica

9 Charter of Fundamental Rights of the European Union, (2007/C303/01)

governments should treat people whose rights are too often denied and whose dignity is too often degraded. Firmly grounded in law and precedent, these principles protect a simple rule: *there are no exceptions when it comes to respecting human rights.*

The document was named after the city where it was adopted and presented in Geneva in 2007 in the presence of a group of 29 international human rights experts. In 2017, the document was supplemented with 9 additional principles, and now it contains 38 principles. Principle 12 states that “everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination based on sexual orientation or gender identity.”

b) NATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK

Constitution of Montenegro

The Constitution of Montenegro¹⁰, Article 6 guarantees and protects rights and freedoms, and Article 7 prohibits the infliction or encouragement of hatred or intolerance on any grounds. Article 8 of the Constitution of Montenegro prohibits direct and indirect discrimination on any basis. Also, the same article stipulates that regulations and the introduction of special measures to achieve overall equality and protection of persons who are in an unequal position on any basis can only be applied until the achievement of the aims for which they were undertaken, shall not be considered discrimination.

The Constitution of Montenegro, by provision of Article 62, guarantees the right to work, to free choice of occupation and

10 Constitution of Montenegro (“Official Gazette of Montenegro”, no.1/2007 and 38/2013 -Amendments I-XVI)

employment, to fair and human working conditions and to protection during unemployment. Article 63 prohibits forced labour. Article 64 guarantees the right of employees to an adequate salary, to limited working hours and paid vacation, as well as the right to protection at work.

Article 25 of the Constitution of Montenegro allows temporary restriction of rights and liberties. At the same time, paragraph 2 of the same article prohibits restrictions based on sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial condition or any other personal feature. In addition, paragraph 4 prescribes an absolute prohibition of inflicting or encouraging hatred or intolerance, as well as discrimination, *and the limitations in this regard may not be applied.*

The Law on Prohibition of Discrimination strictly prohibits discrimination on the basis of sexual orientation, gender identity and intersexual characteristics (Article 19), with a precise explanation of the mentioned terms. Additionally, this law defines hate speech as a special form of discrimination based on the stated grounds (Article 9). Article 16 of the Law on Prohibition of Discrimination states “Discrimination on any of the grounds referred to in Article 2 paragraph 2 of this Law against persons seeking employment, as well as employees, i.e. persons who work for the employer on some other basis shall be prohibited.”

The Law on Gender Equality guarantees protection based on gender identity through the protection of not only men and women but also “persons of different gender identities” equally in all spheres of social life and prohibits discrimination against a person based on “sex change” (Articles 1 and 4).

The Criminal Code¹¹ defines sexual orientation and gender identity

¹¹Criminal Code of Montenegro (“Official Gazette of the Republic of Montenegro”, No. 70/2003, 13/2004 - amended and 47/2006 and “Official Gazette of Montenegro”, No. 40/2008, 25/2010, 32 /2011, 64/2011 – other law, 40/2013, 56/2013 - amended, 14/2015, 42/2015, 58/2015 – other law, 44/2017, 49/2018 and 3/2020)

as aggravating circumstances in cases of hate crimes and hate speech (Article 42a and Article 443).

The Criminal Code also defines the violation of equality in employment, and Article 225 states that “Anyone who knowingly violates regulations or in another unlawful manner deprives a citizen of the right to be freely employed under equal conditions in the territory of Montenegro, or restricts this right, shall be punished by a fine or an imprisonment sentence not exceeding one year.”

Personal characteristics, including sexual orientation and/or gender identity, are not explicitly mentioned regarding this criminal offence as the basis of unequal treatment. The principle of equality promoted by this provision implies potential discriminatory treatment based on some personal characteristic. The fact is that the right to work, as one of the fundamental rights of modern society, may be denied as a result of prejudice against people from the LGBTI community.

Amendments to the Criminal Code from 2017 more closely define the personal characteristics based on which the criminal offence of racial and other discrimination may be committed, while also explicitly stating sexual orientation and gender identity. Thus, Article 443 Racial and other discrimination reads:

(1) Anyone who, because of national or ethnic affiliation, race or religion or because of the absence of such affiliation or because of differences in terms of political or other beliefs, gender, language, education, social position, social origin, sexual orientation, gender identity, disability, financial condition or some other personal capacity violates fundamental human rights and freedoms guaranteed by generally accepted rules of international law and international treaties ratified by Montenegro, shall be punished by an imprisonment sentence from six months to five years.

(2) The sentence referred to in paragraph 1 of this Article shall also be imposed on persons who persecute organisations or individuals for their efforts to ensure the equality of people.

(3) Anyone who spreads ideas about the superiority of one race over another or promotes hatred or intolerance based on race, gender, disability, sexual orientation, gender identity or other personal characteristics or incites racial or other discrimination shall be punished by an imprisonment sentence of three months to three years.

The Labour Law stipulates that direct and indirect discrimination of persons seeking employment, as well as employees, shall be prohibited, regardless of their race, skin colour, national affiliation, social or ethnic origin, connection with a minority nation or minority national community, language, religion or belief, political or other opinions, **gender, sex change, gender identity, sexual orientation**, health condition, disability, age, financial condition, marital or family status, pregnancy, group membership or assumption of group membership, political party, trade union or other organisation, or some other personal characteristics (Article 7). Discrimination referred to in Article 7 of this Law shall be prohibited in relation to: 1) employment conditions and the selection of candidates to perform a certain job; 2) working conditions and rights from the employment relationship; 3) education, training and improvement; 4) promotion at work, and 5) termination of the employment contract. Paragraph 2 of Article 7 further emphasises that “the provisions of the employment contract which determine discrimination on one of the grounds from Articles 7 and 8 of this Law are null and void.”

The Law on the Prohibition of Harassment at Work also defines cases of harassment at work, or related to work (mobbing), including sexual harassment, as well as other issues of importance for the prevention and protection against mobbing and, in accordance with the provisions, regulates work issues and provides for monetary fines. The Law defines the concept of mobbing as “ any active or passive conduct at work or related to work against an employee or group of employees, which recurs, and which is intended to or undermines the dignity, reputation, personal and professional

integrity of the employee and which causes fear or creates an intimidating, humiliating or offensive environment, aggravates working conditions or leads to the isolation of the employee or leads the employee to terminate a contract of employment or another type of contract upon his initiative.” (Article 2 paragraph 1) Incitement or leading others to behave in the manner defined above shall also be considered mobbing. This Law shall apply to employers and employees, as well as persons engaged outside the employment, such as persons attending professional training and expertise; pupils and pupils attending practical training; volunteers; persons performing certain tasks while serving a sentence of imprisonment or corrective measures; persons in voluntary and public works, works organised in the common interest, labour activities and competitions, and any other person taking part in the work of the employer (Article 3 paragraph 1).

Institutional framework

The Protector of Human Rights and Freedoms of Montenegro has the function of the central body for protection against discrimination against LGBTI persons. Its role relates to procedural legal protection in dealing with complaints, initiation and participation in court proceedings, and it also performs the function of conciliation based on a complaint for discrimination, all in line with the Law on Prohibition of Discrimination.¹²

The Constitutional Court of Montenegro is an essential actor in the preparation of legally binding standards and judicial practice. In resolving disputes, the Constitutional Court uses the Constitution of Montenegro as the supreme law and international document that prohibit discrimination on any grounds. These international documents include the aforementioned European Convention on Human Rights and the United Nations Charter.

¹² Ombudsman, Protector of Human Rights and Freedoms of Montenegro

The Gender Equality Committee of the Parliament of Montenegro has an important role when it comes to the human rights of LGBTI persons. This Committee discusses proposals for laws, other regulations and general acts for achieving the principle of gender equality, monitors the application of these rights through the implementation of laws and the improvement of the principle of gender equality, especially in the areas of children's rights, family relations, employment, entrepreneurship, decision-making processes, education, health, social policy and information, it also participates in the preparation, drafting and harmonisation of laws and other acts with the standards of European legislation and programmes of the European Union related to gender equality. Furthermore, it affirms the signing of international documents that deal with this issue, and monitors their implementation, cooperates with the appropriate working bodies of other parliaments, as well as non-governmental organisations in this area.

The Ministry of Human and Minority Rights is a specific organisational unit in the Government of Montenegro. The Ministry supervises and monitors the implementation of non-discriminatory acts, including other related documents in the area of protection of human and minority rights. It collects relevant data and, based on the entire government programme, proposes laws and other regulations to combat discrimination and inequality. The Ministry is also in charge of the passing of relevant by-laws, regulations and guidelines, as well as for the implementation of various action plans and strategies within its jurisdiction.



4. PERCEPTION OF CIVIL SOCIETY ORGANISATIONS AND SYSTEM INSTITUTIONS ON OPPORTUNITIES AND DISCRIMINATION OF LGBTI PERSONS IN THE AREA OF EMPLOYMENT AND WORK

To create this Guide, the Centre for Monitoring and Research (CeMI) conducted qualitative research on perceived opportunities in employment and discrimination of LGBTI persons in the workplace through interviews with civil society organisations (CSO) and institutions of the system. The research aimed to find answers to various questions from a perspective that does not come from the LGBTI community, thus providing an outline of the context in which LGBTI people work or seek employment. The questionnaire prepared for the needs of the project showed good characteristics in the research sense, and its greatest advantages include simplicity of application, easy comprehensibility, and the fact that it may be filled out and interpreted in a short time.

The choice of organisations and institutions with which the interviews were carried out may have several limitations. Principally, the institutions and organisations with which the interviews were conducted are already known and accessible to the Center for Monitoring and Research. The attitudes of this group of people may differ from the attitudes of the general community (if we take recent public opinion surveys as a starting point, we can conclude not only that they may differ but that they are different). The fact that the participants with professional credentials gave answers had a significant impact on the tone of the interview and the absence of

any extremely negative or exclusionary attitude. Also, in the cases where the answers were provided by activists of NGOs dealing with the human rights of LGBTI persons, it is important to emphasise that the views of persons who did not disclose their gender identity and/or sexual orientation at the workplace, as well as persons who live in greater isolation and with less support, would probably have a significant impact on the results of this research process.

Ten representatives of CSOs and system institutions participated in the research.

In the end, it is necessary to mention that the desk research, as well as the answers obtained, were used to formulate recommendations aimed at improving the rights and inclusion of LGBTI persons in the labour market, which form the last chapter of this Guide.

The research showed that the dominant belief is that **LGBTI people are discriminated against in the workplace and during the employment process** because they do not feel safe enough to communicate this information about their identity:

“I believe that they are discriminated against. All relevant sociological researches show that this is the most discriminated social group, and in this case, it is even possible to speak about a large social distance concerning that group.”

“I think that the LGBTI population is discriminated against. Perhaps, LGBTI is one of the most discriminated groups. According to some research carried out in Montenegro, which we follow, it seems that in some spheres of life, the LGBTI population is even more endangered than the Roma and Egyptian populations. Not only in relation with the labour market but according to some general perception and attitudes of citizens about how they perceive members of that population.”

During the employment process, among the respondents, the prevailing opinion is that **employers do not ask questions about sexual orientation or gender identity, but also that problems,**

if this information is known, are possible:

“Employers do not ask such questions, even though we have no information that this happens during interviews. If they get information in the meantime, it is very possible that they will say that another candidate has been chosen.”

Additionally, the majority of respondents understand that LGBTI people **are not visible in the workplace and on the labour market due to a lack of feeling free to do so:**

“... here we have to start from a simple fact. How many people who work in an office have their desks and may put a photo with their partner on the desk? How many people are free to talk to colleagues about it? How many people do we know who talk to their colleagues in that manner? Very few, and most often in certain specific professions.”

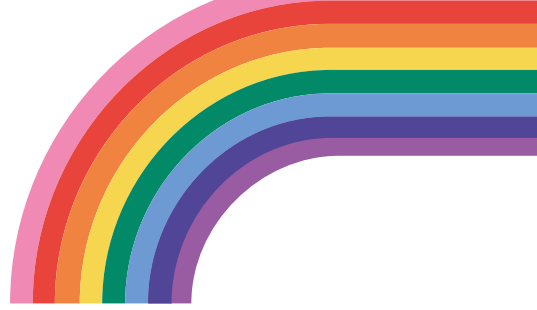
In relation to possible solutions for improving the current situation, the majority of research participants believe **employers themselves need additional education and support during this process for both employers and employees:**

“I believe that constant education about the rights of LGBTI persons, team building, and getting to know each other is necessary. We have to create a culture of pleasantness, cordiality and acceptance, not dissatisfaction, gossip and similar.”

“My position is that diversity contributes to the quality of everything, and it should be encouraged. Interpersonal relations, quality of work, and the idea of diversity are the parameters that should be nourished. I believe that collectives should be encouraged to accept and incorporate diversity because they can only benefit from it.”

Most of the research participants recognised that **the employers should play the leading role in this process:**

“Employers are the ones who can help raise awareness, who can contribute to a society of equal opportunities. If they would start it, I believe other employers would follow their business model, whether as a promotional activity, their advertisements, or campaigns.”



5. PRACTICAL ADVICES AND GUIDELINES THAT CONTRIBUTE TO RESPECT FOR DIVERSITY AND BETTER INCLUSION OF LGBTI PERSONS IN EMPLOYMENT AND WORK PROCESSES

As part of contributing to the culture of respect for human rights, organisations/institutions/companies should, in line with the Constitution of Montenegro and international and national laws, ensure respect for human rights and freedoms, not forgetting the rights and freedoms of LGBTI persons. In particular, it is necessary to take into account the fact that any form of discrimination on any basis, including sexual orientation, gender identity and gender characteristics, against individuals or groups, who are potentially or currently employed, is prohibited by law and that personal characteristics (even those that we have separately highlighted) **must be seen as a private matter that has no impact on work performance.**

Organisations/institutions/companies must respect the right to privacy of all employees and not disclose confidential data to third parties without the consent of the person to whom the data relates. Sexual orientation and gender identity are private matters, and it is prohibited by law to call on anyone to publicly declare their sexual orientation or gender identity, as well as to share that personal data with third parties without the person's consent.

It is particularly important that during employment and during

the work itself, organisations/institutions/companies give each person equal chances and work opportunities and the opportunity for promotion, regardless of their sexual orientation and gender identity. **In particular, it is necessary to take care to ensure a high-quality non-discriminatory approach in job advertisements and during the recruitment and selection process. This is especially important concerning the growing trend of reporting discrimination and rights violations based on work by LGBTI persons.**

Regardless of the state mechanisms in the case of discrimination against LGBTI persons, organisations/institutions/companies should provide special measures to protect LGBTI persons from all types of discrimination in the workplace. It is recommended that the company develops and actively implements internal policies for the prevention of discrimination and human rights violations and to encourage the creation of a positive environment so that LGBTI people feel safe, free and dignified in the workplace.

We will list some of the practical recommendations, the application of which in the process of employment and work greatly affects a fair and dignified atmosphere in which LGBTI people have a real opportunity to establish a working relationship or achieve their full working potential.

1. Employers should promote the prohibition of discrimination against LGBTI persons in the workplace and encourage respect for diversity through public statements of top management in the organisation/institution/company. It would be ideal to have an internal policy on respect for diversity and inclusion that would promote respectful and gender-neutral language and prescribe sanctions for non-compliance. The policy should be promoted by management at least once a year, and certainly every time after the end of the recruitment period for new team members.

2. It would be desirable if within the organisation/institution/company, especially the large one, exists a special mechanism for anonymous reporting of discrimination.
3. It is very important that employers avoid questions of a discriminatory nature during job interviews. Such questions include intrusively seeking information related to: **age, genetic characteristics, place of birth, country of origin, citizenship, disability, gender, sex, sexual orientation, partnership status, familial status or parentage**, race, colour or ethnicity, religion or belief.
4. It is very important that when hiring, employers advertise and really provide the same conditions to all candidates, including those from the LGBTI community (salary, working hours, vacation), for the same job, and to systematically and in a way accessible to all encourage progress in the organisation/institution/company through the reward system and the possibility of advancement.
5. Employers should introduce programmes that would include the mandatory participation of the entire organisation/institution/company (in several groups, by sector, etc.), and such programmes would focus on educating all employees about diversity, respect and inclusion through specially created training, workshops, and seminars. A special aspect of these educational contents, among others, would be information related to the LGBTI community and the specifics of the position of the LGBTI community in Montenegro. The support of the management would be reflected in the precise presentation of the connection between the advancement and attendance of such education and the application of acquired knowledge. It is recommended to develop and implement these programmes in close cooperation with LGBTIQ organisations with experience and expertise in this area.

6. Employers should introduce precisely defined internal rules related to sexual harassment in order to further strengthen the feeling of safety and security of LGBTI persons in the workplace, in addition to laws and strategic documents in the field.
7. Employers should precisely communicate their openness to the employment of LGBTI persons when advertising available jobs in their organisation/institution/company (for example, “All persons may apply for this advertisement, regardless of their gender, sex, sexual orientation, gender identity, gender expression...”).
8. Employers should conduct anonymous surveys among employees in a certain defined period (every six months, every three months, in line with the propositions and needs of the job) through which they could express their opinions on problems, and conflicts, give recommendations for improving the working atmosphere...
9. Employers should encourage their employees to participate in events organised by civil society organisations, and to get informed about their rights.
10. Employers should also create gender-neutral spaces such as gender-neutral toilets in order to respect different gender identities.
11. In order to publicly and clearly express unequivocal support for the LGBTI community, employers should, in addition to other cultural and social events and dates, mark significant dates and events in queer culture and history. These dates include but are not limited to: 17 May (The International Day Against Homophobia, Biphobia and Transphobia), 8 October (International Day of Lesbian Visibility), 23 September (International Day of Bisexual Visibility), 31 March (International Transgender Day of Visibility), etc.

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