

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**

REFERENCE:  
OL KAZ 5/2018

7 November 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders and Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to Human Rights Council resolutions 34/18, 33/9, 34/5 and 32/2.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning draft by-laws **which prohibit the distribution of information on lesbian, gay, bisexual and transsexual (LGBT) people to children, and its potential implications on the right of access to information and freedom of expression.**

According to the information received:

The Ministry of Information and Communication of Kazakhstan has developed two draft by-laws called "The Instruction On Classification of Informational Products" and "Methodology of Defining Informational Products for Children Harming (Not Harming) Their Health and Development" (hereinafter "draft by-laws"), which should enter into force by a decree of the Minister of Information and Communications.

The draft by-laws aim at implementing the provisions of the 2018 Law "On Protection of Children from Information Harming their Health and Development" that entered into force recently in Kazakhstan. A previous version of the Law "On protection of children from information harming their health and development" adopted in 2015, had directly provided for the ban of so-called "propaganda of non-traditional sexual orientation". The 2015 law was declared unconstitutional by the Kazakh Constitutional Council in 2015 on technical grounds.

According to information at our disposal, the draft by-laws declare homosexuality as a perversion and prohibit dissemination of information about LGBT to Kazakhstanis under the age of 18. If adopted, public information related to LGBT

will be banned from open access in printed media, internet, social networks and others.

In addition, the text of the draft law on “Methodology of Defining Informational Products for Children Harming (Not Harming) Their Health and Development” contains inaccurate and stereotypical perceptions towards LGBT people. In particular, paragraph 5 of the draft indicates: “Information prohibited for distribution among children: a) encouraging children to commit acts that threaten their lives and / or health, including harm to their health, suicide, demonstration of the culture of the LGBT society (LGBT community, gay community, also LGBT community and gay community (from English LGBT community (gay community) - a community of lesbian, gay, bisexual and transgender (LGBT) people, united by common interests, problems and goals)”.

We wish to express grave concern that the draft by-laws use language which discriminates against LGBT people, which may have serious negative impacts on the lives of LGBT people living in Kazakhstan, leading to exclusion, stigma and prejudice, including in accessing healthcare services. We are concerned that such legislation contributes to a social environment which explicitly permits and tolerates discrimination and violence based on sexual orientation and gender identification. We also express concerns that such legislation may further deter adolescents from approaching health professionals in anticipation of a judgmental attitude. We are furthermore concerned that classifying information on LGBT as prohibited for children violates the rights of Kazakhstanis to freedom of expression and access to information.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations. In this connection, kindly provide information on the current status of the draft law;
2. Please provide the full details of how the draft by-laws on “Methodology of Defining Informational Products for Children Harming (Not Harming) Their Health and Development” complies with your obligations under the international legal framework of human rights law and standards including, *inter alia*, non-discrimination on the grounds of sexual orientation and freedom of expression under the International Covenant on Civil and Political Rights (ICCPR), which Kazakhstan ratified on 24 January 2006;

3. Please indicate what measures have been taken to implement the Human Rights Committees' Concluding observations on the second periodic report concerning the anti-discrimination legal framework, in which it calls Your Excellency's Government to;
  - (a) explicitly list sexual orientation and gender identity among the prohibited grounds for discrimination; (b) provide adequate and effective protection against all forms of discrimination, including in the private sphere; (c) prohibit direct, indirect and multiple discrimination, in line with the International Covenant on Civil and Political Rights (ICCPR) and other international human rights standards; and (d) provide for access to effective and appropriate remedies to victims of discrimination. And to ensure that no form of discrimination or violence against persons based on their sexual orientation or gender identity is tolerated and that such cases are properly investigated and sanctioned and to review the procedures for gender-reassignment surgery and sex change with a view to ensuring their compatibility with the ICCPR;
4. Please explain how the draft legislation will ensure the respect of adolescents' right to privacy and confidentiality within health care services and how the draft legislation will allow that health services will treat all adolescents with dignity and respect.
5. Please provide further information on measures taken by your Excellency's Government to foster, embrace and celebrate a diverse society;
6. Please indicate what measures have been taken by your Excellency's Government to ensure that Kazakhstani have access to information, including on sexual orientation and gender identification?

We would appreciate receiving a response within 60 days.

While awaiting a reply, we ask you to distribute this letter to all members of Parliament.

Finally, we would like to inform you that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Independent Expert on sexual orientation and gender identity on:

<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Legislation.aspx>

This communication and any response received from your Excellency's Government will also be made public via the communications reporting website within 60 days and included in the communication report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye  
Special Rapporteur on the promotion and protection of the right to freedom of opinion  
and expression

Dainius Pûras  
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable  
standard of physical and mental health

Michel Forst  
Special Rapporteur on the situation of human rights defenders

Victor Madrigal-Borloz  
Independent Expert on protection against violence and discrimination based on sexual  
orientation and gender identity

## **Annex**

### **Reference to international human rights law**

In connection with the above concerns, we would like to draw your Excellency's Government's attention to articles 2, 19, 21 and 26 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Kazakhstan on 24 January 2006, guaranteeing the right to non-discrimination and equal protection of the law, and the right to freedom of opinion and expression.

In this regard, we wish to refer Your Excellency's Government to the right to non-discrimination, which is protected by article 2 of the Universal Declaration of Human Rights as well as the non-discrimination provisions of core international human rights treaties.

We also wish to refer your Excellency's Government to the jurisprudence, general comments and concluding observations of United Nations treaty bodies that consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law. In addition, the special procedures of the Human Rights Council have long recognized discrimination on these grounds.

In addition, we wish to draw your attention to the report by the Independent expert on sexual orientation and gender identity which provides an overview of the violence and discrimination based on sexual orientation and gender identity (A/HRC/38/43). The Independent Expert in his report recommends that States repeal laws that criminalize consensual same-sex relations, gender identity or expression, and statements or publications or actions that discuss or refer to the identity or expression of lesbian, gay, bisexual, trans and gender non-conforming persons (so-called "anti-propaganda" laws). States should moreover review other laws and policies that exacerbate police abuse and harassment, extortion and acts of violence against people based on their actual or perceived sexual orientation or gender identity, in particular, laws based on public decency, morals, health and security, including beggary and loitering laws; and laws criminalizing conduct seen as "indecent" or "provocative", including laws criminalizing sex work.

We would also like to recall resolution 17/19, 27/32 and 32/2 of the Human Rights Council, where the Council expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity. In this connection, we wish to draw your attention to the United Nations High Commissioner for Human Rights High Commissioner's High Commissioner's report to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity (A/HRC/19/41), as well as his [report](#) to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity (A/HRC/29/23). In his reports, he draws attention to, inter alia, "anti-propaganda" laws, which often are vaguely worded and arbitrarily restrict the rights to freedom of expression and assembly, where he shows how limiting or obstructing information related to sexuality or using material that contains

stereotypes and prejudices can contribute to violence and expose young LGBT persons to health risks. He recommends that States should address discrimination by: (a) Revising criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; ordering an immediate moratorium on related prosecution; and expunging the criminal records of individuals convicted of such offences; (b) Repealing so-called “anti-propaganda” and other laws that impose discriminatory restrictions on freedom of expression, association and assembly; (c) Ensuring that anti-discrimination legislation includes sexual orientation and gender identity among prohibited grounds, and also protects intersex persons from discrimination (A/HRC/29/23, paras 48, 57, 79).

We further would like to refer to the Concluding Observations of 9 August 2016 of the Human Rights Committee, in which it expresses concern about reports of violence against LGBT persons by both State and non-State actors, and the failure to address such violence by Kazakhstan and providing specific recommendations to ensure that Kazakhstan’s anti-discrimination legal framework is in line with the International Covenant of Civil and Political Rights (ICCPR) (CCPR/C/KGZ/CO/2, para. 9-10).

We further wish to refer to the jurisprudence of the United Nations human rights treaty bodies that discrimination on the grounds of sexual orientation and gender identity is prohibited under the respective human rights treaties, that legislation prohibiting “propaganda of unconventional sexual relationship” should be repealed and that States should take all necessary measures to guarantee the exercise in practice of the right to peaceful association and assembly for the LGBT community (see *inter alia* CCPR/C/RUS/CO/7, E/C.12/GC/20, CRC/GC/2003/3, CRC/GC/2003/4, CRC/C/GC/13, CEDAW/C/GC/28, CEDAW/C/GC/35, CAT/C/GC/2, A/HRC/19/41).

On the basis of international human rights norms and standards and the work of the United Nations human rights treaty bodies and special procedures, the United Nations High Commissioner for Human Rights has emphasized that States have the obligation to ensure equal protection before the law, equal protection of the law and freedom from discrimination, requiring States to prohibit and prevent discrimination in private and public spheres, and to diminish conditions and attitudes that cause or perpetuate such discrimination. He further stated that to this end, States should enact comprehensive anti-discrimination legislation that includes sexual orientation and gender identity among protected grounds, that States should review and repeal discriminatory laws and address discrimination against LGBT and intersex persons, including in the enjoyment of the rights to health, education, work, water, adequate housing and social security (A/HRC/29/23), para. 16). He further recommends establishing national standards on non-discrimination in education; developing anti-bullying programmes and establishing helplines and other services to support LGBT and gender-non-conforming youth; and providing comprehensive, age-appropriate sexuality education (A/HRC/29/23, para 78(f))

Concerning the right to freedom of expression and freedom of peaceful assembly, we would like to draw your attention to Articles 19 and 21 of the ICCPR. Article 21

states that the right of peaceful assembly should be recognized, and that no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. In a joint statement on free expression and association, UN and regional human rights experts stated that they “categorically reject arguments that such restrictions to the rights of LGBTI people are necessary to protect public morals, health or the well-being of vulnerable people.”<sup>1</sup>

We would further like to refer your Excellency’s Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. In addition and for the particular concerns raised in this letter, we would like to refer to article 7 of the Declaration on Human Rights Defenders, which includes the right to discuss and advocate for human rights ideas that are not necessarily new but that, in some contexts, may be perceived as new or unpopular because they address issues that might challenge tradition and culture. States are encouraged to ensure the protection of defenders who are at greater risk of facing certain forms of violence and discrimination because they are perceived as questioning accepted sociocultural norms, traditions, perceptions and stereotypes, including about sexual orientation and gender identity.

In addition, we would also like to refer your Excellency’s Government to article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Your Excellency’s Government on 24 January 2006, which includes an obligation on the part of all States parties to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially the most vulnerable or marginalized sections of the population, without discrimination. More particularly, we wish to draw the attention of your Excellency’s Government to General Comment General comment No. 22 (2016) on the right to sexual and reproductive health of the Committee on Economic, Social and Cultural Rights, which provides in its’ paragraph 23 that non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. Criminalization of sex between consenting adults of the same gender or

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<sup>1</sup> Joint statement by UN Special Rapporteurs on freedom of opinion and expression, freedom of peaceful assembly and of association, right to health, and human rights defenders African Commission on Human and Peoples’ Rights, Special Rapporteur on Human Rights Defenders in Africa, Inter-American Commission on Human Rights and OSCE Representative on Freedom of the Media, “*Free expression and association key to eliminating Homophobia and Transphobia*” (May 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14602&LangID=E>

the expression of one's gender identity is a clear violation of human rights. Likewise, regulations requiring that lesbian, gay, bisexual transgender and intersex persons be treated as mental or psychiatric patients, or requiring that they be "cured" by so-called "treatment", are a clear violation of their right to sexual and reproductive health. State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.

And lastly, we wish to draw your attention to article 13 of the ICESCR, which recognizes the right to education. The right to education includes the right to receive comprehensive, accurate and age-appropriate information regarding sexuality, in order to ensure young people can lead healthy lives, make informed decisions and protect themselves and others from sexually transmitted infections.<sup>2</sup> In order to be comprehensive, sexual education must pay special attention to diverse sexual orientations, gender identities and sex characteristics.<sup>3</sup>

For the particular concerns raised in this letter with regards to concerns on sexual education, we would like to draw the attention of your Excellency's Government to the Committee on the Rights of the Child's findings that lesbian, gay and transgender children are among those more likely to be exposed to violence.<sup>4</sup> A 2016 study conducted by UNESCO also found that "students who are perceived not to conform to prevailing sexual and gender norms, including those who are lesbian, gay, bisexual or transgender, are more vulnerable to violence". It concluded that "addressing homophobic and transphobic violence in schools is critical to effective learning, to meet human rights commitments, including the right to education and the rights of the child, and to achieve the Sustainable Development Goals (SDGs), in particular SDG4 – ensure inclusive and equitable quality education and promote lifelong learning opportunities for all".<sup>5</sup>

In the same vein, a group of United Nations and international human rights experts recommended that "States must act to overcome prejudice and stereotypes through anti-discrimination initiatives in schools and public education campaigns." "The health and well-being of all children and young adults must be protected, including through ensuring access to non-discriminatory health services and comprehensive

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<sup>2</sup> See CRC General Comment No. 4 (CRC/GC/2003/4), 2003, paras. 26 and 28. See also International Conference on Population and Development, Programme of Action, para. 7.47; Commission on Population and Development resolution 2009/1, para. 7; UNESCO International Technical Guidance on Sexuality Education, sections. 2.3 and 3.4; Human Rights Committee, Concluding Observations on the Republic of Korea (CCPR/C/KOR/CO/4) 2015, para. 15.

<sup>3</sup> Report of the Special Rapporteur on the right to education (A/65/162), 2010, para. 23. See also UNFPA, Comprehensive sexuality education, at <http://www.unfpa.org/comprehensive-sexuality-education>; and World Health Organization Regional Office for Europe and the Federal Centre for Health Education "Standards for Sexuality Education in Europe," 2010, incl. p.27.

<sup>4</sup> Committee on the Rights of the Child, General Comment 13 on the right of the child to freedom from all forms of violence, CRC/C/GC/13 (2011), para.72(g).

<sup>5</sup> Education sector responses to violence based on sexual orientation and gender identity/expression, UNESCO (2016), p.14-15.



sexuality education”.<sup>6</sup>The Special Rapporteur on the right to education noted that “in order to be comprehensive, sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality.”<sup>7</sup>

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<sup>6</sup> Joint statement by the UN Committee on the Rights of the Child, UN Special Rapporteurs on extreme poverty and human rights, freedom of peaceful assembly and association, freedom of opinion and expression, health, human rights defenders and torture, Special Representative of the Secretary General on violence against children, Inter-American Commission on Human Rights, African Commission on Human and Peoples’ Rights, Council of Europe, “Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights” (17 May 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E>

<sup>7</sup> A/65/162, para. 23. See also “Comprehensive sexuality education: giving young people the information, skills and knowledge they need”, UNFPA; and “Standards for Sexuality Education in Europe”, World Health Organization Regional Office for Europe and the Federal Centre for Health Education, including page 27.