

Warsaw, 8 October 2021

1116/2021/PSP/MSZ/ZG

**The European Court of Human Rights  
President of the First Section**  
Council of Europe  
67075 Strasbourg-Cedex  
France

**Ref. *W.W. v. Poland*  
Application no. 31842/20**

Pursuant to the letter of Ms Renata Degener, the Section Registrar of the European Court of Human Rights, dated 5 October 2021, granting leave to make written submissions to the Court by 26 October 2021, as well as the letter dated 22 October 2021 granting extension until 9 November 2021, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of *W.W. against Poland* (application no. 31842/20).

On behalf of the Helsinki Foundation for Human Rights



*Piotr Kładoczny, Ph.D.*

Vice President of the Board  
Helsinki Foundation for Human Rights

***W.W. v. Poland***  
Application no. 31842/20

**WRITTEN COMMENTS  
BY  
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS**

**EXECUTIVE SUMMARY:**

- Present case, concerning abrupt withdrawal of hormone treatment, relates to one of many difficulties faced by transgender prisoners – a group whose specific needs and problems had not yet been a subject of regulation by both the Government and the Prison Service. Treatment of transgender prisoners is therefore based on general provisions of the Penal Enforcement Code, understanding of the administration and willingness of the officers to provide help.
- Poland has not yet introduced legal gender recognition procedure and significant issues were signaled in respect to protection from discrimination and access to adequate healthcare for transgender persons outside prison settings.
- There is growing consensus among torture prevention and human rights international bodies and organizations, scholars, researches and NGOs that LGBTI persons constitute an extremely vulnerable group of prisoners and require adequate protection – including safeguarding their freedom from discrimination and right to adequate healthcare.
- Abrupt withdrawal of hormones – according to medical professionals – may lead to serious consequences for individual's mental and physical health. Negative outcomes in this respect include high likelihood of self-harm, depression and anxiety as well as increased suicidality.
- Providing access to gender-affirming treatment in detention has been recognized as imperative by, *inter alia*, the SPT, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, UNODC, UNDP, CPT, IACHR, WPATH and a growing number of scholars, researchers and NGOs.

**I. INTRODUCTION**

1. The Helsinki Foundation for Human Rights (hereinafter referred to as "HFHR", "Foundation") submits these written comments pursuant to the leave granted by the President of the First Section of the European Court of Human Rights (hereinafter referred to as "ECtHR", "Court") on 5 October 2021.

2. Prohibition of torture and other inhumane or degrading treatment and punishment, including prisoners' right to adequate healthcare and overall conditions of their detention, are of particular interest to the HFHR and have been subject of a number of Foundation's activities, including *amicus curiae* opinions submitted to the Court. Foundation's Legal Intervention Program regularly undertakes actions supporting prisoners' rights and in the years 2011-2013

the Foundation implemented the “Healthcare in Polish prisons – striving to comply with human rights standards” program. The above circumstances have led the Foundation to present its opinion to the Court in the present case. In the opinion of the Foundation, the present case concerns one of many issues faced by transgender persons in prison settings – a group whose specific needs and problems had not yet been a subject of regulation by both the Government and the Prison Service. The circumstances of the case raise therefore critical questions in relation to the overall situation of transgender persons in Polish prisons. Although the ECtHR has already issued a number of judgments concerning conditions of detention and healthcare in prison as well as rights of LGBTI persons, the specific situation of transgender inmates has not yet been substantially addressed by the Court<sup>1</sup> and its position in the present case may lead to important changes in respect to the situation of transgender prisoners in Poland and their right to adequate healthcare.

## II. CURRENT SITUATION OF TRANSGENDER PRISONERS IN POLAND

### a. General situation of transgender persons in Poland

3. In the 2021 edition of ILGA EUROPE’s *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People*, Poland came last among the European Union countries in terms of respecting the rights of LGBTI persons and 43<sup>rd</sup> (of 49 countries) overall<sup>2</sup>. Authors of the report mentioned, among others, dehumanizing hate campaign during 2020 presidential elections or introductions of so-called “LGBT-free-zones” by local governments<sup>3</sup>. Research conducted by the Fundamental Rights Agency (“FRA”) in the years 2019-2020 shows, that 96% of respondents did not consider the measures taken by the Polish authorities to combat LGBTI prejudices and intolerance to be effective – the highest percentage among the EU countries<sup>4</sup>. At the same time as many as 44% of LGBTI respondents from Poland never spoke openly about their gender identity or sexual orientation and another 29% rarely did so<sup>5</sup>. 15% have experienced physical violence in the last five years, again the highest score among EU countries<sup>6</sup>. Despite this, as many as 36% of people who experienced violence did not notify law enforcement from fear of a homo- or transphobic reaction from the officers<sup>7</sup>. Slightly older data collected by the Campaign Against Homophobia (*Kampania Przeciw Homofobii*) indicate, that transgender people are particularly vulnerable to violence – in the years 2010-2011, 10% of LGB respondents experienced physical violence because of their sexual orientation and 43.9% have experienced psychological violence. Among transgender people, 52% of respondents experienced violence during these two years<sup>8</sup>. Yet transphobic hate speech is generally not prosecuted by the state (it

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<sup>1</sup> The case of *Bogdanova v. Russia* (application no. 63378/13) – concerning a transgender women receiving hormone replacement therapy before arrest and denied access to continue therapy in prison despite it being medically necessary after a surgery – was struck out of the list after the Court considered the applicant as no longer wishing to pursue her application. The case of *D.Ç. v. Turkey* (application no. 10684/13) – concerning a transgender women denied gender reassignment in prison – was declared inadmissible due to failure to exhaust domestic remedies.

<sup>2</sup> ILGA Europe, *Rainbow Europe. Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People*, <https://www.rainbow-europe.org/#8653/0/0> (last accessed: 21.10.2021).

<sup>3</sup> ILGA Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in Poland covering the period of January to December 2020*, <https://www.ilga-europe.org/sites/default/files/2021/poland.pdf> (last accessed: 21.10.2021).

<sup>4</sup> FRA, *A long way to go for LGBTI equality*, Luxembourg 2020, p. 14.

<sup>5</sup> *Ibidem*, p. 24.

<sup>6</sup> *Ibidem*, p. 40.

<sup>7</sup> *Ibidem*, p. 49.

<sup>8</sup> Z. Jabłońska, P. Knut, *Prawa...*, p. 44.

can be brought to court in a civil suit or a private bill of indictment)<sup>9</sup>. It is also not obligatory for law enforcement to establish transphobic motives in cases of hate crimes<sup>10</sup>.

4. Even though discriminatory practices may be exacerbated by the inability to recognize an individual as transgender, gender recognition procedure has not yet been regulated under Polish law. In judicial practice, a procedure based on declaratory action has been established – requiring a transgender person to sue their parents<sup>11</sup>. Often lengthy and costly procedure has been widely criticized (including by the HFHR in its’ *amicus curiae* opinion in the case of *Y v. Poland*<sup>12</sup>, as well as by the Ombudsman<sup>13</sup> and non-governmental organizations<sup>14</sup>).

5. Although there is a lack of research on access to medical care for transgender prisoners, studies relating to the general population are far from optimistic. Research conducted by Transgender Europe (“TGEU”) shows that only 35.5% of respondents among healthcare professionals in Poland had any training on working with trans people in general, which reflects information gathered from transgender patients – 44.8% of those respondents who approached medical specialists and 52.2% of those who approached general practitioners pointed out their providers’ lack of knowledge on trans issues<sup>15</sup>. Because of that, TGEU recommended that the training on working with trans healthcare users should be obligatory for healthcare providers<sup>16</sup>. 38% of respondents from Poland reported delaying seeking medical help because of gender identity – which is particularly alarming having considered that 66.7% of respondents from Poland stated that they had serious suicide thoughts and 26.4% had at least one suicide attempt. 58.1% of them did not seek any help and only 35.5% looked for professional mental health care<sup>17</sup>. Meanwhile 39.7% of all respondents reported a mental health professional not using their right name or pronoun, 31.5% reported their inappropriate curiosity, 9% – sharing information about gender identity without consent, 24% – ignoring specific needs, 46.3% – lack of knowledge on trans issues (48.4% reported that on general practitioners). 14% of all respondents had to change their mental health professional due to their negative reaction and 14.8% had to change their GP<sup>18</sup>.

#### b. Polish legislation regarding the situation of transgender persons in prisons

6. As indicated above, currently in Poland no specific regulation has been introduced in relation to the situation of LGBTI persons – including trans, intersex and gender non-conforming persons – in places of deprivation of liberty. Therefore, ensuring their personal safety, respecting their dignity and meeting special needs resulting from gender dysphoria is carried out on general principles and the conditions in which a transgender prisoner is serving their sentence (or is being

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<sup>9</sup> A. Mazurczak et al., *Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzegania z perspektywy Rzecznika Praw Obywatelskich*, „Biuletyn Rzecznika Praw Obywatelskich” 2019, no. 6, Warsaw 2019, p. 27.

<sup>10</sup> *Ibidem*, p. 34.

<sup>11</sup> For a more detailed description of the procedure, see M. Adamczewska-Stachura, P. Pilch, *Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*, Biuletyn Rzecznika Praw Obywatelskich 2020, no. 2, Office of the Commissioner of Human Rights, Warsaw 2020.

<sup>12</sup> Written comments by the HFHR in the case of *Y v. Poland*, application no. 74131/14, letter of 28.02.2020, published on the HFHR’s website: <https://www.hfhr.pl/ksztalt-procedury-uzgodnienia-plci-lamie-prawo-do-prywatnosci-hfpc-sklada-opinie-przyjaciela-sadu/> (last accessed: 2.11.2021).

<sup>13</sup> M. Adamczewska-Stachura, P. Pilch, *Postępowania...*, A. Mazurczak et al., *Sytuacja...*

<sup>14</sup> For example: M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian prawnych dotyczących osób transpłciowych w prawie polskim* [in:] W. Dynarski, K. Śmiszek (eds.), *Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycje zmian*, Polish Anti-discrimination Law Society, Trans-Fuzja Foundation, Warsaw 2013, p. 181-226.

<sup>15</sup> A. Smiley et al., *Overdiagnosed but Underserved. Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey*, TGEU 2017, p. 38-39. It’s worth noting however, that the sample group of medical professionals consisted only of 93 persons with an average age of 35 years – which may have affected the result.

<sup>16</sup> *Ibidem*, p. 40-41.

<sup>17</sup> *Ibidem*, p. 39-40.

<sup>18</sup> *Ibidem*, p. 13.

held in pre-trial detention) and the fulfillment of their specific needs largely depend on the understanding of the administration and the approach of the officers.

7. In April 2021, the HFHR submitted a freedom of information request to the Director General of the Prison Service, regarding the introduction of internal procedures to be followed in the event of a suspicion that a person staying in the unit is transgender. The Foundation also asked for information on additional activities aimed at ensuring the safety of transgender people, including additional training for officers. In response to the request, the Foundation was informed that despite non-existence of such regulations, the Prison Service has an obligation – in accordance with Article 108 § 1 of the Penal Enforcement Code (*Kodeks karny wykonawczy*) – to ensure the safety of persons deprived of liberty. This duty, as indicated by the Prison Service, is carried out by, *inter alia*, appropriate classification decisions and housing, psychological care, also in the context of suicidal prevention. It was also emphasized that in the course of training, officers are sensitized to the needs of groups requiring special care, and “due to the extensive experience in the implementation of the principle of individualization of punishment”, ensuring appropriate conditions for transgender inmates “does not constitute any new challenge”<sup>19</sup>.

8. Penal Enforcement Code and the Ordinance of the Minister of Justice of 21 December 2016 on the organizational and procedural regulation of the penalty of imprisonment as well as the Ordinance of the Minister of Justice of 22 December 2016 on the organizational and procedural regulation of pre-trial detention are the key legislation controlling the deprivation of liberty pursuant to pre-trial detention or sentencing in a criminal case. As previously mentioned, none of the above contains specific provisions concerning transgender prisoners. They do, however, contain several provisions that would be applicable to this group of inmates, apart from previously mentioned Article 108 § 1 of the Penal Enforcement Code, concerning the duty to take appropriate measures to ensure personal safety of prisoners. Article 67, concerning the purposes of carrying out the penalty of imprisonment, mentions in § 2 the rule of individualization of the penal enforcement. This principle means that the penal enforcement process should be adjusted to the specific characteristics of an inmate, while the use of means and methods available should be tailored to their individual needs<sup>20</sup>. One of the manifestations of such individualization is the classification of prisoners, carried out – in accordance with Article 82 § 1 – in order to prevent harmful influences, to ensure personal safety, to choose the appropriate punishment enforcement system or proper housing inside the penitentiary unit. Prisoner’s sex /gender<sup>21</sup> is one of the criteria of classification. Although the Code does not specify the basis for determining the individual’s gender, it is generally assumed that it is determined only by the gender marker in the identity document<sup>22</sup>. Gender indicated in one’s documents is also among the housing criteria<sup>23</sup>. Prisoner’s right to adequate healthcare is guaranteed in Articles 102 § 1<sup>24</sup> and 115 of the Penal Enforcement Code. According to those provisions, every prisoners shall be provided with free healthcare, medication and sanitary articles, as a rule by medical entities for persons deprived of liberty (this obligation is further specified in the Ordinance of the Minister of Justice of 14 June 2012 on the provision of health services by medical entities for persons deprived of liberty). Psychological care is included in this duty, but as the National Preventive Mechanism and the Ombudsman (under whose mandate the NPM operates) underlined numerous times, due to the

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<sup>19</sup> Letter of April 20<sup>th</sup>, 2021 from the Director of the Office of the Director General of the Prison Service, no. BDG.0143.93.2021.KS.

<sup>20</sup> K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warsaw 2017, comment to Article 67.

<sup>21</sup> Both Polish language and law do not differentiate between these terms.

<sup>22</sup> See for example: Z. Jabłońska, P. Knut, *osób LGBT w Polsce: raport z badań nad wdrażaniem Zalecenia CM/Rec (2010)5 Komitetu Ministrów Rady Europy dla Państw Członkowskich w zakresie środków zwalczania dyskryminacji opartej na orientacji seksualnej lub tożsamości płciowej*, Kampania Przeciw Homofobii, Warsaw 2012, p. 151.

<sup>23</sup> § 10 of the Ordinance of the Minister of Justice of 21 December 2016 on the organizational and procedural regulation of the penalty of imprisonment.

<sup>24</sup> “The convict has the right in particular to: 1) food, clothing, living conditions, rooms and healthcare as well as appropriate hygiene conditions for the maintenance of health (...)”.

low number of psychologists employed in the penitentiary facilities, psychological care in prisons is insufficient and ineffective<sup>25</sup>.

### III. STANDARDS OF CARE OF TRANSGENDER PRISONERS. INTERNATIONAL PERSPECTIVE

9. In places of deprivation of liberty, LGBTI persons are considered extremely vulnerable to ill-treatment, and transgender persons in particular. As the Association for the Prevention of Torture (“APT”) suggests, imprisoned LGBTI persons “are more likely to have been sexually victimized, reported mental health problems, experience solitary confinement, and have been subjected to sanctions”<sup>26</sup>. Trans detainees, especially trans women, according to the APT face “unique exposure to violence from both staff and fellow inmates”<sup>27</sup>. Due to the heightened vulnerability to ill-treatment, researchers point out, that LGBTI inmates may feel the imperative to hide their gender identity as means of self-protection – which results in a “cycle of invisibility”, as the administration may not be aware of the scale of the problem and refuse to address specific issues because of that<sup>28</sup>. Although both the Government and the Prison Service haven’t yet introduced legislation concerning transgender prisoners (or transgender persons in general), this inaction may be contrary to the recommendations of a number of torture prevention and human rights bodies, NGOs, foreign Prison Services and other states.

#### a. United Nations

10. The necessity to introduce comprehensive regulation on this matter has been indicated, among others, by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“SPT”, “Subcommittee”), which in its 2016 annual report stressed, that “[s]trengthening the protection of [LGBTI] people deprived of their liberty required the adoption of legislative, administrative and judicial measures. To be adequate, such measures require diligent risk assessment, including the identification of causes, forms and consequences of violence and discrimination”<sup>29</sup>. The SPT underlined, that housing decisions of transgender prisoners should be done on a case-by-case basis, taking into account their views as to their safety<sup>30</sup>. The Subcommittee also found it imperative for the states to put in place measures to identify and properly address the specific health needs of transgender persons, including hormone and other treatment related to gender transition<sup>31</sup>. The Subcommittee addressed healthcare needs of transgender prisoners also in the 2015 annual report, where it pointed out that the ill-treatment of LGBTI persons may also occur in health care settings and include denial of gender-appropriate medical treatment, verbal abuse or sterilization. Because of that, the SPT encouraged state parties to “develop and implement public health policies aimed at providing gender-appropriate care”<sup>32</sup>.

11. Special Rapporteur on torture and other cruel, inhuman or degrading treatment expressed similar concerns in a 2016 report to the Human Rights Council. As he underlined, “States are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever

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<sup>25</sup> National Preventive Mechanism yearly report for 2020, [https://bip.brpo.gov.pl/sites/default/files/Raport\\_KMPT\\_2020\\_interaktywny.pdf](https://bip.brpo.gov.pl/sites/default/files/Raport_KMPT_2020_interaktywny.pdf) (last accessed 2.11.2021).

<sup>26</sup> APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, Geneva 2018.

<sup>27</sup> *Ibidem*, p. 58-59.

<sup>28</sup> N. Carr et al., *Out on the Inside. The Rights, Experiences and Needs of LGBT People in Prison*, Irish Penal Reform Trust, Dublin 2016, p. 14-20.

<sup>29</sup> Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, § 72.

<sup>30</sup> *Ibidem*, § 76.

<sup>31</sup> *Ibidem*, 77.

<sup>32</sup> Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, §§ 68-71.

they create and implement discriminatory laws that trap them in abusive circumstances”<sup>33</sup>. Report underlines difficulties that transgender persons often face regarding access to appropriate healthcare, due to lack of knowledge or sensitivity to their needs on part of healthcare professionals<sup>34</sup>. Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concern over the situation of transgender individuals in custody as well. In a 2017 statement, Rapporteur underlined, that female transgender prisoners are often subjected to extreme abuse at the hands of inmate or officers and “[i]n some cases, transgender women in need of life-saving medical treatment have died owing to discrimination in and denial of access to essential services”<sup>35</sup>.

12. United Nations Office on Drugs and Crime (“UNODC”) acknowledged that transgender persons deprived of liberty are “often said to be denied medical treatment for gender dysphoria, such as hormone therapy”. LGBTI prisoners in general are also likely to be in particular need of mental health care, due to experienced violence, discriminatory attitudes and humiliation in prisons<sup>36</sup>. Because of the noticeable shortcomings in those areas, UNODC recommended ensuring availability of treatment for gender dysphoria in prisons, including access to hormone therapy and sex reassignment surgery. It also recommended developing policies and strategies ensuring maximum possible protection of LGBTI prisoners and disciplinary action of staff failing to respect non-discrimination principles<sup>37</sup>.

13. Mapping good practices for the management of transgender prisoners, the UNODC, together with the United Nations Development Program (“UNDP”) noted, that hormone therapy, despite being considered “main medical intervention recommended to address gender incongruence”, is often denied or limited for prisoners. Three main models exist in this respect – 1) a ‘freeze frame’ approach (continued access only at the level preceding imprisonment); 2) a continuation approach (continuation of therapy initiated before imprisonment, allowing for changes in dosing); 3) an initiation approach (allowing for a commencement of hormone therapy or its continuation)<sup>38</sup>. According to the authors of the report, first model “can never be considered a good practice or even appropriate care” and second model may be problematic if transgender prisoners took hormones from unofficial sources. Authors emphasized that the “consequences of abrupt withdrawal of hormones or lack of initiation of hormone therapy (...) include a high likelihood of negative outcomes” – such as surgical self-treatment, depression or anxiety; it can also have affect suicidality<sup>39</sup>. Addressing access to gender-affirming surgeries, authors find allowing such surgeries for transgender prisoners with a valid medical diagnosis of gender incongruence a good practice, while absorbing its cost by the state – a best practice. As they state, “denying access to such interventions in prisons (...) can never be considered a good practice”, if they’re available outside<sup>40</sup>.

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<sup>33</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, §§ 10-11.

<sup>34</sup> *Ibidem*, § 49.

<sup>35</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, A/HRC/35/23, § 46.

<sup>36</sup> T. Atabay, *Handbook on prisoners with special needs*, UNODC Criminal Justice Handbook Series, Vienna/New York 2009, p. 108.

<sup>37</sup> *Ibidem*, p. 119-121.

<sup>38</sup> UNDP, UNODC, *Mapping of Good Practices for the Management of Transgender Prisoners*, Bangkok 2020, p. 34.

<sup>39</sup> *Ibidem*, p. 36.

<sup>40</sup> *Ibidem*, p. 37.

b. Council of Europe

14. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity ("Recommendation")<sup>41</sup> provides that member states should take appropriate measures to ensure safety and dignity of transgender persons deprived of liberty and to prevent physical assault and sexual abuse committed by inmates or members of staff, as well as to protect and respect their gender identity<sup>42</sup>. Addressing healthcare, the Committee of Ministers pointed out that appropriate measures should be taken to ensure effective access to gender reassignment, without unreasonable requirements<sup>43</sup>.

15. Commissioner for Human Rights briefly addressed denial of access to hormone therapy for transgender prisoners in a 2009 issue paper on human rights and gender identity<sup>44</sup>, noting, that facing periods of time without treatment may result in serious health problems and irreversible physiological changes<sup>45</sup>.

16. European Committee for the Prevention of Torture ("CPT") addressed the situation of transgender prisoners as well. In its' 2015 report on Austria, the CPT mentioned a case of a transgender inmate, who stated that she was not allowed to wear women's clothes in the company of other prisoners and who had been told that legal gender recognition, hormone therapy and gender reassignment surgery were not available for her as a prisoner – even though they were available for transgender persons outside prison settings. The CPT recommended Austrian authorities to ensure access to assessment and treatment of gender incongruence as well as legal procedures of gender recognition. It also underlined the need to introduce "policies to combat discrimination and exclusion faced by transgender persons in closed institutions"<sup>46</sup>. In a 2016 report on Malta, the CPT delegation pointed out incidents concerning inadequate housing of transgender prisoners (three transgender women housed in a male unit), violence towards a trans prisoner, referring to transgender women with male names and hindering them from expressing as women (i.e. by prohibiting wearing female clothing). The CPT recommended putting in place policies to combat discrimination and exclusion face by transgender persons<sup>47</sup>.

17. Soon after the report was published, Maltese Correctional Services introduced *Trans, Gender Variant & Intersex Inmates Policy* ("Policy")<sup>48</sup>, which aims to prevent discrimination and harassment on grounds of gender identity, gender expression and sex characteristics<sup>49</sup> as well as protecting the dignity and autonomy of self of trans, gender variant and intersex individuals<sup>50</sup>. The Policy concerns numerous aspects on imprisonment, from entry and registration<sup>51</sup> to training of correctional officers<sup>52</sup>. Importantly, in the light of the case in which this brief is submitted, it also addresses access to gender recognition and health services. Firstly, the Policy stipulates that

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<sup>41</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, adopted by the Committee of Ministers on 31.03.2010.

<sup>42</sup> Article I.A.4 of the Appendix to the Recommendation.

<sup>43</sup> Article VII.35 of the Appendix to the Recommendation.

<sup>44</sup> Commissioner for Human Rights, *Human Rights and Gender Identity*, Strasbourg 2009, CommDH/IssuePaper(2009)2.

<sup>45</sup> *Ibidem*, p. 16, note 60.

<sup>46</sup> CPT report on visit to Austria, CPT/Inf (2015) 34, § 115.

<sup>47</sup> CPT report on visit to Malta, CPT/Inf (2016) 25, § §50-54.

<sup>48</sup> Correctional Services (Malta), *Trans, Gender Variant & Intersex Inmates Policy*, 2016, [https://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20\(Final-%20Final\).pdf](https://homeaffairs.gov.mt/en/media/Policies-Documents/Documents/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy%20-%20August%202016%20(Final-%20Final).pdf) (last accessed: 3.11.2021).

<sup>49</sup> Article 1.3.1 (c) of the Policy.

<sup>50</sup> Article 1.3.2 (a) of the Policy.

<sup>51</sup> Article 3.1 of the Policy.

<sup>52</sup> Article 4 of the Policy.



prisoners are not excluded from the right to access gender recognition procedures and that the staff of the correctional facility should provide professional aid to the prisoner expressing willingness to pursue said procedure<sup>53</sup>. Secondly, addressing healthcare needs, it says that: 1) hormone medication an inmate is receiving on prescription upon arrival should be recorded and continued; 2) access to hormone therapy, hair removal, speech therapy or surgery as part of a process of transition while in prison should be taken in consultation with a medical professional, in accordance with general principles; 3) bearing in mind particular vulnerability of a transgender prisoner, “every effort should be made by Correctional Services to ensure access to the required/requested medical treatment that assists the inmates in aligning their physical characteristics with their gender identity” – regardless of legal gender identity; 4) such assistance should be “undertaken promptly”; 5) due to the heightened risk of depression, anxiety, self-harm and suicide among the trans population, Correctional Services are obliged to establish the level of risk and current needs for the individual inmate, and their mental health needs should be addressed as a priority<sup>54</sup>. Maltese Policy has been acknowledged by APT<sup>55</sup>, UNODC and UNDP<sup>56</sup> and OSCE Office for Democratic Institutions and Human Rights (“ODIHR”), which referred to it as an example of policy preventing sexual and gender-based violence<sup>57</sup>.

c. Organization of American States

18. On November 25<sup>th</sup>, 2019, the Inter-American Commission on Human Rights (“IACHR”) submitted a request for an advisory opinion to the Inter-American Court of Human Rights (“IACtHR”), concerning differentiated approaches to persons deprived of liberty, the aim of which was to make joint interpretation of the obligations that the principle of equality and non-discrimination imposes on the OAS states in the context of particularly vulnerable groups of prisoners – including LGBTI persons<sup>58</sup>. Addressing the problems the LGBTI prisoners face, the IACHR identified a number of issues, including lack of access to adequate healthcare<sup>59</sup>. In this respect, the IACHR emphasized, that medical care often doesn’t acknowledge specific needs of trans inmates and during its’ on-site visits it found out that prison medical units do not have hormonal medication and medical professionals lack training. Furthermore, due to the absence of regulation in this respect, it may be difficult to access treatment obtained outside and follow up treatment after gender reassignment surgery<sup>60</sup>. Although the IACtHR had not yet issued its’ opinion, a significant number of the OAS states and organs, international organizations, national preventive mechanisms, NGOs and independent scholars submitted their *amicus curiae* briefs – many of them agreeing with the IACHR’s observations. Among others, briefs state, that treatment and support available for transgender persons outside must be available inside detention, including hormone therapy<sup>61</sup>; inadequate accessibility of trans-specific healthcare in prisons is well documented and challenges in accessing it are exacerbated as prison and medical personnel are often unwilling to address the needs of transgender prisoners<sup>62</sup>; transgender persons in

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<sup>53</sup> Article 3.9 of the Policy.

<sup>54</sup> Articles 3.10-3.11 of the Policy.

<sup>55</sup> APT, *Towards...*, p. 92.

<sup>56</sup> UNDP, UNODC, *Mapping...*, p. 33

<sup>57</sup> OSCE/ODIHR, *Preventing and Addressing Sexual and Gender-Based Violence in Places of Deprivation of Liberty. Standards, Approaches and Examples from the OSCE Region*, Warsaw 2019, p. 113-114.

<sup>58</sup> IACHR Request for an advisory opinion to the IACtHR on differentiated approaches to persons deprived of liberty (“Request”), §§ 1-3.

<sup>59</sup> § 29 of the Request.

<sup>60</sup> § 34 of the Request.

<sup>61</sup> Written observations submitted by International Human Rights Practicum at the Boston College of Law, [https://www.corteidh.or.cr/sitios/observaciones/OC-29/76\\_Boston\\_CLS.pdf](https://www.corteidh.or.cr/sitios/observaciones/OC-29/76_Boston_CLS.pdf) (last accessed: 3.11.2021), p. 38.

<sup>62</sup> Written observations submitted by International Human Rights Law Institute at DePaul University College of Law in coordination with Instituto Internacional de Responsabilidad Social y Derechos Humanos, [https://www.corteidh.or.cr/sitios/observaciones/OC-29/75\\_DePaul\\_University.pdf](https://www.corteidh.or.cr/sitios/observaciones/OC-29/75_DePaul_University.pdf) (last accessed: 3.11.2021), p. 50-51.

detention are affected by higher rates of suicide and self-harm, and hormone therapy or surgery can be essential to the safety and maintenance of their mental and physical health<sup>63</sup>.

d. Non-governmental organizations and scholars

19. *Standards of Care* ("SoC"), drafted by the World Professional Association for Transgender Health ("WPATH"), are clinical guidelines, aiming to "promote the highest standards of healthcare" for transgender and gender-nonconforming individuals, based on "the best available science"<sup>64</sup>. The SoC are being used as a model and a benchmark in drafting local standards<sup>65</sup>. In its' XIV chapter, applicability of SoC is analyzed in respect of people living in institutional environments. According to WPATH, all necessary elements of assessment and treatment can be provided to people deprived of liberty and should be done so on a non-discriminatory basis. Particular attention WPATH draws onto abrupt withdrawal of hormones, stressing that consequences may include "a high likelihood of negative outcomes such as surgical self-treatment by autocastration, depressed mood, dysphoria and/or suicidality". Reasonable accommodations to the SoC in prison settings may be possible, unless they would jeopardize the delivery of medically necessary care<sup>66</sup>.

20. Another non-governmental principles addressing access to healthcare of transgender persons deprived of liberty are the Yogyakarta Principles ("YP") on the application of human rights law standards in regard to sexual orientation, gender identity, gender expression and sex characteristics, drafted by a group of experts in 2006 and expanded in 2017<sup>67</sup>. The YP were met with support from, *inter alia*, the UN High Commissioner on Human Rights, UNODC, UN AIDS and a number of states, they were also cited in rulings of ECtHR, Court of Justice of the European Union or Inter-American Commission on Human Rights<sup>68</sup>. Principle 9, covering the right to treatment with dignity while in detention, affirms, that states should "[p]rovide adequate access to medical care and counselling appropriate to the needs of those in custody, recognizing any particular needs of persons on the basis of (...) gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired"<sup>69</sup>. In a 2017 addition to the Principles, authors added, that states shall take measures to combat violence, discrimination and other harm on the grounds of gender identity faced by persons in detention, *inter alia* in respect to access to and continuation of gender affirming treatment and healthcare<sup>70</sup>. Non-discriminatory access to the highest attainable standard of health, including protection from harm on the basis on gender identity in healthcare settings was also mentioned<sup>71</sup>.

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<sup>63</sup> Written observations by L. Sosa et al. of the Utrecht University, [https://www.corteidh.or.cr/sitios/observaciones/OC-29/85\\_Utrecht\\_Uni.pdf](https://www.corteidh.or.cr/sitios/observaciones/OC-29/85_Utrecht_Uni.pdf) (last accessed: 3.11.2021), p. 18-19.

<sup>64</sup> E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, WPATH 2012, [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English2012.pdf?t=1613669341](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?t=1613669341) (last accessed: 3.11.2021), p. 1-2.

<sup>65</sup> See for example the statement of expert panel on Recommendations of the Polish Sexological Society on medical care in transgender adults: B. Grabski et al., *Zalecenia Polskiego Towarzystwa Seksuologicznego dotyczące opieki nad zdrowiem dorosłych osób transpłciowych – stanowisko panelu ekspertów*, *Psychiatria Polska* vol. 178 (online first), p. 1-8.

<sup>66</sup> E. Coleman et al., *Standards...*, p. 67-68. Similar concerns were expressed by K. Clark et al, in "What's the right thing to do?" *Correctional healthcare providers' knowledge, attitudes and experiences caring for transgender inmates*, *Social Science & Medicine* 2017, vol. 193, p. 81 and D. Routh et al. in *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, *International Journal of Offender Therapy and Comparative Criminology* 2015, p. 7.

<sup>67</sup> Full text of both Yogyakarta Principles and the Yogyakarta Principles plus 10 is available on <https://yogyakartaprinciples.org/> (last accessed 3.11.2021).

<sup>68</sup> M. O'Flaherty, *The Yogyakarta Principles at Ten*, *Nordic Journal of Human Rights*, vol. 33 no. 4, 2015, p. 287-292.

<sup>69</sup> Principle 9 (b) of the YP.

<sup>70</sup> Additional state obligations relating to the right to treatment with humanity while in detention, Principle 9 (h).

<sup>71</sup> Additional state obligations relating to the right to the highest attainable standard of health, Principle 17 (j).

21. Taking the Principles as the starting point, the APT further underlines specific healthcare needs of the transgender prisoners and the prevalent inadequacy of their practical realization (or a general lack thereof). It states that detainees should not be prevented from initiating gender recognition proceedings while in prison and that their specialized healthcare should include not only gender affirming treatment, but also psychological support and mental health counseling, as the risk of suicidal ideation and self-harm among transgender prisoners may be up to 10 times higher than in general population<sup>72</sup>. At least part of the explanation of the elevated rates may be – according to a growing consensus among researchers – *minority stress*, caused by frequent experiences of discrimination<sup>73</sup>. Providing access to treatment without discrimination – including accessing hormone therapy in prison – may improve quality of life, reduce symptoms of depression and anxiety as well and lower the risk of suicide. Abrupt withdrawal on the other hand may lead to serious consequences for mental and physical health<sup>74</sup>. Because of that, numerous scholars call for safeguarding access to gender-affirming treatment – continued access to transgender individuals taking hormones prior to incarceration (both prescribed and ‘street hormones’<sup>75</sup>), available initiation of treatment in detention and supported healthcare needs upon re-entry – and introducing adequate regulation in this respect<sup>76</sup>. Some researchers observed that continuation of care may be relatively common once a policy to ensure access to treatment had been introduced<sup>77</sup> and that the probability of reporting suicide attempts may decrease, relatively to the level of care provided<sup>78</sup>.

#### IV. CONCLUSIONS

- The situation of transgender prisoners has not yet been a subject of regulation in Poland. Adequate treatment largely depends on the understanding of the administration and the approach of the officers. At the same time significant issues in respect to the transgender persons’ general access to healthcare and prevention of discrimination have been reported.
- There is growing consensus among human rights organizations and scholars that transgender persons constitute a particularly vulnerable group of prisoners and their healthcare needs (including especially gender affirming treatment) must be recognized and adequately safeguarded, as lack thereof may lead to serious consequences for mental and physical health of the prisoners.

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<sup>72</sup> APT, *Towards...*, p. 89-93.

<sup>73</sup> A. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, *Journal of Homosexuality* vol. 58, 2011, p. 22.

<sup>74</sup> J. Sevelius, V. Jenness, *Challenges and opportunities for gender-affirming healthcare for transgender women in prison*, *International Journal of Prisoner Health* 2017, vol. 13 no. 1, p. 35-36.

<sup>75</sup> In this respect M. Maycock observes that a number of transgender persons may take non-prescribed hormones due to negative experiences of accessing health services. Because of imprisonment and deprivation of such resources, abrupt withdrawal of treatment caused – among other side effects – slowing down the gender transition. See M. Maycock, *The transgender pains of imprisonment*, *European Journal of Criminology* 2020, p. 9.

<sup>76</sup> J. Sevelius, V. Jenness, *Challenges...*, p. 38. Similarly: K. Clark et al., *What’s...*, p. 82, 87; A. Brömdal et al., *Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people*, *International Journal of Transgenderism* 2019, vol. 20, no. 4, p. 346.

<sup>77</sup> L. Drakeford, *Correctional Policy and Attempted Suicide Among Transgender Individuals*, *Journal of Correctional Health* vol. 24 no. 2, 2018, p. 172.

<sup>78</sup> L. Drakeford, *Correctional...*, p. 176-179.