

ARTICLE 19

# Russia: Federal laws introducing ban of propaganda of non-traditional sexual relationships

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June 2013

Legal analysis

## Executive summary

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In this analysis, ARTICLE 19 calls on the Upper Chamber of the Russian Federal Assembly (the Federation Council) and the President of the Russian Federation to reject the Bill passed by the State Duma which seeks to amend several federal laws, including the Code of Administrative Offenses, in order to introduce a ban on so-called ‘propaganda of non-traditional sexual relationships’ (the Bill).

The Bill does not comply with international human standards. If it becomes law, it will introduce illegitimate restrictions on freedom of expression, discriminate against Lesbian, Gay, Bisexual, and Transgender (LGBT) persons, impede pluralistic and open discussion on matters of sexual identity, equality and tolerance, and harm the rights of children it ostensibly seeks to promote.

The proposed ban on ‘propaganda of non-traditional sexual relationships’ will in breach of Russia’s international human rights obligations for a number of reasons:

- First, any restrictions on freedom of expression and freedom of assembly must meet the requirements of legality, such as certainty and predictability. The definitions of prohibited ‘propaganda’ contained in the Bill are too vague and overly broad to be considered as ‘law’ within the meaning of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The vagueness and subjective nature of the terms used in the Bill can lead to arbitrary interpretation and abuse by law enforcement authorities.
- Second, there is no objective and reasonable connection between the introduced restrictions and the purported aim of protecting the rights of children or public morals. The Bill is not supported by any scientific evidence which would show that the type of information covered by the ban has a harmful effect on children. On the contrary, the restrictions will damage the health and development of children as they will be deprived of access to information necessary for their full enjoyment of the right to health and the right to education. Therefore it does not further the otherwise legitimate aim of protecting the rights of others, in this case children;
- Third, the restrictions are discriminatory because they target only information relating to non-heterosexual sexuality and gender identity without a reasonable and objective justification for such differentiated treatment. They are also discriminatory because they perpetuate discriminatory practices and attitudes and silence those advocating for equality and LGBT rights while privileging their opponents.

**In light of these considerations, ARTICLE 19 recommends that the Bill is not passed into law.**



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# Introduction

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In this analysis, ARTICLE 19 examines the Federal Law “On Introducing Amendments to Article 5 of the Federal Law ‘On the Protection of Children from Information Harmful to their Health and Development’ and Miscellaneous Legal Acts of the Russian Federation for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values’ (the Bill) for its compliance with international human rights standards, especially the right to freedom of expression.

The Russian State Duma adopted the Bill in third reading on 11 June 2013 and it has now been referred to the Federation Council, the Upper Chamber of the Russian Parliament. If the Bill is approved or left by the Federation Council without consideration, it will become law once it is signed by the President of the Russian Federation.

The Bill was initiated by the Legislative Assembly of Novosibirsk Oblast in March 2012. A short briefing note, introducing the initiative, includes the following:

- The authors complain of a “barrage” of “homosexual propaganda” which is conducted in the media and through public actions and which presents “homosexuality as a behavioural norm”;
- “Homosexual propaganda” is described as “especially dangerous for children and youths”;
- The declared objective of the Bill is to “shield, first of all, the young generation from the effects of homosexual propaganda” and provide measures banning actions aimed at the “popularisation of homosexuality”;
- The note also states that “family, motherhood and childhood in their traditional understanding inherited from the ancestors’ are values which require ‘special protection by the state.’”

The introduction of this legislative proposal came in the wake of the proliferation of regional bans on ‘homosexual propaganda’. At the time of tabling the initiative, at least nine regional legislators had adopted such a ban – and their number has been growing since.

The draft Bill passed all three readings at the State Duma without any significant discussion. The main change to its wording had undergone in the process was the replacement of references to “propaganda” for “homosexual relationships” and “homosexual orientation” with references to “non-traditional” sexual relationships and “predispositions”. This new terminology, however, is not defined in the Bill.

The Bill is designed to amend two federal laws concerned with children’s rights and welfare as well as introduce a new provision in the Code of Administrative Offences:

- Article 1 of the Bill amends Article 5 of the Federal Law ‘On Protection of Children from Information Harmful to their Health and Development’ by adding information ‘propagandising non-traditional sexual relationships’ to the list of information banned for distribution among children;
- Article 2 of the Bill makes a similar amendment to Article 14 of the Federal Law ‘On basic guarantees for the rights of the child in the Russian Federation’ which obliges the

authorities to take measures to protect children from certain types of information and propaganda that are harmful to their health and moral and spiritual health;

- Finally, Article 3 creates a new administrative offence of ‘propaganda of non-traditional sexual relationships among minors’ by introducing Article 6.21 in the Code of Administrative Offences. The provision establishes a series of administrative penalties in the form of fines, suspensions for legal entities and deportations for foreign nationals. Fines increase considerably where ‘propaganda’ is carried out in the mass media or the Internet.

ARTICLE 19 has worked extensively on the protection of the right to freedom of expression in Russia and, on a number of occasions, has addressed the subject of prohibition of “homosexual propaganda” in Russia and other countries. It has advocated against this type of restriction on freedom of expression before the European Union<sup>1</sup> and the UN Human Rights Commission.<sup>2</sup>

From the moment this Bill was introduced in the State Duma, we have repeatedly and consistently called on the Russian legislature not to adopt it because it violates the right to freedom of expression of all persons and discriminates against LGBT persons.<sup>3</sup> ARTICLE 19 has recently published a report that provides a human rights-based analysis of bans on ‘homosexual propaganda’ introduced in order to protect ‘traditional values’.<sup>4</sup>

Given our previous concerns and the criticism of the draft Bill, we call on the Federation Council to reject the Bill. Should the Bill pass in the Federation Council, the President of the Russian Federation must refuse signing it into law.

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<sup>1</sup> ARTICLE 19, EU: Sustained pressure needed against “homosexual propaganda” bans; available at <http://www.article19.org/resources.php/resource/37097/en/eu:-sustained-pressure-needed-against-“homosexual-propaganda”-bans>

<sup>2</sup> ARTICLE 19’s submission to the Universal Periodic Review; available at <http://www.article19.org/resources.php/resource/3473/en/russia:-article-19%27s-submission-to-the-un-universal-periodic-review>

<sup>3</sup> ARTICLE 19, Russia: Planned ban on “homosexual propaganda” discriminates, censors human rights work and undermines freedom of expression for all; available at: <http://www.article19.org/resources.php/resource/3568/en/russia:-planned-ban-on-“homosexual-propaganda”-discriminates,-censors-human-rights-work-and-undermines-freedom-of-expression-for-all;> Russia: Alarming enthusiasm for anti-gay propaganda law in Duma vote; available at: <http://www.article19.org/resources.php/resource/3595/en/russia:-alarming-enthusiasm-for-anti-gay-propaganda-law-in-duma-vote;> and, Russia: Ban on “propaganda of non-traditional sexual relationships” violates international law; available at: <http://www.article19.org/resources.php/resource/37102/en/russia:-ban-on-“propaganda-of-non-traditional-sexual-relationships”-violates-international-law>.

<sup>4</sup> ARTICLE 19, Traditional values? Attempts to censor sexuality. Homosexual propaganda bans, freedom of expression and equality; available at: <http://www.article19.org/resources.php/resource/3637/en/what%E2%80%99s-wrong-with-tradition?-how-%E2%80%98homosexual-propaganda%E2%80%99-bans-violate-human-rights>.

# International standards

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## The right to freedom of expression and information

Article 19 of the UDHR guarantees the right to freedom of expression.<sup>5</sup> This is elaborated upon and given legal force by Article 19 of the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> which protects the right of all people to seek, receive, and impart information of any form, including political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.<sup>7</sup> The right protects expression that others may find deeply offensive.<sup>8</sup>

At the Council of Europe level, freedom of expression is similarly guaranteed in Article 10 of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has held that this right is “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”<sup>9</sup> It has been emphasised that “there is little scope [...] for restrictions on political speech or on debate on questions of public interest.”<sup>10</sup>

The ECtHR has also emphasised that “restricting a person from receiving information that others wish or may be willing to impart” is a violation of the right to freedom of expression.<sup>11</sup> Otherwise, “society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion.”<sup>12</sup>

It is widely recognised by international human rights mechanisms that the right to freedom of expression and information applies irrespective of sexual orientation. The Human Rights Committee has explicitly stated that it protects the right to publicly give expression to their sexual identity and seek understanding for it.<sup>13</sup>

The UN High Commissioner on Human Rights has recommended that States:

[E]nsure that individuals can exercise their rights to freedom of expression, association and peaceful assembly in safety without discrimination on grounds of sexual orientation and gender identity.<sup>14</sup>

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<sup>5</sup> UN General Assembly Resolution 217A(III), adopted on 10 December 1948.

<sup>6</sup> International Covenant on Civil and Political Rights, 16 December 1966, UN Treaty Series, vol. 999, p. 171.

<sup>7</sup> General Comment No. 34, HR Committee, CCPR/C/GC/34, 12 September 2011, para. 11.

<sup>8</sup> *Ibid.*

<sup>9</sup> ECtHR, *Handyside v. UK*, Application No. 5493/72, Judgment of 7 December 1976, para. 49.

<sup>10</sup> ECtHR, *Öllinger v Austria*, Application No. 76900/01, Judgment of 29 June 2006, para. 38.

<sup>11</sup> ECtHR, *Leander v. Sweden*, Application No.9248, 26 March 1987, para 74; and *Sirbu et al v. Moldova*, Application Nos.73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01, 15 June 2004, para 18.

<sup>12</sup> ECtHR, *Alekseyev v. Russia*, Applications nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 77.

<sup>13</sup> UN Human Rights Committee, *Fedotova v. Russian Federation*, CCPR/C/106/D/1932/2010, Communication No. 1932/2010, 30 November 2012, para. 10.7.

<sup>14</sup> Report of the UN High Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 17 November 2011, para. 84(f).

Within the Council of Europe, the Committee of Ministers has recommended:

Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.<sup>15</sup>

The 2011 Council of Europe report, *Discrimination on Grounds of Sexual Orientation and Gender Identity*,<sup>16</sup> recommends that States respect the right to freedom of expression by safeguarding the possibility to impart and receive information on issues related to sexual orientation and gender identity in any form, such as the press, publications, oral and written statements, art and other media. It recommends that any discriminatory provision criminalising the dissemination and diffusion of factual information concerning sexual orientation and gender identity should be abolished.

On 18 June 2013, the Venice Commission of the Council of Europe issued an opinion in which it concluded that bans on “homosexual propaganda” are “incompatible with ECHR and international human rights standards,” including the right to freedom of expression.<sup>17</sup>

## The right to freedom of assembly and association

The right to freedom of expression is integral to the enjoyment of the rights to freedom of peaceful assembly and of association, guaranteed in Article 21 of the ICCPR and Article 11 of the ECHR.<sup>18</sup> The state is under a positive obligation to enable the exercise of the right to freedom of peaceful assembly, including the obligation to exercise a presumption in favour of the holding of assemblies. It must protect peaceful assemblies, including from counter demonstrators and *agents provocateurs*.<sup>19</sup>

The right to freedom of peaceful assembly also extends to the expression of ideas that may be considered controversial or that are “not necessarily favourably received by the government or the majority of the population”<sup>20</sup> or that “may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote.”<sup>21</sup>

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<sup>15</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, para. 13

<sup>16</sup> *Discrimination on Grounds of Sexual Orientation and Gender Identity*, 2nd edition, 2011.

<sup>17</sup> European Commission for Democracy Through Law (Venice Commission), Opinion 707/2012 on the issue of the prohibition of so-called “propaganda of homosexuality” in the light of recent legislation in some member states of the Council of Europe, 28 June 2013, para. 81.

<sup>18</sup> General Comment No. 34, *op. cit.*, para. 4. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, 20 April 2010, para. 29; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27, 21 May 2012, para. 12.

<sup>19</sup> ECtHR, *Plattform “Ärzte für das Leben” v. Austria*, Application No. 10126/82, 21 June 1988, para. 34.

<sup>20</sup> HR Committee, *Viktor Korneenko et al v. Belarus*, Communication No. 1274/2004, para. 7.3

<sup>21</sup> ECtHR, *Stankov & UMO Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95, 2 October 2001, para. 86.

This right is also guaranteed regardless of the sexual orientation or gender identity of the participants and protects expression related to issues of sexual orientation and gender identity.<sup>22</sup> The obligation to secure the effective enjoyment of the right to freedom of peaceful assembly is of “particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.”<sup>23</sup> The ECtHR has stressed that the exercise of this right cannot be “made conditional on its being accepted by the majority” as otherwise, “a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practice and effective.”<sup>24</sup>

## Limiting the rights to freedom of expression and freedom of assembly

While the right to freedom of expression and the right to freedom of peaceful assembly are fundamental rights, they may be subject to narrowly tailored limitations. Both under the ICCPR and the ECHR, limitations on these rights must comply with a three-part test, namely:

- They must be **provided by law** (or for freedom of assembly be “in conformity with the law”), i.e. they must “be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”<sup>25</sup>
- They must **pursue one of the ‘legitimate aims’** expressly listed in the respective provisions of the ICCPR and ECHR. Under the ICCPR these are: respect for the rights or reputations or others, the protection of national security or of public order, or the protection of public health or morals (Articles 19(3) and 21 of the ICCPR). The right to freedom of peaceful assembly may be additionally restricted to protect public safety.<sup>26</sup>
- They must be **necessary and proportionate to the legitimate aim pursued**, i.e. States must demonstrate in a “specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>27</sup> Moreover, the restriction must not be overly broad and must be the least restrictive means available for achieving the protective function.

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<sup>22</sup> *Fedotova, op. cit.; Alekseyev, op.cit.; Baczkowski and Others, op. cit.*

<sup>23</sup> *Alekseyev, op. cit.*, para. 70. See also: *Baczkowski and Others, op. cit.*, para. 64.

<sup>24</sup> *Alekseyev, op. cit.*, para. 81.

<sup>25</sup> General Comment No. 34, *op. cit.* Also, the Siracusa Principles, *ibid.*, require limitations to be articulated in terms that are “clear and accessible by everyone” and to be of general application, that they not be arbitrary or unreasonable, and that adequate safeguards and effective remedies shall be provided for the illegal or abusive imposition or application of limitations on human rights.” In similar terms, the ECtHR has stated that limitations must be “formulated with sufficient precision to enable the citizen ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” See, e.g. *Muller and Others v. Switzerland*, application No. 10737/84, 24 May 1988, para. 29.

<sup>26</sup> Under the ECHR these rights may be restricted to protect national security, the prevention of disorder or crime, for the protection of health or morals, and the protection of the rights and freedoms of others ( Article10(2) ECHR and Article 11(2) ECHR).

<sup>27</sup> General Comment No. 34, *op. cit.*, para 35; also: *Shin v. Republic of Korea*, Communication No. 926/2000, HR Committee, 16 March 2004, para. 7.3.

Under international law, limitations to protect the rights of others should not be interpreted, inter alia, to restrict political debate.<sup>28</sup> Also, they must be supported by evidence and should not be speculative. The ECtHR has held that there was no scientific or social data “suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or ‘vulnerable adults’.”<sup>29</sup> Venice Commission has concluded that “it cannot be deemed to be in the interest of minors that they be shielded from relevant and appropriate information on sexuality, including homosexuality.”<sup>30</sup> Indeed, ARTICLE 19 has argued that prohibitions on homosexual propaganda deprive all individuals of information that is crucial to asserting their economic, social and cultural rights, in particular the rights to health and education.<sup>31</sup>

The State bears the burden of demonstrating that any limitation to protect “public morals” is essential to the maintenance of respect for fundamental values of the community.<sup>32</sup> While States enjoy a margin of appreciation in this regard, this discretionary leeway does not permit “public morals” to be invoked to “justify discriminatory practices”<sup>33</sup> or “to perpetuate prejudice or promote intolerance.”<sup>34</sup> The ECtHR has stated that:

“[I]t would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.”<sup>35</sup>

International human rights bodies have also noted that concepts of morality are constantly evolving,<sup>36</sup> that any limitation “must be based on principles not deriving exclusively from a single tradition”,<sup>37</sup> and “must be understood in the light of the universality of human rights and the principle of non-discrimination.”<sup>38</sup>

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<sup>28</sup> General Comment No. 34, *op. cit.*, para. 28.

<sup>29</sup> *Alekseyev, op. cit.*, para. 86.

<sup>30</sup> Venice Commission Opinion 707/2012, *op. cit.*, para. 63.

<sup>31</sup> ARTICLE 19, Traditional values? Attempts to censor sexuality. Homosexual propaganda bans, freedom of expression and equality, *Ibid.*, at pages 16 – 17.

<sup>32</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, part I.A.2 and I.A.9, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4.

<sup>33</sup> *Ibid.* See also General Comment No. 34, *op. cit.*, para. 32.

<sup>34</sup> UN Human Rights Committee, *Hertzberg et al v. Finland*, Communication No. 61/1979, individual opinion by Committee members Opsahl, Lallah and Tarnopolsky, 2 April 1982. The decision of the majority in *Hertzberg* should now be read in light of the decision in *Fedotova, op. cit.*

<sup>35</sup> *Alekseyev, op. cit.*, para. 81.

<sup>36</sup> The Siracusa Principles, *op. cit.* See also: *Muller vs. Switzerland, op. cit.*, para. 35, in which the ECtHR equated the concept of “public morality” with safeguarding the general population from obscene materials. In *Alekseyev, op. cit.*, in finding that the limitation placed on the right to freedom of peaceful assembly was not necessary in a democratic society, the ECtHR noted para. 82 that “[a]t no stage was it suggested that the event would involve any graphic demonstration of obscenity of a type comparable to the exhibition in the case of Müller and Others referred to by the Government... the participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views.”

<sup>37</sup> General Comment No. 34, *op. cit.*, para. 32.

<sup>38</sup> *Ibid.*

Similarly, in cases of invoking protection of public health, international standards maintain that such measures must be “both evidence-based and proportionate to ensure respect of human rights.”<sup>39</sup>

Finally, any restrictions on the rights of freedom of expression and freedom of assembly must be imposed in a discriminatory fashion. The prohibition of discrimination is contained both in the ICCPR (Articles 2(1) and 26) and the ECHR (Article 14). The Human Rights Committee has interpreted the prohibition to cover the grounds of sexual orientation and gender identity.<sup>40</sup> The Committee has explicitly ruled that the enforcement of administrative sanctions against “homosexual propaganda” violates an individual’s right to non-discrimination under Article 26 in conjunction with Article 19 of the ICCPR.<sup>41</sup> The ECtHR has also recognised that sexual orientation is a concept covered by the prohibition of discrimination under Article 14 of the ECHR.<sup>42</sup>

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<sup>39</sup> Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 3 August 2011, A/66/254, para. 18.

<sup>40</sup> UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, para. 8.7; and *Young v Australia*, Communication No. 941/2000, para. 10.4. See also, e.g., Human Rights Committee Concluding observations on Chile (CCPR/C/CHL/CO/5, para 16), San Marino (CCPR/C/SMR/CO/2, para 7), and Austria (CCPR/C/AUT/CO/4, para. 8).

<sup>41</sup> *Fedotova*, op. cit.

<sup>42</sup> See, e.g., ECtHR, *Kozak v. Poland*, Application no 13102/02, 2 March 2010.

# Analysis of the Bill

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The Bill is comprised of three articles that introduce amendments to two federal laws and the Code of Administrative Offences respectively.

- Article 1 of the Bill amends Article 5 of the Federal Law 'On Protection of Children from Information Harmful to their Health and Development'<sup>43</sup> by adding information 'propagandising non-traditional sexual relationships' to the list of information banned for distribution among children. Children are defined in Russian legislation as persons under the age of 18.
- Article 2 of the Bill makes a similar amendment to Article 14 of the Federal Law 'On Basic Guarantees for the Rights of the Child in the Russian Federation'<sup>44</sup> which obliges the authorities to take measures to protect children from certain types of information and propaganda that are harmful to their health and moral and spiritual health. Examples of the type of information prohibited in Article 14 include racial and social intolerance, alcohol and tobacco advertising, and pornography. The Bill extends this category by adding 'information propagandising non-traditional sexual relationships'.
- Article 3 creates a new administrative offence of 'propaganda of non-traditional sexual relationships among minors' by introducing Article 6.21 to the Code of Administrative Offences. The provision establishes a series of administrative penalties in the form of fines, suspensions for legal entities and deportations for foreign nationals. Fines range from 4,000 roubles to 1,000,000 roubles, increasing considerably for cases of 'propaganda' carried out with the use of the mass media or the Internet.<sup>45</sup>

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<sup>43</sup> Federal Law 'On Protection of Children from Information Harmful to their Health and Development, adopted on 29 December 2010, No. 436 – F3; available (in Russian) at <http://www.rg.ru/2010/12/31/deti-inform-dok.html>.

<sup>44</sup> Federal Law 'On Basic Guarantees for the Rights of the Child in the Russian Federation, adopted on 24 July 1998, No. 124-FZ.

<sup>45</sup> New Article 6.21 will read:

1. Promotion of non-traditional sexual relations among minors, expressed in the dissemination of information aimed at developing non-traditional sexual juvenile facilities, attractiveness of non-traditional sexual relations, a distorted picture of the social equivalence of traditional and non-traditional sexual relations, or the imposition of information on non-traditional sexual relationships, causing interest in such relationships if these actions do not have a criminal offense, are punishable by an administrative fine on citizens in the amount of four thousand to five thousand rubles for officials - from forty thousand to fifty thousand rubles for legal entities - from eight hundred thousand to one million rubles or administrative suspension of activity for up to ninety days.
2. Actions provided for by paragraph 1 of this Article, committed with the use of the media and (or) information and telecommunication networks (including the "Internet"), if these actions do not have a criminal offense, - shall entail the imposition of an administrative fine on citizens in the amount of fifty thousand to one hundred thousand rubles for officials - from one hundred thousand to two hundred thousand rubles for legal entities - one million rubles or administrative suspension of activity for up to ninety days.
3. Actions provided for by paragraph 1 of this Article, committed by a foreign national or a stateless person, if these actions do not have a criminal offense, - shall be punishable by a fine of four thousand to five thousand rubles from the administrative expulsion from the Russian Federation or administrative arrest for up to fifteen days with administrative expulsion from the Russian Federation.
4. Actions provided for by paragraph 1 of this Article, committed by a foreign national or a stateless person with the use of the media and (or) information and telecommunication networks (including the "Internet"), if these actions do not have a criminal offense, - shall be punishable by a fine of fifty thousand to one hundred

- Paragraph 1 of Article 6.21 defines the offence of “propaganda of non-traditional sexual relationships” as “spreading information which aims at causing minors to form non-traditional sexual predispositions, notions of attractiveness of non-traditional sexual relationships, distorted ideas about equal social value of traditional and non-traditional sexual relationships, or imposing information about non-traditional sexual relationships which raises interest in such relationships insofar as these acts do not amount to a criminal offence.”
- Paragraph 2 provides increased penalties for individuals and legal entities where “propaganda” is carried out through the use of the mass media and/or the Internet. For individuals fines increase to between 50,000 and 100,000 Roubles, for officials to between 100,000 and 200,000 Roubles, and for legal entities to a minimum of 1,000,000 Roubles or suspension of activities for 90 days.
- Paragraph 3 establishes penalties for acts prohibited in paragraphs 1. For individuals fines are set between 4,000 and 5,000 Roubles, for officials fines are set between 40,000 and 50,000 Roubles, and for legal entities between 800,000 and 1,000,000 Roubles.
- Paragraph 4 establishes penalties for when these acts are committed by foreign nationals or stateless persons. Penalties for foreign nationals include administrative detention for up to 15 days followed by deportation in conjunction with a possible fine of 4,000 to 5,000 Roubles.

ARTICLE 19 finds the Bill to be fundamentally flawed in three respects, each of which makes it incompatible with Russia’s international human rights obligations.

### **The bill violates the right to freedom of expression**

Each of the three articles in the Bill seek to limit the dissemination of information regarding sexual orientation and gender identity, either through direct bans or through the creation of positive duties on the State to protect children from specific information.

Each provision clearly infringes upon the right to freedom of expression, and must therefore comply with the three-part test under Article 19(3) of the ICCPR. The bill does not meet any of these requirements.

#### **No legal certainty:**

The restrictions imposed by the Bill on freedom of expression are not ‘provided by law’. As a consequence, human rights defenders, teachers, medical professionals, journalists and bloggers cannot be certain what expression or other conduct is or is not permitted under the ban. This ambiguity also gives too much discretion to law enforcement authorities to arbitrarily apply the law.

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thousand with administrative expulsion from the Russian Federation or administrative arrest for up to fifteen days with administrative expulsion from the Russian Federation.

The definition given to “propaganda of non-traditional sexual relationship” in Article 6.21(2) is unclear, raising more questions regarding meaning than it resolves:

Spreading information which aims at causing minors to form non-traditional sexual predispositions, notions of attractiveness of non-traditional sexual relationships, distorted ideas about the equal social value of traditional and non-traditional sexual relationships, or imposing information about non-traditional sexual relationships which raises interest in such relationships insofar as these acts do not amount to a criminal offence.

“Non-traditional sexual relationships” (or “predispositions”) is not defined, although it is clearly understood to insinuate all same-sex relationships. It is believed the language is borrowed from a 2010 judgment of the Russian Constitutional Court, which limited the scope of the term “homosexual propaganda” in an administrative provision in Ryazan Oblast.<sup>46</sup>

A number of other terms are ambiguous and open the provisions to a range of interpretations and possible arbitrary enforcement. For example, what would constitute “raised interest in” “non-traditional sexual relationships” is entirely unclear. By this definition, the national debate regarding this Bill could be considered the most spectacular incident of propagating “non-traditional” relationships in Russian history. Other key terms in the definition are clearly based on subjective value judgments that do not have the quality of law. For example, it is entirely unascertainable to predict what information will be considered as creating “distorted ideas about the equal social value of traditional and non-traditional sexual relationships”.

As a consequence of this ambiguity, the prohibitions feasibly could apply to *any* information regarding sexual orientation or gender identity that does not fit with what the State considers as in-line with “tradition”.

What “among minors” means is also unclear, and the Bill offers no definition for this. It may mean the sharing of information where children are likely to be exposed to it. However, children can potentially be present in any public place, and with the Internet essentially have as much access to information online as any adult. Predicting the presence of children in any space, on-line or off-line, is quite impossible and is a variable that the proponent of any expression will rarely be in absolute control of. This makes the scope of the prohibition incredibly broad. Moreover, there are many cases where it is clearly legitimate, and even an obligation for the State, to target age-appropriate information regarding sexual orientation and gender identity at children, and the law fails to distinguish these circumstances from other instances where certain information may not be age-appropriate and therefore subject to narrowly tailored restrictions.

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<sup>46</sup> Judgment of 19 January 2010 (no. 151-O-O) of the Constitutional Court of the Russian Federation. “Homosexual propaganda” was defined by the Court as “the activity aimed at purposeful and uncontrolled dissemination of information which is able to cause damage to moral and spiritual development or to the health of minors, inducing them to form warped perceptions that traditional and non-traditional marital relations are socially equal, bearing in mind that minors due to their age are not able to estimate such information critically and indecently.” The Supreme Court has also restricted the definition of “homosexual propaganda” and considered that “such prohibition does not prevent from holding public events, including public debates on the social status of sexual minorities, without dictating homosexual lifestyle to minors who are not able to critically estimate such information due to their age.”

As the Venice Commission has observed, existing prohibitions on “homosexual propaganda” at the regional level in Russia that are similarly vague to the Bill have been applied inconsistently, thus demonstrating that the lack of legal certainty leads to arbitrary enforcement.<sup>47</sup>

**Not necessary in a democratic society for the pursuit of a legitimate aim:**

As outlined above, any restriction on the right to freedom of expression must be in pursuit of a legitimate aim, as exhaustively listed within Articles 19(3) and 21 of the ICCPR and the corresponding provisions under the ECHR. These include “the rights of others” as well as the protection of “public morals”. However, any restriction must also be “necessary in a democratic society”.

Our analysis of the Bill exposes that its purported aims of the law to protect the health and morals of children are disingenuous, and that international experience demonstrates that the Bill will undermine these interests rather than advance them.

Protection of the rights of others

The briefing note to the Bill, initiated by the Legislative Assembly of Novosibirsk Oblast in March 2012, indicates that the protection of “children”, “the young generation”, “youths” “family”, and “motherhood” are central objectives to the Bill. This is supported by the titles of the two Federal laws to be amended by the Bill.

In determining whether the Bill protects the rights of others, it is important to consider the numerous decisions of international human rights courts and bodies, including against Russia, that found States to have failed to produce evidence in support of claims that the mention of homosexuality or public debate about the social status of sexual minorities has any adverse affect on children or vulnerable adults.<sup>48</sup> These decisions reiterate that the protective utility of any restriction on the right to freedom of expression or freedom of peaceful assembly must be supported by objective evidence and must not be speculative. As with analogous bans on “homosexual propaganda”, the Bill lacks an evidential basis for the claim that it protects the rights of children. The claims proponents of the Bill advance rather rest upon and perpetuate harmful stereotypes of LGBT people that appeal to the prejudices of majorities but have no basis in fact or reality.

Rather, evidence indicates that open debate and discussion regarding sexual orientation and gender identity in their full diversity, including age-appropriate information for children, is conducive to social inclusion, positive public health outcomes, and education.<sup>49</sup> States are

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<sup>47</sup> Venice Commission Opinion 707/2012, *op. cit.*, para. 33 - 34.

<sup>48</sup> *Alekseyev*, *op. cit.*, para. 86 “there is no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children.” Thus the ECtHR concluded that the ban on the public event was “not based on an acceptable assessment of the relevant facts.”

<sup>49</sup> See, for example: Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 16 February 2004, E/CN.4/2004/49, para. 53, 56; Annual Report of the UN High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, *op. cit.*, paras 58, 60 - 61; Report by the Special Rapporteur on the Right to Education, E/CN.4/2006/45, 8 February 2006, para. 113; E/CN.4/2003/75/add.1, para. 1508.

under an obligation to refrain from censoring, withholding or intentionally misrepresenting health-related information<sup>50</sup> and this requires the abolition of laws that “censor discussions of homosexuality in the classroom” since this fuels “stigma and discrimination of vulnerable minorities.”<sup>51</sup> Therefore, far from protecting the health of children, the measures introduced in the Bill will put their physical and mental development at serious risk.

Prohibitions on “homosexual propaganda” have also consistently been enforced against LGBT human rights defenders attempting to make political statements about the discriminatory treatment of LGBT people in their respective countries. International human rights law does not permit the “protection of the rights of others” to be invoked to restrict political debate, or to justify discriminatory practices against LGBT people.<sup>52</sup>

### Protection of public morals

ARTICLE 19 observes that the explanatory note to the Bill clearly bases the law as protecting what may be described as “public morals”.<sup>53</sup> However, for a number of reasons the restrictions on the right to freedom of expression cannot be justified on this basis:

- The Bill overlooks the principle under international human rights law “public morals” is not a fixed concept but one that develops over time, and thus cannot be satisfied by mere reference to historical practices,<sup>54</sup> as found in the explanatory note, which speaks of values “inherited from the ancestors”.
- By rooting the law in the need to preserve historical values, and implicitly the position of Russian Orthodoxy in society, the Bill ignores the principle that “public morals” must always be interpreted in light of the universality of human rights and not be premised on principles derived from a single tradition.<sup>55</sup>
- International standards are clear that “public morals” cannot be invoked to justify prejudice or promote intolerance.<sup>56</sup>

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<sup>50</sup> C.f. UN Committee on ESCR.12/2000/14, para. 14

<sup>51</sup> Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *op. cit.*, para 59. See also Report of the UN Special Rapporteur on the right to education, A/65/162, 23 July 2010, paras 23 and 69.

<sup>52</sup> *Alekseyev, ibid.*; General Comment No. 34, *op. cit.*, para. 28.

<sup>53</sup> The explanatory note to the Bill explains that “family, motherhood and childhood in their traditional understanding inherited from the ancestors’ are values which require ‘special protection by the state.’”

<sup>54</sup> Venice Commission Opinion 707/2012, *op. cit.*, para. 56. See also: *Muller vs. Switzerland, op. cit.*, para. 35, in which the ECtHR equated the concept of “public morality” with safeguarding the general population from obscene materials. In *Alekseyev, op. cit.*, in finding that the limitation placed on the right to freedom of peaceful assembly was not necessary in a democratic society, the ECtHR noted para. 82 that “[a]t no stage was it suggested that the event would involve any graphic demonstration of obscenity of a type comparable to the exhibition in the case of *Müller and Others* referred to by the Government... the participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views.” Citing comments of the Mayor of Moscow, the ECtHR exposed the public morality argument as cover for the fact that what the authorities found objectionable was “the very fact that they [the demonstrators] wishes to openly identify themselves as gay men or lesbians, individually and as a group.” The Court therefore found that the violation of the applicant’s Article 11 rights also constituted a violation of the guarantee against discrimination under Article 14.

<sup>55</sup> General Comment No. 34, *op. cit.*, para. 32.

<sup>56</sup> *Ibid.* The HR Committee also asserted that morality based limitations on rights “must be understood in the light of the universality of human rights and the principle of non-discrimination; General Comment No. 34, *op. cit.*, para. 32.

- No clear evidence has been presented to make the case that the Bill is *essential* to the maintenance of fundamental values of the community as required by international law.<sup>57</sup>

The UN High Commissioner for Human Rights has warned of “privileging the antagonists” rather than those claiming rights when applying “public morality” arguments in this context.<sup>58</sup> Similarly, in the case of *Alexseyev v. Russia*, the ECtHR said:

It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly would be merely theoretical rather than practical and effective as required by the Convention.<sup>59</sup>

Further, while international human rights bodies have interpreted “public morals” as permitting narrow restrictions on graphic depictions of obscenity,<sup>60</sup> the Bill does not distinguish between obscene expression and other forms of information regarding sex, sexuality, and gender identity. Decisions of international courts related to permissible restrictions on obscene content can therefore be distinguished from those that impose what are essentially blanket prohibitions on the dissemination of information related to sex between persons of the same sex, sexuality, or gender identity.<sup>61</sup> It is also worth noting that “pornography” targeting children is already prohibited under Article 14 of the Federal Law ‘On Basic Guarantees for the Rights of the Child in the Russian Federation’.

ARTICLE 19 concludes that diverse sexual orientation and gender identities are part of the human condition, and the silencing of LGBT people cannot be framed as an issue of morality or the protection of children. We therefore conclude that the Bill is not necessary to protect public morals in a democratic society.

### Freedom of expression on-line

The right to freedom of expression applies through any media of a person’s choice, including through the Internet.<sup>62</sup> International standards on freedom of expression are clear that heightened penalties for expression that takes place on-line or through the media are not

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<sup>57</sup> As required by the Siracusa Principles, *op. cit.*

<sup>58</sup> Report of the United Nations High Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, *op. cit.*, para. 64.

<sup>59</sup> Alexseyev, *op. cit.*, para. 81.

<sup>60</sup> See also: *Muller vs. Switzerland*, *op. cit.*, para. 35, in which the ECtHR equated the concept of “public morality” with safeguarding the general population from obscene materials. In *Alekseyev, op. cit.*, in finding that the limitation placed on the right to freedom of peaceful assembly was not necessary in a democratic society, the ECtHR noted para. 82 that “[a]t no stage was it suggested that the event would involve any graphic demonstration of obscenity of a type comparable to the exhibition in the case of *Müller and Others* referred to by the Government... the participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views.” Citing comments of the Mayor of Moscow, the ECtHR exposed the public morality argument as cover for the fact that what the authorities found objectionable was “the very fact that they [the demonstrators] wishes to openly identify themselves as gay men or lesbians, individually and as a group.” The Court therefore found that the violation of the applicant’s Article 11 rights also constituted a violation of the guarantee against discrimination under Article 14.

<sup>61</sup> *Ibid.*

<sup>62</sup> General Comment No. 34, *op. cit.*, para. 12.

necessary in a democratic society.<sup>63</sup> Article 2 of the Bill and the heightened penalties it applies for acts of “propaganda” online or through mass media is therefore wholly incompatible with the right to freedom of expression.

### Right to Equality and Non-Discrimination

In addition to meeting the three-part test under Article 19(3) of the ICCPR and Article 10(2) of the ECHR, restrictions on freedom of expression must still be applied with respect for the principles of equality and non-discrimination.<sup>64</sup>

As outlined above, international standards are clear, under both the ICCPR and the ECHR, that sexual orientation and gender identity are protected grounds from discrimination under the respective provisions of both instruments.<sup>65</sup>

ARTICLE 19 recalls that the Human Rights Committee in *Fedotova v. Russia* found that a regional ban on “homosexual propaganda” in Ryazan Oblast violated the right to non-discrimination under Article 26 of the ICCPR because the authorities could not show that a different treatment of “homosexual propaganda” as opposed to “propaganda” of heterosexuality or sexuality in general was based on “reasonable and objective criteria.”<sup>66</sup>

The ECtHR has held that to the extent that a prohibition in law “embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.”<sup>67</sup>

Whereas the ECtHR equates discrimination on the grounds of race with discrimination on the grounds of sexual orientation, the Bill instead seeks to group positive expression regarding sexual orientation, in particular homosexuality, together with racist speech.<sup>68</sup> This is a clear misunderstanding that sexual orientation and gender identity are protected grounds against discrimination on the same basis as race and other recognised grounds.

Additionally ARTICLE 19 finds that Paragraph 4 of the Bill discriminates against foreign nationals and stateless persons by providing distinct sanctions, including administrative detention, for acts of “propaganda”. All rights contained within the ICCPR, with the exception of the right to vote (Article 25, ICCPR), must be guaranteed to all people within the territory and subject to the jurisdiction of any State without discrimination (Article 2(1), ICCPR).<sup>69</sup> The right to freedom of expression must therefore be guaranteed to all without regard to national origin.

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<sup>63</sup> Joint Declaration on Freedom of Expression and the Internet, June 2011.

<sup>64</sup> See, eg, ECtHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, Applications nos. 9214/80; 9473/81; 9474/81, 28 May 1985, para. 82.

<sup>65</sup> UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, para. 8.7; and *Young v Australia*, Communication No. 941/2000, para. 10.4. See also, e.g., Human Rights Committee Concluding observations on Chile (CCPR/C/CHL/CO/5, para 16), San Marino (CCPR/C/SMR/CO/2, para 7), and Austria (CCPR/C/AUT/CO/4, para. 8); ECtHR, *Kozak v. Poland*, Application no 13102/02, 2 March 2010.

<sup>66</sup> *Fedotova, op. cit.*, para 10.6.

<sup>67</sup> ECtHR, *S.L. v. Austria*, Application no. 45330/99, 9 January 2003, at para. 43 – 44.

<sup>68</sup> Article 2 of the Bill.

<sup>69</sup> See also: HR Committee, General Comment No. 15.

## The Bill violates economic, social and cultural rights

If enacted, the Bill will deprive all people, in particular young LGBT people, from information that is essential for asserting their economic, social and cultural rights, in particular the rights to education<sup>70</sup> and right to health<sup>71</sup> as guaranteed by numerous international instruments.

Together, the right to the highest attainable standard of health and the right to education impose a positive obligation on States to make available and disseminate information regarding sexuality and sexual health.<sup>72</sup> Hence, States should abolish criminal and other laws restricting access to comprehensive education and information on sexual and reproductive health.<sup>73</sup> This also requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information<sup>74</sup> and requires the abolition of laws that “censor discussions of homosexuality in the classroom” since this fuels “stigma and discrimination of vulnerable minorities.”<sup>75</sup>

Furthermore, the Special Rapporteur on the right to education noted that hetero-normative sexual education normalises, stereotypes and promotes discriminatory images that deny the existence of LGBT people exposing them to risky and discriminatory practices.<sup>76</sup> The Special Rapporteur voiced specific concerns in a 2008 communication to Poland that a proposed law to ban the “promotion of homosexuality” would “prevent students having access to sexual health information.”<sup>77</sup> The European Committee of Social Rights has similarly held that State-sponsored sex education programmes that reinforce gender and sexual orientation stereotypes or prejudice or contribute to the social exclusion of marginalised groups violate both the rights of young people to health and non-discrimination.<sup>78</sup> They held that the State has a responsibility to ensure that education “is objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting information.”<sup>79</sup> At the regional level, this position is supported by the Committee of Ministers for the Council of Europe Recommendation CM/Rec(2010).<sup>80</sup>

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<sup>70</sup> E.g. Article 26 of the UDHR; Article 28(1) and (3) of the CRC; Article 3(a) of the UNESCO Convention Against Discrimination in Education.

<sup>71</sup> Article 25(1) of the UDHR, Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 12(1) of the Convention on the Elimination of Discrimination against Women, and Articles 24 and 17 of the Convention on the Rights of the Child.

<sup>72</sup> 2011 Annual Report of the UN High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, *op. cit.*, para. 61. “The right to education includes the right to receive comprehensive, accurate and age-appropriate information regarding human sexuality in order to ensure young people have access to information needed to lead healthy lives, make informed decisions and protect themselves and others from sexually-transmitted infections.”

<sup>73</sup> Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 3 August 2011 A/66/254, para. 56.

<sup>74</sup> *C.f.* UN Committee on ESCR.12/2000/14, para. 14

<sup>75</sup> Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *op. cit.*, para 59. See also Report of the UN Special Rapporteur on the right to education, A/65/162, 23 July 2010, paras 23 and 69.

<sup>76</sup> *Ibid.*, para. 69.

<sup>77</sup> Report of the Special Rapporteur on the right to education, 13 May 2008, A/HRC/8/10/Add.1, para. 81.

<sup>78</sup> International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, Complaint No. 45, decision of 11 August 2009, para. 48.

<sup>79</sup> *Ibid.*, para. 47

<sup>80</sup> Appendix to the Recommendation, paras. 31-32

ARTICLE 19 therefore finds that the Bill, by contributing to a climate of fear and uncertainty regarding what information on sexual orientation and gender identity may legally be shared in crucial areas such as health and education, violates Russia's obligations under international human rights law.

### **Conclusion**

ARTICLE 19 finds that the Bill violates Russia's international human rights obligations under Articles 19(2) and 26 of the ICCPR and Articles 10 and 14 of the ECHR. In light of these considerations, ARTICLE 19 recommends that the Bill is not passed into law, and that the Russia government take immediate steps to repeal analogous bans on "homosexual propaganda" at the regional levels.