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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Visit to the United States of America

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz*

Summary

In the present report, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, provides information on his visit to the United States of America from 16 to 29 August 2022. The Independent Expert assessed the implementation of national and international human rights standards to combat violence and discrimination based on sexual orientation and gender identity in the United States of America and offered recommendations to strengthen protections in this regard.

* The summary of the report is being circulated in all official languages. The report itself, which is annexed to the summary, is being circulated in the language of submission only.



Annex

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, on his visit to the United States of America

I. Introduction

1. The mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity was established in 2016 by the Human Rights Council in its resolution 32/2 and renewed in 2019 and 2022 through resolutions 41/18 and 50/10. The mandate responds to the serious concerns of the international community regarding discrimination and violence against lesbian, gay, bisexual, trans and gender-diverse (LGBT) persons. At the invitation of the Government, the Independent Expert conducted a country visit to the United States of America from 16 to 29 August 2022. The Independent Expert commends the United States for its decision to issue a standing invitation to the special procedures and to take a seat at the Human Rights Council. He welcomes the fact that his visit was executed as part of the country's effective reintegration into the international human rights architecture. The Independent Expert expresses his appreciation to the Government for its openness to dialogue, as well as the excellent cooperation in the preparation and execution of the visit.

2. The Independent Expert visited Washington, D.C.; Birmingham, Alabama; Miami, Florida; and San Diego, California. He met with more than 70 officials at federal, state and municipal levels, including representatives of the White House, the Department of State, the Department of Housing and Urban Development, the Department of Commerce, the Department of Justice, the Department of Education, the Department of Labor, the Department of Homeland Security and the Department of Health and Human Services, as well as the secretariat of the Congressional LGBTQ+ Equality Caucus. He also held a meeting with authorities of an immigration detention centre and visited some of the facilities and conducted an onsite visit to a port of entry at the border with Mexico. He also met with more than 100 civil society organizations and coalitions, faith leaders, academics and persons with lived experience of violence and discrimination based on sexual discrimination and gender identity. The visit benefited from the support of civil society organizations. The Independent Expert warmly thanks the Birmingham Civil Rights Institute; the Human Rights Campaign; Survivors of Torture, International; and the National Black Justice Coalition, all of which facilitated meetings and activities during the visit.

3. The Independent Expert wishes to express his gratitude to the civil society representatives in the United States for their generosity in sharing their knowledge and lived experiences, oftentimes at the great personal cost of reliving harrowing trauma and unspeakable pain: the depth of their stories will continue to inspire and provide inestimable evidence to the furtherance of the human rights of LGBT persons.

4. The visit took place in extraordinary circumstances. By August 2022, the United States had been significantly affected by the coronavirus disease (COVID-19) pandemic, including close to 100 million cases and more than 1 million deaths. LGBT persons suffered disproportionate material and psychological damages;¹ so did the organizations providing services to them and defending their rights.

¹ See www.ncbi.nlm.nih.gov/pmc/articles/PMC8743502; and <https://williamsinstitute.law.ucla.edu/publications/covid-surge-lgbt>.

II. Context and background

5. The visit took place in the context of a democracy seen by many around the world as a land of unique opportunity, but also marked by unresolved legacies of colonialism and slavery and, more recently, by serious attempts to overturn the 2020 election,² which will continue to mark the political landscape for years to come. The human rights of LGBT persons have played a disproportionate role in the political narratives during the past two decades, adding to the historical impact of the criminalization of same-sex intimacy and pathologization that existed in law and practice until relatively recently: the American Psychiatric Association maintained homosexuality on its list of mental disorders until 1987, and gender dysphoria until 2012; and criminalization of same-sex intimacy existed in some parts of the country until 2003.

6. Half a century before the visit of the Independent Expert, the Stonewall uprising led to the first pride marches in multiple cities across the United States, increasing visibility of LGBT persons. The legacy of that struggle has helped shape the fight for equality, which has led to singular achievements through the years. The Supreme Court declared that state and local laws criminalizing consensual same-sex sexual relationships were unconstitutional in 2003.³ In the 2010s, Congress repealed the “Don’t Ask, Don’t Tell” policy, allowing gay and lesbian persons to serve openly in the military, and the Supreme Court declared unconstitutional the definition of marriage as just between a man and a woman, leading to federal and state recognition of same-sex couples.⁴

7. Despite those significant achievements, most LGBT persons are generally poorer, less educated, less sheltered and more often incarcerated than their cisgender, heterosexual counterparts. They also are not a monolithic community, and their lived realities vary greatly based on intersecting factors such as race and socioeconomic status. Dynamics of privilege and discrimination place very few LGBT persons at an apex. Proportionately, trans persons of colour face the highest levels of disadvantage and are more likely to live in poverty: almost 50 per cent of Hispanic trans persons and almost 40 per cent of Black trans persons live in poverty,⁵ compared with a general rate of 11.4 per cent in the United States.⁶ The evidence strongly suggests that LGBT persons of colour face higher rates of discrimination in education, employment, access to health services, housing and the criminal justice system and violence in general. The Center for American Progress conducted a survey in June 2020 and found that 24 per cent of LGBT persons of colour reported some form of discriminatory treatment from a doctor or health-care provider, compared with 17 per cent of their white counterparts; while 44 per cent stated that discrimination against them affected their ability to purchase or rent a home to some extent, and 48 per cent of them had an annual income of less than \$40,000.⁷ In a more extreme form, 10 per cent of LGBT persons of colour reported doctors refusing care due to their sexual orientation. When care was provided, 19 per cent of LGBT persons of colour experienced doctors being visibly upset due to the patient’s sexual orientation.⁸

III. Legal, institutional and public policy framework

8. The United States has ratified several core United Nations human rights treaties, such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Independent Expert nonetheless underlines the importance of ratifying all human rights treaties, including those

² See www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf.

³ See <https://supreme.justia.com/cases/federal/us/539/558>.

⁴ See <https://supreme.justia.com/cases/federal/us/570/744>; and <https://supreme.justia.com/cases/federal/us/576/644>.

⁵ See <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

⁶ See www.census.gov/library/publications/2021/demo/p60-273.html.

⁷ See www.americanprogress.org/article/lgbtq-people-color-encounter-heightened-discrimination.

⁸ Ibid.

with provisions that would allow persons under the jurisdiction of the United States to submit individual complaints to the United Nations human rights treaty bodies or to the Inter-American Court of Human Rights.

9. Describing the state of the human rights of LGBT persons in the United States requires an acknowledgement of the complexities in rights delivery within the division of power between federal and state structures and the way it manifests itself today within a highly polarized, primarily two-party, political system.

10. Federal systems are under the obligation to implement treaty commitments. The complexities of federal systems are not unique to the United States. Even in the Americas, other States are structured in a manner that motivated the drafters of the American Convention on Human Rights to include, in article 28 thereof, the provision that “[w]here a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction”, in the clear understanding that the enforcement of international human rights obligations prevails over state-level vicissitudes. In particular, the Independent Expert commends the Department of Justice and human rights defenders in the United States for their consistent concern and vigilance in relation to anti-trans and anti-LGBT legislation. At the time of the visit, some of those laws had been blocked by injunctions, but it was evident that the work of tracking and reacting to regressive legislation demands an extraordinary amount of energy and resources. At the time of the visit, different sources reported the tracking of more than 400 bills seeking to restrict the human rights of LGBT persons.⁹ In the context of the concerted attack against LGBT persons at the state level, the Independent Expert was stunned to hear, from several persons with whom he had conversations, that supportive families had decided to leave the states in which they resided with their trans and gender-diverse children because they feared persecution, or had made plans – or had contemplated making plans – to escape in case persecutory measures were adopted.

A. Protections, or lack thereof, at federal level

11. The years of the presidential administration of Donald Trump (2017–2021) were characterized by an increase in anti-LGBT rhetoric, with a reported 43 per cent increase in the number of designated anti-LGBT hate groups in 2019,¹⁰ as well as emboldened conservative politicians and legislatures passing anti-LGBT legislation.¹¹ Federal protections for LGBT persons were removed through executive action, such as a presidential memorandum banning trans persons from serving in the military¹² and the removal of sexual orientation as a protected characteristic from anti-discrimination guidelines of federal departments. The administration also refused to apply the prohibition of discrimination based on sex to LGBT persons and worked to install religious exemptions to civil rights law.¹³

12. The Independent Expert gathered significant evidence showing that the presidential administration of Joseph Biden (2021–present) had taken an impressive array of executive measures aimed at the protection of the human rights of LGBT persons. On the day of his inauguration, President Biden signed Executive Order 13988 instructing that everyone “should receive equal treatment under the law, no matter their gender identity or sexual orientation” and instructing federal agencies to review all agency actions under other sex discrimination laws for consistency with this interpretation, so long as the laws do not contain sufficient indications to the contrary.¹⁴ The executive order built upon the 2020 Supreme Court ruling in *Bostock v. Clayton County*, in which it established that protection against

⁹ See www.aclu.org/issues/lgbtq-rights/transgender-rights/trans-rights-under-attack-2020.

¹⁰ See www.splcenter.org/sites/default/files/yih_2020_final.pdf.

¹¹ See www.aclu.org/documents/past-legislation-affecting-lgbt-rights-across-country-2019.

¹² See <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals>.

¹³ See www.splcenter.org/sites/default/files/yih_2020_final.pdf.

¹⁴ See www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation.

discrimination on the basis of sex in employment provided under Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity.¹⁵

13. Subsequently, the Government issued a series of executive orders aiming either at dismantling anti-LGBT policies put in place by the previous administration¹⁶ or at increasing protection based on sexual orientation and gender identity, including Executive Order 14075 on advancing equality for lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) individuals, in which the President directs federal agency actions to address exposure to so-called conversion therapy domestically and around the world, and strengthen the protection of LGBT children and their families and LGBT older persons, and requests agencies to fund programmes to address LGBT homelessness and housing instability.¹⁷

14. Some of the policies adopted by the Government built on already existing measures.¹⁸ Others were autonomous and new, such as the State Department policy to add a third gender marker on identity documents for gender non-conforming, non-binary and intersex persons,¹⁹ the creation of the White House-led Interagency Working Group on Safety, Opportunity, and Inclusion for Transgender and Gender Diverse Individuals, which focuses especially on trans women and girls of colour²⁰ and the creation of a restitution programme for LGBT veteran victims of the infamous “Don’t Ask, Don’t Tell” policy.²¹

15. Those powerful and meaningful developments were based on principles and values that are in conformity with international human rights law, showed a clear strategic intent and provided significant capacity for their implementation. The Independent Expert welcomes the approach that includes sexual orientation and gender identity in the Government’s efforts towards a comprehensive strategy to advance gender equity and equality across the whole government.

16. However, the Independent Expert expresses concerns about the extent to which those protections might be precarious and subject to change by judicial, administrative or legislative action.

17. Notwithstanding the robustness of the legal system and tradition, the dissonance between some rulings of the Supreme Court and international human rights standards is a source of particular concern. The overruling of *Roe v. Wade* by the Supreme Court²² was devastating for the human rights of lesbian and bisexual women, as well as trans men and gender-diverse persons with gestational capacity. The Independent Expert concurs that, as outlined in the submission of the special procedures of the Human Rights Council to the Supreme Court,²³ access to safe and legal abortion constitutes a critical part of the right to the highest attainable standard of health (which includes reproductive rights), as well as other human rights, including the rights to non-discrimination and equality, the right to respect for private life, the right to life and the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment. In addition, the Independent Expert finds it shocking that a Justice of the Supreme Court, in his concurring opinion, recommended that “in future cases, [the Court] should reconsider all of this Court’s substantive due process precedents, including

¹⁵ See www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

¹⁶ See www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform.

¹⁷ See [www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/#:~:text=\(a\)%20Advancing%20equity%20and%20full,%2C%20security%2C%20and%20civil%20rights](http://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/#:~:text=(a)%20Advancing%20equity%20and%20full,%2C%20security%2C%20and%20civil%20rights).

¹⁸ See <https://obamawhitehouse.archives.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1>.

¹⁹ See www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/fact-sheet-biden-harris-administration-advances-equality-for-transgender-americans.

²⁰ See www.whitehouse.gov/wp-content/uploads/2021/11/Report_Memorializing-Transgender-Day-of-Remembrance_FINAL-002.pdf.

²¹ See www.npr.org/2021/09/21/1039337461/lgbtq-vets-discharged-under-dont-ask-dont-tell-have-new-chance-for-full-benefits.

²² See www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

²³ See www.supremecourt.gov/DocketPDF/19/19-1392/193045/20210920163400578_19-1392%20bsac%20United%20Nations%20Mandate%20Holders.pdf.

Griswold, Lawrence and Obergefell".²⁴ The suggestion to manoeuvre a reinstatement of criminalization of same-sex intimacy is deeply threatening to LGBT communities and persons; such action by a judiciary would constitute a prima facie violation of international human rights obligations and would most likely engage the international responsibility of the State.²⁵

18. For that reason, the Independent Expert urges the United States Congress to secure overarching anti-discrimination protections. Although, shortly after the visit, Congress adopted the Respect for Marriage Act, requiring the federal Government and states to recognize same-sex marriages,²⁶ the Independent Expert urged Congress to also adopt the Equality Act, which would amend the Civil Rights Act of 1964 to explicitly prohibit discrimination based on an individual's sexual orientation or gender identity in employment, housing, credit, education, public accommodation and jury service. That is particularly urgent in the light of the findings of the Independent Expert in relation to the frailty or absolute absence of state-level protections in as many as 31 states.

19. Those considerations should trigger a nationwide reflection on the relationship of the United States with international and regional human rights law and institutions, as well as a reconsidering of the call, previously made by States in the context of the universal periodic review,²⁷ special procedures²⁸ and treaty bodies²⁹ for the creation of a national human rights institution to oversee implementation of the international treaty obligations of the United States. Authorities should also consider the creation of an inter-agency federal body responsible for implementation and follow-up to the recommendations of United Nations human rights mechanisms. That is of particular importance because, even though several federal agencies have limited authority to respond to violations in particular areas, such as employment or housing, there is no federal or state entity with broad authority to monitor the universal human rights of LGBT persons.

B. Protections, or lack thereof, at state level

20. Inequalities exist between the protections of the human rights of LGBT persons from one state to another. In 31 states, there were still no legislative or public policy protections against discrimination in access to one or all of the key sectors of housing, employment or health care.³⁰ In addition, the Independent Expert is deeply concerned by a widespread set of state-level actions aimed at regression in the protection of the human rights of LGBT persons by legislative, executive and judicial action. A veritable plague of so-called anti-LGBT bills has been sweeping across the country: 2021 was described as the "worst year in recent history for LGBTQ state legislative attacks",³¹ with 268 anti-equality bills introduced in state legislatures, including 27 that were signed into law.³² That record was nonetheless broken in 2022 as the number increased to 315 bills, including 29 that were signed into law.³³ Those attempts to legislate or administratively create restrictions cover a broad range of issues, particularly targeting comprehensive sexual and gender education, access of trans persons to sports and single-sex facilities, and gender-affirming care. As the Independent Expert conducted his visit across the country, news of such legislative and administrative measures kept surfacing in local and national headlines: one example was the decision by the Florida

²⁴ See concurring opinion of Justice Thomas, p. 3, available at www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

²⁵ See www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-06-01-en.pdf.

²⁶ See www.congress.gov/bill/117th-congress/house-bill/8404.

²⁷ A/HRC/46/15, paras. 26.90–26.100.

²⁸ A/HRC/49/46/Add.1, para. 71 (b).

²⁹ CERD/C/USA/CO/10-12, para. 11.

³⁰ See www.hrc.org/campaigns/equality-act.

³¹ See www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law.

³² See <https://reports.hrc.org/2021-state-equality-index-2>.

³³ See https://reports.hrc.org/2022-state-equality-index?_ga=2.83550230.1401550990.1679773336-74166994.1679773336.

Agency for Health Care Administration to adopt new standards of care restricting access to gender-affirming care for trans youth and adults.³⁴

21. With regard to executive and judicial action, the Independent Expert observed a trend towards weaponizing state agencies, and he received reports that actors hostile to the recognition of the human rights of LGBT persons were developing a litigation strategy against the furtherance of Executive Order 13988. Throughout conversations with human rights defenders and civil society leaders, the Independent Expert heard that the promotion of state-level legislation would follow a particular methodology backed by significant resources, with regressive template model laws and regulations to be promoted at communal, local and state levels, and the intervention of organizations claiming research and community legitimacy. In Birmingham, Alabama, faith leaders conveyed their substantial concern about the misuse of religious narratives and the deliberate exploitation of earnestly religious persons for political purposes; similar views were conveyed to the Independent Experts in all meetings with human rights defenders.

22. The legal analysis of the present topic also includes religious exemptions, with deliberate attempts by diverse actors to misrepresent the complementary nature of the human right to freedom of religion and belief and the concept of freedom from violence and discrimination based on sexual orientation and gender identity. As recognition of the rights of LGBT persons to be free from violence and discrimination has advanced, calls for “religious-based exemptions” from laws guaranteeing equality for LGBT persons have increased. Civil society organizations outlined situations in which states enabled religious exemptions for persons or organizations that executed government or public functions in areas such as child welfare, marriage or schooling. One worrying example is found in government-funded foster care and adoption agencies, which could reject prospective families based on sexual orientation and gender identity, as well as faith.³⁵

23. Providers of goods and services to the public have also gained exemptions from non-discrimination laws to exclude customers who are LGBT based on claims of religious beliefs. Those claims often involve, but are not limited to, objections to serving LGBT couples who are seeking to celebrate relationships³⁶ or to carry out political and social activism. Some 44 religious exemption bills were filed across the country in 2021³⁷ and 37 in 2022,³⁸ including religious exemption bills in medical care allowing health providers to discriminate against LGBT patients.

24. States have obligations under international human rights law to ensure that LGBT consumers are not discriminated against, regardless of whether the discrimination is on the part of a State or a non-State actor.³⁹ As the Special Rapporteur on freedom of religion or belief has said, “it is not permissible for individuals or groups to invoke ‘religious liberty’ to perpetuate discrimination against ... lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere”.⁴⁰

25. Religious exemptions are often referred to as protections for health-care providers’ “conscientious objections” to providing services that go against their convictions, including abortion services, and hormonal and other similar treatments.⁴¹ In some instances, those groups have successfully expanded the concept of so-called conscientious objection beyond

³⁴ Since then, the Florida Board of Medicine has banned gender-affirming care for minors altogether. See www.usnews.com/news/health-news/articles/2023-03-16/floridas-board-of-medicine-bans-gender-affirming-care-for-minors-does-the-science-back-that-up#:~:text=That%20was%20followed%20in%20August,involving%20both%20minors%20and%20adults.

³⁵ See www.nyulawreview.org/wp-content/uploads/2021/04/N.Y.U.-L.-Rev.-96-1-April-Spoto.pdf.

³⁶ See www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf.

³⁷ See <https://reports.hrc.org/2021-state-equality-index-2>.

³⁸ See https://reports.hrc.org/2022-state-equality-index?_ga=2.186794408.1401550990.1679773336-74166994.1679773336.

³⁹ Human Rights Committee, general comment No. 28 (2000), para. 4.

⁴⁰ A/HRC/37/49, paras. 39 and 40.

⁴¹ See https://adfinternational.org/wp-content/uploads/2021/08/Freedom-of-Conscience_WP_digital_interactive.pdf.

individual health-care workers to enable institutions, such as hospitals or even for-profit companies, to invoke such a claim against LGBT patients.⁴² Those efforts pose a threat to LGBT persons by substantially restricting the spaces in which they can access necessary services.

26. United Nations human rights bodies have recognized conscientious objection in the limited context of military service;⁴³ and the Human Rights Committee has advised States to remove all barriers to effective access by women and girls to safe legal abortion caused as a result of conscientious objections by individual medical providers.⁴⁴ Regarding the provision of health care, United Nations treaty monitoring bodies and numerous special procedures have emphasized that States cannot permit conscience-based refusals of health care to infringe on the rights of patients,⁴⁵ including the right to reproductive health care.⁴⁶ In situations in which States choose to enable conscience-based refusals, international law obliges States to ensure an adequate number and distribution of willing providers;⁴⁷ limit conscientious objection claims to individuals (as opposed to institutions);⁴⁸ establish effective referral systems for willing providers;⁴⁹ prohibit refusals in emergency circumstances;⁵⁰ and establish systems to monitor compliance with all of these requirements.⁵¹ The Independent Expert urges the Government to redouble its efforts to ensure that those standards are met in order to protect LGBT persons living under its jurisdiction from violence and discrimination.

27. The mandate holder is also concerned by research that suggests that those types of restrictive and exclusionary health-care policies disproportionately affect LGBT persons of colour. A recent survey found that 23 per cent of LGBT persons of colour reported experiencing some form of refusal of care by a doctor or other health-care provider (as opposed to 15 per cent of all LGBT persons surveyed), and 46 per cent of trans or non-binary respondents of colour experienced at least one kind of refusal of care by a health-care provider (as opposed to 32 per cent overall).⁵²

C. Data

28. The data resulting from the census are used to distribute federal funds for a variety of programmes, to reapportion the number of seats in the House of Representatives and to monitor discrimination and enforcement of civil rights laws. The 2020 American Community Survey, carried out by the Census Bureau under the Trump administration, included for the first time a question about relationship status that included “opposite-sex husband/wife/spouse”, “same-sex husband/wife/spouse”, “opposite-sex unmarried partner” and “same-sex unmarried partner”.⁵³ That was perceived as a positive step by LGBT advocacy groups, although many had advocated for an explicit question related to gender identity and sexual orientation.⁵⁴

29. In July 2021, the Biden administration directed the Census Bureau to explicitly collect disaggregated data on sexual orientation and gender identity in the experimental Household

⁴² See https://unipd-centrodirittiumani.it/public/docs/RightAtRisk_TimeForAction_June2021.pdf.

⁴³ Human Rights Committee, general comment No. 22 (1993), para. 11.

⁴⁴ General comment No. 36 (2018), para. 8.

⁴⁵ [A/HRC/14/20/Add.3](#), para. 55.

⁴⁶ Human Rights Committee, general comment No. 36 (2018), para. 8.

⁴⁷ Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), paras. 14 and 43.

⁴⁸ Human Rights Committee, general comment No. 36 (2018), para. 8. The World Health Organization has recommended banning institutional claims of conscience; see <https://bioedge.org/bioethics-d75/conscientious-objection/conscientious-objection-is-indefensible-says-who>.

⁴⁹ Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), para. 43.

⁵⁰ *Ibid.*

⁵¹ Human Rights Committee, general comment No. 36 (2018), para. 8; and [E/C.12/ESP/CO/6](#), paras. 43 and 44.

⁵² See www.americanprogress.org/article/advancing-health-care-nondiscrimination-protections-for-lgbtqi-communities.

⁵³ See www.nbcnews.com/feature/nbc-out/2020-census-what-lgbtq-americans-should-know-n1167656.

⁵⁴ *Ibid.*

Pulse Survey, a survey designed to quickly and efficiently deploy data collected on how people's lives have been affected by the COVID-19 pandemic,⁵⁵ marking the first time the federal Government collected data about LGBT persons in real time. Subsequently, Executive Order 14075 on advancing equality for LGBTQI+ individuals included a section on promoting inclusive and responsible federal data collection practices, which ordered the Interagency Working Group on Equitable Data to establish a subcommittee on sexual orientation and gender identity data to advance the responsible and effective collection and use of data on sexual orientation, gender identity and sex characteristics.⁵⁶

30. The Independent Expert welcomes those initiatives: disaggregated data collection is key to inform public policies in their consideration of the specific needs of LGBT persons and ensuring protection from violence and discrimination.

D. Social inclusion

31. The Independent Expert regularly carries out social inclusion analysis with a point of departure in the key sectors of health, employment, education and housing. In the section below, the Independent Expert provides an overview of the main federal protections for each sector, as well as the main pushbacks at the state level.

1. Health

32. Section 1557 of the Patient Protection and Affordable Care Act (2010) prohibits discrimination in health care based on race, colour, national origin, sex, age or disability. The Department of Health and Human Services originally concluded that the prohibition of discrimination based on "sex" included sexual orientation and gender identity, before narrowing the definition of sex discrimination to remove these protections in June 2020.⁵⁷ However, that policy was reversed in 2021 following the decision of the Supreme Court in *Bostock v. Clayton County*.⁵⁸

33. Despite federal protections, available data show widespread discrimination and prejudice against LGBT persons in their access to health care. For example, 17 per cent of LGBT adults do not have health insurance coverage compared with 12 per cent of heterosexual and cisgender adults. More specifically, 23 per cent of LGBT adults of colour, 22 per cent of trans adults and 32 per cent of trans adults of colour have no form of health coverage.⁵⁹

34. The Healthy People 2020 initiative found that: "LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights."⁶⁰ The Centers for Disease Control and Prevention report that homophobia, stigma and discrimination can negatively affect the physical and mental health of gay and bisexual men, as well as the quality of the health care that they receive.⁶¹ The Office of Women's Health also recognizes that discrimination and stigmatization may lead to lesbian and bisexual women having higher rates of depression and anxiety than other women, as well as being less likely than other women to get routine mammograms and clinical breast examinations.⁶² Discrimination and social stigmatization may explain the high risk of HIV infection among

⁵⁵ See www.census.gov/programs-surveys/household-pulse-survey/data.html.

⁵⁶ See www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals.

⁵⁷ See www.washingtonpost.com/health/2020/06/12/trump-transgender-protections.

⁵⁸ See <https://web.archive.org/web/20210511001911/www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

⁵⁹ See <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf>.

⁶⁰ See <https://wayback.archive-it.org/5774/20220413203148/https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>.

⁶¹ See www.cdc.gov/msmhealth/stigma-and-discrimination.htm.

⁶² See www.womenshealth.gov/30-achievements/29.

trans women, among other health concerns facing trans persons.⁶³ Other discrimination and stigmatization in a variety of other settings, including housing, employment and education, faced by LGBT persons in the United States can lead to negative long-term consequences for health and well-being.

35. All the above risk factors are often magnified and compounded by the vulnerabilities exposed through poverty, race, immigration and other factors. For example, during the visit, the Independent Expert heard concerns from human rights defenders in relation to asymmetries of access to the mpox vaccine: Black and Hispanic men received it at a lower rate than members of other racial groups.⁶⁴

36. The Independent Expert observed that the dynamics within federal and state competencies play a prominent role in relation to fundamental human rights concerns, such as bodily autonomy, comprehensive sexual and gender education, and sexual and reproductive rights, all of which significantly affect the human rights of LGBT persons. The available evidence suggests that adults belonging to sexual and gender minorities have higher rates of mistimed or unwanted pregnancies,⁶⁵ that lesbian, gay and bisexual persons are at higher risk of sexual violence⁶⁶ and that bisexual persons are three times as likely as heterosexuals to have had an abortion.⁶⁷ Abortion bans have also led (and will likely continue to lead) to the closure of clinics that are critical sources of sexual and reproductive health care for LGBT persons: ⁶⁸ contraception and abortion services, wellness services, examinations, testing and treatment for sexually transmitted infections, hormone replacement therapy and insemination services.⁶⁹

37. Many anti-LGBT bills are designed to restrict access to health care for trans persons, in particular trans youth, in violation of their right to the enjoyment of the highest attainable standard of physical and mental health. For example, in Arkansas, the state legislature adopted legislation to ban gender-affirming medical treatments for trans children; in Alabama, legislation criminalized medical providers of gender-affirming care; and, in Texas, a directive classified medical treatments for trans adolescents as child abuse, thus leading to possible criminal prosecution of parents supporting their child's right to recognition of gender identity.

38. Despite the improvements in social acceptance and visibility of LGBT persons in the United States over the past few decades, the evidence suggests that there is no sign of improvement in their exposure to stressors and suicidal ideation.⁷⁰ The propagation of anti-LGBT discourse and anti-LGBT bills in the past few years has created a toxic environment that has led to surges in calls to suicide prevention hotlines for LGBT persons. The 2022 National Survey on LGBTQ Youth Mental Health carried out by the Trevor Project recorded that 45 per cent of LGBT youth had seriously considered attempting suicide in the previous year, including more than half of trans and gender-diverse youth.⁷¹ In Alabama, civil society organizations and LGBT persons highlighted that they were aware that young LGBT persons were dying by suicide "all the time" in the rural part of the state. Medical providers who met with the Independent Expert referred to trans youth who could access one of the two clinics providing gender-affirming care in Alabama as "the lucky ones" and highlighted that most children who came to those clinics had suicidal ideations. Indeed, there is robust evidence concerning the benefits of gender-affirming treatment and its positive impact on mental health. In a 2020 study, it was found that of the more than 20,500 trans adults surveyed in the United States, only 2.5 per cent received puberty blockers during adolescence despite

⁶³ See www.cdc.gov/hiv/group/gender/transgender/index.html.

⁶⁴ See www.cdc.gov/mmwr/volumes/72/wr/mm7215a4.htm.

⁶⁵ See www.ncbi.nlm.nih.gov/pmc/articles/PMC5819992.

⁶⁶ See www.ncbi.nlm.nih.gov/pmc/articles/PMC3118668.

⁶⁷ See www.sciencedirect.com/science/article/abs/pii/S1049386719304839.

⁶⁸ See www.sciencedirect.com/science/article/pii/S2590151620300022.

⁶⁹ See www.lambdalegal.org/sites/default/files/legal-docs/downloads/us_20191202_june-medical-services-v-gee_brief-of-lgbtq-orgs-as-amici.pdf.

⁷⁰ See <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0246827>.

⁷¹ See www.thetrevorproject.org/survey-2022.

almost 17 per cent expressing their wish to do so, but the adults who received treatment were 70 per cent less likely to have considered suicide.⁷²

2. Employment

39. Employees of federal contractors, including subcontractors, can rely on a strong legal and policy framework protecting employment discrimination based on sexual orientation and gender identity. Executive Order 11246 of 1965 on equal employment opportunity, as amended, requires affirmative action and prohibits federal contractors from discriminating on the basis of race, colour, religion, sex, sexual orientation, gender identity or national origin.⁷³ The scope of the religious exemption in section 204 (c) of Executive Order 11246 for religious organizations with respect to the employment of individuals of a particular religion was expanded effective January 2021, but the rescission of this norm had already been announced during the country visit and was later completed.⁷⁴

40. The Civil Service Reform Act of 1978 prohibits federal workplace discrimination based on sex, which includes discrimination based on sexual orientation and gender identity.⁷⁵ In addition, Executive Order 13087 added sexual orientation to the grounds on which discrimination in federal employment is explicitly prohibited.⁷⁶ Those protections are reaffirmed in Executive Order 13988, which President Biden issued on his first day in office. Furthermore, a guidance document entitled “Addressing sexual orientation and gender identity discrimination in federal civilian employment: a guide to employment rights, protections, and responsibilities” has been developed by the Government and reiterates that all federal officials and managers should create a “work environment that is free from sexual orientation and gender identity discrimination, in accordance with existing federal law”.⁷⁷ In the document, the Government also lays out a complaint procedure for allegations of discrimination based on sexual orientation or gender identity.

41. State legislation provides unequal protection from employment discrimination in the United States, with some sources suggesting that 16 states and two territories do not have explicit prohibitions in their legislation.⁷⁸ Those and other challenges appear to exist throughout the country: a recent national survey documented 46 per cent of LGBT workers reporting unfair treatment in their careers because of their sexual orientation or gender identity;⁷⁹ and available studies have concluded that gay and bisexual men earned less than their heterosexual counterparts,⁸⁰ that gay men report higher salaries than lesbian women, but that both reported less income than non-LGBT colleagues.⁸¹

42. The rate of trans persons living in poverty or being unemployed is much higher than the national average,⁸² with 27 per cent of trans workers reporting being fired, not hired or denied promotion in 2016 and 2017.⁸³ LGBT employees of colour are more likely to report

⁷² See <https://publications.aap.org/pediatrics/article/145/2/e20191725/68259/Pubertal-Suppression-for-Transgender-Youth-and>.

⁷³ See www.dol.gov/agencies/ofccp/executive-order-11246/as-amended.

⁷⁴ See www.dol.gov/agencies/ofccp/recission-notices/dir2018-03#:~:text=BACKGROUND%3A%20As%20amended%20in%202002,individuals%20of%20a%20particular%20religion.

⁷⁵ United States Code, Title 5, sect. 2302 (b) (1).

⁷⁶ See www.eeoc.gov/executive-order-13087.

⁷⁷ See www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf.

⁷⁸ Reportedly, 23 states, three territories, and the District of Columbia have legislation explicitly prohibiting such discrimination; 10 states explicitly interpret existing prohibitions on sex discrimination to include sexual orientation or gender identity; and legislation in another state explicitly prohibits discrimination based on sexual orientation only. See www.lgbtmap.org/equality_maps/employment_non_discrimination_laws.

⁷⁹ See <https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination>.

⁸⁰ See <https://journals.sagepub.com/doi/10.1177/001979391406700109>.

⁸¹ See www.prudential.com/wps/wcm/connect/ba145fe5-88cf-48c3-ab67-6ab3cc5dba7a/PrudentialLGBT2016-2017.pdf?MOD=AJPERES&CVID=IYX8NZE&CVID=IYX8NZE, p. 4.

⁸² See <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁸³ *Ibid.*, p. 148.

discrimination and harassment at the workplace and are significantly more likely to report not being hired because of their sexual orientation or gender identity than white LGBT employees.⁸⁴

43. The COVID-19 pandemic had a disproportionate impact on the employment of LGBT persons. At the time of the visit, it had been estimated that 10 per cent of LGBT persons in the United States were unemployed,⁸⁵ which means that they were more likely to experience poverty and less likely to have access to health care or housing. In 2021, 21.6 per cent of LGBT respondents to the Household Pulse Survey reported loss of employment income in their household compared with 16 per cent of non-LGBT respondents.⁸⁶

3. Education

44. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programmes and activities, which includes schools and universities, that receive federal financial assistance or funds. It has been interpreted by courts and federal agencies as including protection against sexual harassment and discrimination for failing to conform to gender stereotypes. In 2016, the Department of Justice and the Office for Civil Rights of the Department of Education jointly issued guidance that clarified that discrimination against trans students was considered sex discrimination; it was rescinded in 2018, although that decision was under review as of 2021.⁸⁷ Furthermore, in March 2021, President Biden issued Executive Order 14021 on guaranteeing an educational environment free from discrimination on the basis of sex, including sexual orientation or gender identity.⁸⁸ Later that year, the Office for Civil Rights issued a notice of interpretation that elucidated that Title IX's prohibition on discrimination on the basis of sex included discrimination based on sexual orientation or gender identity, in line with *Bostock v. Clayton County*.⁸⁹

45. Similarly, a growing number of states were taking additional steps to protect LGBT youth by explicitly including sexual orientation, gender identity and gender expression in laws that protect against discrimination and harassment in schools. Those developments at the federal and state levels are welcomed by the Independent Expert, in particular because one of the issues raised consistently during the visit was the design and implementation of legislation and policies that limit the enjoyment of human rights by LGBT students, and students in general, in relation to sexual orientation and gender identity.

46. The adoption of comprehensive sexuality education inclusive of sexual orientation and gender identity can significantly reduce physical and psychological health risks for LGBT youth,⁹⁰ including with regard to sexual and reproductive health, and help them avoid secondary effects, such as substance abuse, mistrust of health services and self-medication.⁹¹ However, 83 per cent of LGBT youth in the United States reported not having received comprehensive sexuality education in their current or previous academic institution⁹² and reducing access to comprehensive education can only be expected to worsen the situation.

47. Many of those who voiced concern referred to legislation creating obstacles to comprehensive sexual health and gender education, and others provided evidence of bias and discrimination in educational curricula or sexual health information programmes. So-called

⁸⁴ See <https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination>.

⁸⁵ See <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf>.

⁸⁶ See www.census.gov/library/stories/2021/11/census-bureau-survey-explores-sexual-orientation-and-gender-identity.html.

⁸⁷ See www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. It was rescinded in 2017, but was under review as of April 2021; see www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

⁸⁸ See www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity.

⁸⁹ See www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf. Final revisions of regulations implementing Title IX were still pending at the time of drafting.

⁹⁰ A/HRC/50/27, paras. 33 and 34.

⁹¹ A/74/181, para. 8.

⁹² United Nations Association Pride Affinity Group, submission, p. 3.

Don't Say Gay or Trans laws recently passed or under consideration in several states, among them Florida and Alabama, restrict teachers and staff from discussing issues related to sexual orientation and gender identity at school and can have the impact of endorsing exclusion, bullying and harassment of LGBT youth in education settings. Florida's Parental Rights in Education Act, adopted in March 2022, includes a curricular component that limits classroom discussion or instruction of gender identity and sexual orientation through the third grade, as well as a parental notification component.⁹³ The second component implies, for example, that if a child is being bullied for being perceived to be lesbian, gay, bisexual or otherwise gender-diverse, the school is required by law to inform the parents instead of providing supportive counselling and education for the students.⁹⁴

48. Lawmakers and school officials in some states are also restricting the ability of trans children and youth to use names and pronouns that accurately reflect their gender identity and limiting their access to bathrooms and changing rooms. Comprehensive changes by the state legislatures, the state departments of education and school administrators around the United States are needed to make school environments welcoming for LGBT students and allow them to have the capacity to achieve similar education outcomes without fearing exclusion, bullying or other forms of violence and discrimination.

49. One of the issues of singular concern is the implementation of legislation and policies in some states that categorically ban trans students from participating in athletics consistent with their gender identity across all sports, age groups and levels of competition. Legal recognition of gender identity is recognized under a human rights framework stemming from the right to recognition everywhere as a person before the law and the right to equal protection of the law enshrined in articles 6 and 7 of the Universal Declaration of Human Rights. Any limitations to the right of trans youth to take part in sports as a part of their right to take part in cultural life and their right to education should therefore be determined by law, comply with the strict criteria of necessity and proportionality, and should represent the least restrictive measure to achieve a legitimate aim. In the case of sports, it includes the protection and promotion of a notion of fairness that is compatible with human rights protections; and in the case of sports within education settings, the achievement of educational objectives. Those are human rights-based standards and tests that must be met in order to consider the exclusion of any person from participation in sports; it is also the approach that has been adopted by the International Olympic Committee in its Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations.⁹⁵

50. Conversely, the categoric exclusion of trans persons from participating in athletics consistent with their gender identity is a prima facie violation of their human rights to be free from discrimination; it is also a prima facie violation of their right to privacy. In particular, blanket exclusions from sport in education settings based only on gender identity or sex characteristics focus only on assumed muscular strength and ignore the wider range of other factors that enable some athletes to perform better than others,⁹⁶ and appear to rely on stereotypical notions of performance and body type of a woman or a man. The Independent Expert draws attention to the sexist scrutiny and suspicion that that type of measure will exact on all student athletes, and recalls that States have obligations under international human rights law to protect all persons from being subjected to medical and physical examinations that violate the principles of human dignity, equality, autonomy and physical and psychological integrity of a person.

4. Housing

51. Federal law related to housing does not explicitly prohibit discrimination based on sexual orientation or gender identity. However, the federal Fair Housing Act (Title VIII of

⁹³ See www.flsenate.gov/Session/Bill/2022/1557.

⁹⁴ See <https://today.law.harvard.edu/limiting-lessons>.

⁹⁵ See <https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations>.

⁹⁶ See www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf; and www.ohchr.org/sites/default/files/documents/issues/health/AC-Caster-Semenya-vs-Switzerland.pdf.

the Civil Rights Act of 1968) prohibits discrimination based on sex and, from the 2010s, the Department of Housing and Urban Development began interpreting sex discrimination to include discrimination because of gender identity and, in certain circumstances, sexual orientation (e.g. non-conformance with gender stereotypes). Courts have similarly interpreted the sex discrimination provisions of the Fair Housing Act to include sexual orientation and gender identity.

52. In 2012 and 2016, the Department of Housing and Urban Development promulgated three programme rules providing equal access to housing, which together make up its Equal Access Rule, which ensures that core federal housing programmes and services are open to all persons regardless of sexual orientation or gender identity. The Equal Access Rule provides that housing that is financed or insured by the Department of Housing and Urban Development must be made available without regard to actual or perceived sexual orientation, gender identity or marital status. It prohibits inquiries about an applicant's sexual orientation or gender identity and the denial of housing on that basis. In addition, sexual orientation and gender identity cannot be part of any lending decision in federally insured mortgages. The Equal Access Rule also ensures equal access to individuals in accordance with their gender identity in programmes and shelters funded under government programmes.⁹⁷ During the Trump administration, the Department of Housing and Urban Development proposed a rule that would have allowed shelters to discriminate against trans persons. However, that measure was withdrawn in 2021, thus ensuring that equal access in shelter programmes was never rolled back.⁹⁸

53. Following the decision in *Bostock v. Clayton County*, Executive Order 13988 directed federal agencies to assess all agency actions taken under federal statutes that prohibited sex discrimination and to fully enforce those statutes to combat discrimination based on sexual orientation and gender identity.⁹⁹ Pursuant to that executive order, on 11 February 2021, the Office of Fair Housing and Equal Opportunity of the Department of Housing and Urban Development issued a memorandum on implementation of Executive Order 13988 on the enforcement of the Fair Housing Act.¹⁰⁰ The memorandum was the first of its kind by any federal agency to be issued after *Bostock v. Clayton County*. It required the Office of Fair Housing and Equal Opportunity to investigate all complaints of sex discrimination, including discrimination on the basis of gender identity or sexual orientation, that met other jurisdictional requirements. It also required state and local agencies in the Fair Housing Assistance Program of the Department of Housing and Urban Development, through which such agencies process housing discrimination complaints under laws that the Department has deemed "substantially equivalent" to the Fair Housing Act, to administer such laws in accordance with the decision of the Supreme Court in *Bostock v. Clayton County*. The Office of Fair Housing and Equal Opportunity has also provided training to investigators, agencies and the public on how the Department of Housing and Urban Development is implementing the Fair Housing Act following the decision in *Bostock v. Clayton County*. It has also made the training materials publicly available online. In accordance with Executive Order 14075, the federal Government must strengthen support for preventing and addressing LGBTQI+ homelessness and housing instability. Moreover, the Department of Housing and Urban Development was directed to establish a working group on LGBTQI+ homelessness and housing equity.¹⁰¹

54. The Department of Housing and Urban Development faces aggressive opposition to its work towards equality, including through litigation. At the time of the visit, several cases were filed against President Biden and the Department of Housing and Urban Development

⁹⁷ See www.federalregister.gov/documents/2016/09/21/2016-22589/equal-access-in-accordance-with-an-individuals-gender-identity-in-community-planning-and-development.

⁹⁸ See https://web.archive.org/web/20210422194235/https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_069.

⁹⁹ See www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation.

¹⁰⁰ See www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

¹⁰¹ See www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals.

through federal courts,¹⁰² and government representatives who met with the Independent Expert underlined the fragility of protections by the executive branch, which are constantly challenged in courts.

55. Despite those legislative and policy measures, LGBT persons are disproportionately facing homelessness and housing insecurity. According to a report published in 2020 by the Williams Institute, LGBT persons appear to be more likely to face housing unaffordability, are less likely to own their homes, are more likely to be renters and are more likely to be homeless than their heterosexual and cisgender counterparts.¹⁰³ Among young adults aged 18–25, LGBT persons have a 2.2 times greater risk of homelessness than non-LGBT persons; furthermore, while it is estimated that only 7 per cent of the youth population in the United States are LGBT, 40 per cent of all young persons experiencing homelessness are LGBT.¹⁰⁴ Factors contributing to obstacles faced by LGBT persons to their right to adequate housing in the United States include family rejection, poverty, challenges in accessing shelters for the homeless, harassment and discrimination by housing providers, discrimination by mortgage lenders, and discrimination in employment and other settings.

IV. Violence

56. In 2009, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act led to the expansion of the scope of hate crimes to include gender, sexual orientation, gender identity and disability.¹⁰⁵ According to official statistics, in 2019, approximately 18.8 per cent of hate crimes in the Uniform Crime Reports were related to sexual orientation or gender identity bias,¹⁰⁶ and 20.3 per cent of violent hate crime victimizations in the National Crime Victimization Survey in the period 2015–2019 were related to sexual orientation.¹⁰⁷ Asymmetries within communities and identities appear to be significant: a study commissioned by the Department of Health and Human Services from the National Academy of Sciences found that 38 per cent of gay men surveyed reported experiencing hate crimes against their person or property, compared with 11–13 per cent of lesbians, bisexual men and bisexual women.¹⁰⁸

57. One issue raised frequently with the Independent Expert was the high underreporting of hate crimes against LGBT persons and the generalized impunity of the perpetrators of those crimes that are indeed reported, particularly for crimes against trans persons of colour. Civil society organizations that the Independent Expert met during the visit reported, for example, that since 2002 in Chicago only one killing of a trans person of colour had been solved and it was not labelled as a hate crime. The Independent Expert found it noteworthy that, despite hearing dozens of stories of violence based on sexual orientation and gender identity having occurred in the past five years in Alabama, the information recorded in the Uniform Crime Reporting programme for 2020 was of one hate crime based on sexual orientation, and zero in relation to gender identity.¹⁰⁹ According to the information received, that is likely due not only to the voluntary nature of the reporting to the Federal Bureau of Investigation, but also to distrust of law enforcement agencies based on a number of factors that include their own unwillingness to register and investigate complaints as hate crimes. The Independent Expert strongly encourages the federal and state governments to increase their efforts to address the likely case of underreporting and impunity of hate crimes.

58. Bisexual women encounter intimate partner violence at higher rates than other populations; 46.1 per cent reported having been raped in their lifetime and 74.9 per cent reported having been victims of sexual violence other than rape.¹¹⁰ In the 2015 Transgender

¹⁰² See <https://ecf.ca8.uscourts.gov/opndir/22/07/212270P.pdf>.

¹⁰³ See <https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-instability>.

¹⁰⁴ See www.chapinhall.org/wp-content/uploads/VoYC-LGBTQ-Brief-FINAL.pdf.

¹⁰⁵ United States Code, Title 18, sect. 249.

¹⁰⁶ See <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/hcrle1019.pdf>.

¹⁰⁷ See https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/hcv0519_1.pdf.

¹⁰⁸ See www.ncbi.nlm.nih.gov/books/NBK64806.

¹⁰⁹ See www.justice.gov/hatecrimes/state-specific-information/alabama.

¹¹⁰ See www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

Survey, more than half of respondents reported having experienced intimate partner violence; 47 per cent reported having been sexually assaulted in their lifetime; and 10 per cent reported having been sexually assaulted in the past year. In many cases, the rates of victimization were greater for trans respondents of colour than for trans people who were white.¹¹¹

59. The Independent Expert notes that the 2013 reauthorization of the Violence against Women Act added a non-discrimination provision applicable to all grants by the Office on Violence against Women; it prohibits discrimination on broader grounds than existing, cross-cutting civil rights statutes, including discrimination on the basis of religion, gender identity or sexual orientation. The Act also expanded the definition of “underserved populations” to include populations underserved because of religion, gender identity or sexual orientation. The Act added a new purpose area to the STOP (Services, Training, Officers and Prosecutors) Violence against Women Formula Grant Program to permit states to use STOP funds to improve responses to victims who face barriers to service due to their sexual orientation or gender identity. In addition, the Government should ensure that its efforts in relation to gender-based violence, including the National Action Plan to End Gender-based Violence, fully include women in all their diversity. The Independent Expert welcomes the fact that the Biden administration issued a report on safety, opportunity and inclusion for trans individuals on the occasion of the Transgender Day of Remembrance in 2021,¹¹² and encourages the Government to strengthen its effective action to protect LGBT persons against violence.

60. LGBT older persons are particularly at risk of violence in the form of abuse and mistreatment because of their sexual orientation and gender identity. A national study on abuses in nursing facilities found that LGBT residents were discriminated against and mistreated by both staff and other residents on the basis of their sexual orientation and gender identity.¹¹³ After a lifetime of discrimination and violence, the study also showed that LGBT older persons were even expecting to suffer isolation, abuse or neglect.¹¹⁴

61. The rates of incarceration of LGBT persons in the United States are also of concern, as they appear to be disproportionate: while the evidence suggests that 4.5 per cent of the adult population in the United States identifies as LGBT, as many as 9.3 per cent of men and 42.1 per cent of women in state and federal prisons and 6.2 per cent of men and 35.7 per cent of women in local jails belong to sexual minorities,¹¹⁵ and the percentage of lesbian, bisexual and queer women incarcerated is 10 times higher than in the general population.¹¹⁶ Within that context, research suggests that gay men are 11 times more likely, compared with heterosexual men, to report being sexually victimized by another inmate, and bisexual men are 10 times more likely.¹¹⁷

62. According to a 2019 report by the Williams Institute, an estimated 698,000 LGBT adults have undergone conversion practices wrongfully called conversion “therapies”, including 350,000 who received them as adolescents.¹¹⁸ The Independent Expert welcomes efforts across the United States to prohibit conversion practices, including the laws of 20 states and the District of Columbia banning conversion practices for minors.¹¹⁹ At the time of the visit, however, 58 per cent of the population in the United States lived in states in which no ban or only a partial ban was in effect.¹²⁰

¹¹¹ See www.ustranssurvey.org/reports.

¹¹² See www.whitehouse.gov/wp-content/uploads/2021/11/Report_Memorializing-Transgender-Day-of-Remembrance_FINAL-002.pdf.

¹¹³ See www.justiceinaging.org/wp-content/uploads/2011/04/RE_LGBT-Stories-from-the-Field.pdf.

¹¹⁴ Ibid.

¹¹⁵ See <https://pubmed.ncbi.nlm.nih.gov/27997242>, analysing data from <https://bjs.ojp.gov/library/publications/sexual-victimization-prisons-and-jails-reported-inmates-2011-12-update> and www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

¹¹⁶ See <https://williamsinstitute.law.ucla.edu/publications/system-involved-lbq-girls-women>.

¹¹⁷ See https://fenwayhealth.org/wp-content/uploads/TFIP-33_Best-Practices-for-LGBTI-Incarcerated-People-Brief_web.pdf.

¹¹⁸ See <https://williamsinstitute.law.ucla.edu/publications/conversion-therapy-and-lgbt-youth>.

¹¹⁹ As of 17 May 2023.

¹²⁰ See www.lgbtmap.org/equality-maps/conversion_therapy.

V. Asylum

63. The Biden administration included protection for refugees and asylum-seekers in the memorandum of 4 February 2021 on advancing the human rights of lesbian, gay, bisexual, transgender, queer and intersex persons around the world.¹²¹ In addition, an executive order provides for the recognition of same-sex partners unable to marry outside the United States to allow them entry into the United States as a derivative under the United States Refugee Admissions Program.¹²²

64. When the current administration triggered a winding down of the Migrant Protection Protocols and admitted some 13,000 persons, allowing them to apply for asylum, that was a welcome development. Although the Independent Expert laments that the programme restarted in late 2021, he warmly welcomes the steps taken by the Government to obtain a ruling by the Supreme Court in June 2022, after which a second winding down of the programme was initiated. During the visit, the Independent Expert was informed that no new registrations were taking place under the Migrant Protection Protocols.¹²³

65. The Independent Expert remains concerned that, despite its clear willingness and drive to adopt measures to protect LGBT persons, the Biden administration has not yet fully dismantled the discriminatory architecture put in place by the Trump administration that has so damaged refugee law at the global level. Therein, human rights advocates identified some 100 policies that negatively affect the rights of immigrants, asylum-seekers and refugees, which daily harm thousands. A salient example was the public health ordinance known as Title 42, introduced at the onset of the COVID-19 pandemic, which was used to carry out approximately 2.8 million rapid expulsions without access to asylum procedures.¹²⁴ The Independent Expert had urged the Government to end the policy; he welcomes the fact that it ended in May 2023. However, human rights defenders documented thousands of cases of kidnapping, torture, rape and other violent attacks on persons waiting in, or expelled to, Mexico, including LGBT persons,¹²⁵ and it is uncertain that any judicial or administrative remedy is available to these persons in connection with any claims in relation to violations of their human rights.

66. The Independent Expert received information, from several government and non-government sources, that pointed to a backlog of between 1 and 2 million asylum cases.

67. In the absence of the unique visiting framework afforded by national prevention mechanisms through the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, during the visit the Independent Expert chose to have conversations with several asylum-seekers who had been in administrative detention, but were no longer deprived of liberty. They shared harrowing stories of human misery: a gay man travelled for three years throughout the continent fleeing daily beatings and police abuse in his country of origin and waited for months at the United States border to be able to present his case, only to find himself handcuffed and taken to a detention centre where he was deprived of liberty for six months. When he was released on parole, he was compelled to wear an ankle monitor for a further six months; he reported to the Independent Expert that two years later he had not yet obtained his work permit.

¹²¹ See www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-advancing-the-human-rights-of-lesbian-gay-bisexual-transgender-queer-and-intersex-persons-around-the-world. See also www.americanprogress.org/article/4-ways-u-s-government-can-strengthen-refugee-resettlement-lgbtqi-people.

¹²² See www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/executive-order-on-rebuilding-and-enhancing-programs-to-resettle-refugees-and-planning-for-the-impact-of-climate-change-on-migration. See also www.uscis.gov/sites/default/files/document/memos/Revised_Guidance_on%20Informal_%28_Camp_%29_Marriages.pdf.

¹²³ The programme was in limbo following the visit in 2022.

¹²⁴ See www.migrationpolicy.org/article/border-after-title-42.

¹²⁵ See <https://humanrightsfirst.org/library/biden-administration-use-and-expansion-of-trump-policy-to-ban-people-seeking-asylum-endangers-lives-tramples-human-rights>.

68. That and other testimonies were consistent with numerous claims and grievances set forth by human rights defenders to the effect that asylum-seekers face violence and discrimination when they are detained in immigration detention centres; and, as the Independent Expert advised the Government during his debriefing, it is particularly concerning given that a general policy of administrative detention of asylum-seekers is not justified under international human rights law and also not based on any reasonable need within a democratic society. Evidence available suggests that LGBT persons in Immigration and Customs Enforcement custody are up to 97 times more likely to be sexually assaulted than other detained persons.¹²⁶ Asylum-seekers who are detained while awaiting the outcome of their applications or following a decision to deny them entry often face a higher risk of sexual harassment and mistreatment while detained than those who do not identify as LGBT persons.¹²⁷ Furthermore, the mandate received allegations of differentiated challenges of LGTBI persons living with HIV, and systemic failures on the part of Immigration and Customs Enforcement and Customs and Border Protection to provide appropriate treatment to all HIV-positive immigrants entrusted to their care, including interruption in the provision of medication, denial of access to medical records and misinformation in relation to the COVID-19 pandemic.¹²⁸

69. During the meeting with authorities at Otay Mesa Detention Center, the Independent Expert was informed of several measures adopted to address some of the identified challenges, and he observed and welcomed an awareness of concepts relating to sexual orientation and gender identity. He was also informed of differentiated protocols for the intake, showers, housing and other aspects of the detention of trans persons, as well as the existence of a Prevention of Sexual Assault Coordinator and a Transgender Classification and Care Committee. The Independent Expert is of the opinion that those measures attest to the importance of awareness-raising and training, as well as the positive impact of implementation by Immigration and Customs Enforcement of the regulation of the Department of Homeland Security issued pursuant to the Prison Rape Elimination Act, as well as Immigration and Customs Enforcement Policy No. 11062.2 on sexual abuse and assault prevention and intervention and its further guidance, issued in 2015, regarding the care of transgender detainees. As the Independent Expert remarked during the visit, however, no differential measures or protocols were observed or reported in relation to gay, lesbian or bisexual persons; and it was discussed that, while the official statistics of Immigration and Customs Enforcement mention LGBT persons under “vulnerable populations”, there are no means to corroborate the information, given that there are no data gathering mechanisms for those identities throughout the system. The same could be said for grievance processes against personnel and complaints against other detained persons: the Independent Expert was informed that there were no overarching comprehensive systems to follow up on these, information that appears to correlate with previous findings of the Government Accountability Office.¹²⁹

70. According to ethnographic fieldwork conducted in Los Angeles and New York City between May 2017 and August 2019, anti-trafficking programmes rarely address the abuse and criminalization faced by LGBT migrants, in particular trans women. The study found that anti-trafficking interventions had little impact on their lives as most are unaware of services offered by anti-trafficking programmes, even if they may not have been implicitly or explicitly excluded in the process.¹³⁰ Furthermore, there is a high criminalization of LGBT forcibly displaced persons, linked to the difficulty to access the formal labour market. Discriminatory law enforcement practices have reportedly led to the hyper-criminalization of trans migrants who were profiled not only by their gender identity status, but also by their immigration status.¹³¹

¹²⁶ See www.americanprogress.org/article/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse.

¹²⁷ See <https://link.springer.com/article/10.1007/s41134-019-00092-2>.

¹²⁸ See <https://immigrationequality.org/wp-content/uploads/2020/09/Complaint-to-Office-of-Civil-Rights-and-Civil-Liberties-Re-HIV-Care-in-Detention-Facilities.pdf>.

¹²⁹ See www.gao.gov/assets/gao-20-596.pdf.

¹³⁰ See www.tandfonline.com/doi/abs/10.1080/23322705.2020.1690116?journalCode=uhtm20.

¹³¹ Ibid.

VI. Conclusions and recommendations

A. Conclusions

71. The Independent Expert has gathered significant evidence of measures adopted by the Government in furtherance of the human rights of LGBT persons, including an impressive array of public policies and legislative actions.

72. Unfortunately, those positive measures have been deliberately undermined by a widespread, profoundly negative riptide of regressive legislative measures intended to roll back the human rights of LGBT persons at the state level. Those include deeply discriminatory measures seeking to rebuild stigmatization of LGBT persons, limiting comprehensive sexual and gender education for all, and limiting access to gender-affirming treatment, sports and single-sex facilities for trans and gender-diverse persons.

73. The work of tracking and reacting to the massive barrage of regressive state legislation and local policies limiting the human rights of LGBT persons demands an extraordinary amount of energy and resources, and civil society plays a key role in the tracking of these actions and the litigation to challenge them.

74. Those threats directed towards the protections offered to sexual and reproductive rights, among others, should trigger a nationwide reflection on the relation of the United States to international and regional human rights law and its institutions, including on the creation of a national human rights institution for oversight of international treaty obligations, as well as an inter-agency federal body responsible for implementation and follow-up to the recommendations of United Nations human rights mechanisms.

75. The international system has a lot to offer to level out that equation. Human rights treaties, including those with provisions that would allow persons under its jurisdiction to present individual complaints to the United Nations human rights treaty bodies or to the Inter-American Court of Human Rights represent powerful tools that could complement domestic legislation and policy. Recent experience proves that, in some instances, persons living under the jurisdiction of the United States may be left without recourse at the domestic level, particularly in cases in which the Supreme Court issues findings that are at odds with fundamental rights.

76. At the same time, the efforts to consolidate a domestic system of rights should continue. The Independent Expert further urges Congress to secure overarching anti-discrimination protections, such as the Equality Act.

77. States are obligated under international human rights law to ensure that LGBT consumers are not discriminated against, regardless of whether by State or non-State actors, and the State cannot permit conscience-based refusals of health care to infringe on the rights of patients, including the right to reproductive health care. In situations in which individual states choose to enable conscience-based refusals, these must be done in accordance with international human rights standards. The Independent Expert urges the Government to redouble its efforts to ensure that those standards are met at both the federal and state levels, in order to protect LGBT persons living under its jurisdiction from violence and discrimination.

78. The Independent Expert remains concerned about the disparity in outcomes in key sectors such as health, education, employment and housing, as well as the underreporting of and impunity for hate crimes based on sexual orientation and gender identity.

79. Comprehensive changes by the state legislatures, the state departments of education and school administrators around the nation are needed to make school environments welcoming for LGBT students and allow them to have the capacity to achieve similar education outcomes without fearing exclusion, bullying or other forms of violence and discrimination.

80. The Independent Expert remains concerned that, despite its clear willingness and drive to adopt measures to protect LGBT persons, the Biden administration has not yet fully dismantled the discriminatory architecture put in place by the Trump administration in relation to the asylum system, which has so damaged refugee law at the global level.

81. As the Independent Expert advised the Government during his debriefing, it is particularly concerning given that a general policy of administrative detention of asylum-seekers is not justified under international human rights law and also not based on any reasonable need within a democratic society.

B. Recommendations

82. Based on those conclusions and the observations made in the present report, the Independent Expert makes the following recommendations to the federal and state-level governments of the United States in relation to their respective competences.

83. With regard to legal and policy frameworks, the federal and state-level governments should:

(a) Accede to additional United Nations and regional human rights treaties, to enhance conformity with international standards;

(b) Create a national human rights institution for oversight of international treaty obligations, and an inter-agency federal body responsible for implementation of and follow-up to the recommendations of United Nations human rights mechanisms;

(c) Adopt legislation necessary for the legal recognition of gender identity at the federal and state levels;

(d) Adopt legislation necessary for the prohibition of conversion practices at the federal and state levels;

(e) Enhance anti-discrimination legal protections, including through the passage of the Equality Act;

(f) Review all laws and policies providing for “conscience-based refusals” of services to LGBT persons to ensure conformity with international human rights law.

84. With regard to data, the federal and state-level governments should:

(a) Gather disaggregated data that allow proper identification of how group characteristics, including race, interact with sexual orientation and gender identity in placing persons at higher risk of social exclusion;

(b) Monitor outcomes in key sectors such as health, education, employment and housing, with a view to adopting laws and policies to reduce human rights disparities based on sexual orientation and gender identity.

85. With regard to health, the federal and state-level governments should carry out awareness-raising campaigns among parents, families and communities on sexual and gender diversity, aimed at reducing intra-family violence against LGBT persons and rejection by their families.

86. With regard to employment, the federal and state-level governments should pursue federal-level legislation that promotes the highest possible level of equal protection from employment discrimination.

87. With regard to education, the federal and state-level governments should:

(a) Strengthen comprehensive sexuality and gender education materials – and adopt effective school policies and campaigns to disseminate those resources – to counter misinformation, discrimination and violence affecting students;

(b) Ensure the inclusion of sexual orientation and gender identity in all relevant educational materials, including teacher training and student textbooks, to

promote human rights education and to reduce violence and discrimination in educational institutions;

(c) Make school environments more welcoming for LGBT students and allow them to have the capacity to achieve similar education outcomes without fearing exclusion, bullying or other forms of violence and discrimination;

(d) Facilitate access to sport in conformity with gender identity, with any exceptions assessed for their compatibility with international human rights law protections.

88. With regard to housing, the federal and state-level governments should pursue federal-level legislation that promotes the highest possible level of equal protection from housing discrimination.

89. With regard to violence, the federal and state-level governments should:

(a) Increase efforts at the federal and state levels to address underreporting of and impunity for hate crimes based on sexual orientation and gender identity, including by reinforcing dialogue with affected communities and populations;

(b) Ensure all efforts to address gender-based violence, including the National Action Plan to End Gender-based Violence, fully include women in all their diversity.

90. With regard to asylum, the federal and state-level governments should:

(a) Ensure judicial and administrative remedies are available to any persons whose rights were violated under United States laws and policies on asylum, including on the basis of Title 42;

(b) Enhance the differential measures or protocols in relation to gay, lesbian or bisexual persons in contact with Immigration and Customs Enforcement, including but not limited to data-gathering mechanisms to identify those populations throughout the system, and the implementation of overarching comprehensive systems to follow up on grievances against personnel and other detainees;

(c) Gather data on the identities of LGBT persons throughout the asylum and refugee systems, in order to better protect them from discrimination and violence upon reception, detention and resettlement.

91. With regard to awareness-raising, the federal and state-level governments should disseminate widely relevant findings of the present report to central, national and local-level authorities to share and consider the replication of good practices, as well as to address any identified protection gaps.
