

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Bogdanova v. Russia

(Application No. 63378/13)

WRITTEN COMMENTS

submitted jointly by

Transgender Europe (TGEU)

Coming Out

**The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex
Association (ILGA-Europe)**

The European Professional Association for Transgender Health (EPATH)

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A. Introduction

1. These written comments are submitted jointly by TGEU, Coming Out, EPATH and ILGA-Europe pursuant to leave granted by the President of the First Section on 21 May 2015 in accordance with Article 36§2 of the Convention.

2. *Bogdanova v. Russia*, concerns a transgender prisoner whose health was jeopardised by the prison authorities' refusal to provide necessary medical treatment, including the continuation of hormone replacement therapy, and whose safety was put at risk through the disclosure of her transgender status to other prisoners, allegedly by the prison authorities.

3. In this submission we provide information on three key aspects of the case: first, the medical aspect, with an outline of the internationally recognised professional and legal standards pertaining to gender reassignment treatment, highlighting the circumstances in which such treatment is medically necessary, the consequences for physical and mental health of interrupting hormone replacement therapy, and best practice with regard to the provision of gender reassignment treatment in prisons; secondly, transgender persons' vulnerability to abuse in prisons; and thirdly, discriminatory attitudes towards transgender persons in Russia, as manifested in the public sphere, in the inadequacy of procedures for legal gender recognition, and in the failure to meet their medical needs. This third element shows the *Bogdanova* case to be a symptom of deeper social problems. It suggests that any effective approach to remedies must address not just access to gender reassignment treatment, but also the need within the prison service for awareness-raising and training and for the amendment of codes of conduct and operational procedures.

B. Main terms, and summary of discrimination experienced by transgender people

4. **Transgender or trans people** have a gender identity that is different to the gender assigned at birth. This includes people who intend to undergo, are undergoing, or have undergone gender reassignment as well as those who prefer or choose to present themselves differently to the expectations of the gender assigned to them at birth.¹ Diversity within the transgender spectrum is large with 73% of transgender respondents not identifying as either male or female.²

5. **Gender identity** is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.³

¹ Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd edition, 2011, p. 132, available here: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf ("*Discrimination on grounds of sexual orientation and gender identity in Europe*"); Council of the European Union, Guidelines to promote and protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, 2013.

² EU Fundamental Rights Agency - *Being Trans in the European Union* (the EU report), 2014, p. 104.

³ The "Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity" ("*the Yogyakarta Principles*"), Preamble, available here: <http://www.yogyakartaprinciples.org/>. The Yogyakarta Principles were adopted in 2006 by a group of human rights experts with the aim of promoting the implementation of already existing international human rights law in relation to people of diverse sexual orientation and gender identities. Several Council of Europe Member States, have specifically endorsed or referred to the Yogyakarta Principles in their official documents, see Eitelbrick P. L. and Zerán A. T., *The Impact of the Yogyakarta Principles on International Human Rights Law Development. A Study of November 2007 – June 2010*, Final Report, 2010, p. 12. In addition, the Council of Europe Commissioner for Human Rights has referred to the Guidelines in his publications, for example *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, Introduction ("*The Human Rights and Gender Identity Issue Paper*").

6. **Gender reassignment treatment (GRT)** or gender confirming/affirming treatment is a set of medical measures that can but does not have to include psychological, endocrinological and surgical treatments aimed at aligning a person's physical appearance with their gender identity. It might include psychological consultation, hormone replacement therapy (HRT), and sex or gender reassignment surgery (such as facial surgery, chest/breast surgery, different kinds of genital surgery and hysterectomy) (GRS), facial/body hair removal, hair reconstruction, voice surgery and other non-genital, non-breast surgical interventions, sterilization (leading to infertility). Not every trans person wishes for or is able to undergo all or any of these measures.

7. **Gender dysphoria** is a mental health diagnosis describing the discomfort or distress that is caused by a discrepancy between the person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).⁴

8. **Transphobia** is defined as an "irrational fear of, and aversion to" transgender persons or gender non-conformity.⁵ Individual, structural or institutional manifestations of transphobia include discrimination, criminalisation, marginalisation, social exclusion and violence on grounds of (perceived) gender identity and gender expression.

9. As a recent resolution of the Parliamentary Assembly of the Council of Europe has emphasised, transgender people face widespread discrimination in Europe, as well as a high prevalence of hate speech, hate crime, bullying and physical and psychological violence.⁶ This violence can take place at their workplace, on the street, or in the family.⁷ In some countries, transgender people are afraid to come out and may keep their gender identity secret for fear of negative repercussions.⁸ They experience high rates of unemployment, and often have to change jobs when undergoing gender reassignment treatment.⁹ Transgender people are more likely to be homeless than the general population.¹⁰

10. Many transgender people report feeling lonely or isolated, and some but not all experience mental health issues. Research undertaken in different European countries consistently shows higher suicide rates and self-harming behaviour among transgender people.¹¹ Transgender people surveyed typically cite a number of trans-related reasons for such behaviour, including gender dysphoria, not having their gender recognized, social stigma, frustrations with treatment delays, lack of access to treatment, worry that they would never 'fully' or 'successfully' transition, having their identity

⁴ WPATH SoC v7, see *infra* §11. The term is repudiated by large parts of the trans community as inaccurate, stigmatizing and pathologizing healthy variances of gender identities and expressions.

⁵ *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 131.

⁶ *Discrimination against transgender people in Europe – Resolution 2048* (2015).

⁷ Motmans, de Biolley, Debunne, *Being transgender in Belgium: Mapping the social and legal situation of transgender people*, 2010 ("the Belgium report"), p. 64 *et seq.*, available here: http://igvm-iefh.belgium.be/nl/binaries/34%20-%20Transgender_ENG_tcm336-99783.pdf, *Situation of Transgender Persons in Ukraine*, Kyiv, 2010, ("the Ukraine report"), p. 44-45, available here <http://www.ilga-europe.org/home/guide/europe/country-by-country/ukraine/situation-of-transgender-persons-in-ukraine>, Saskia Keuzenkamp, *Be who you are: The life of transgenders in the Netherlands*, 2012 ("the Netherlands report"), p. 100-101, summary in English available here http://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2012/Be_who_you_are, McNeil, Bailey, Ellis, Regan, *Speaking from the Margins: Trans Mental Health and Wellbeing in Ireland*, 2013 ("the Ireland report"), p. 34 *et seq.*, available here <http://www.teni.ie/news-post.aspx?contentid=1027>, McNeil, Bailey, Ellis, Morton, Regan, *Trans Mental Health Study 2012* ("the Scotland report"), p. 61 *et seq.*, available here http://www.gires.org.uk/assets/Medpro-Assets/trans_mh_study.pdf.

⁸ The Belgium report, p. 114-115, 120, the Netherlands report, p. 99.

⁹ The Ukraine report, p. 41-43, the Belgium report, p. 123., the EU report, p. 9.

¹⁰ See for example the Scotland report, p. 71.

¹¹ The Belgium report, p. 105, Homosexualités & Socialisme (HES), Mouvement d'Affirmation des jeunes Gais, Lesbiennes, Bi et Trans (le MAG- Jeunes LGBT), *Enquête sur le vécu des jeunes populations trans en France*, 2009, p. 1, available here: http://www.hes-france.org/IMG/pdf/Rapport_Prelim_Enquete_JeunesTrans_Avril2009_Vfinal.pdf, the Ireland report p. 31-33, the Scotland report p. 55-59.

misunderstood by health professionals and not feeling supported by gender identity specialists.¹² Transgender people face systemic discrimination trying to access general health care services, which includes being treated with contempt or refused care.¹³ Health care professionals may be ignorant of the specific health needs of transgender people, lack the professional training to meet their health needs, or refuse to provide treatment due to transphobic prejudice.¹⁴

C. Medical aspects

Professional and legal standards on gender-affirming health care

11. *The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC) published by the World Professional Association for Transgender Health (WPATH)¹⁵ outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”.¹⁶ The SoC are regularly updated to reflect scientific and social developments and used widely by health care professionals across the world. The most recent version of the SoC (SoC-7) dates from 25 September 2011.

12. According to the WPATH, the SoC can only serve as guidelines for a process in which the trans person’s individual health care must be key. If a medical transition is needed, the process consists of one, of some, or of all GRT procedures.¹⁷ Professional standards and scientific research show that gender reassignment is the only effective treatment for those trans people who need to alter their body; in that sense, GRT is a necessary medical treatment, and not elective or cosmetic.¹⁸ Research shows clearly that “feminising/masculinising hormone therapy – the administration of exogenous endocrine agents to induce feminising or masculinising changes – is a medically necessary intervention for many transsexual, transgender and gender-nonconforming individuals with gender dysphoria.”¹⁹ Its effect is to “induce physical changes that are more congruent with a patient’s gender identity.”²⁰ Likewise, “surgery is essential and medically necessary to alleviate [trans people’s] gender dysphoria.”²¹

13. One of the largest studies on trans peoples’ health recently undertaken in Europe²² demonstrates the positive effects access to necessary GRT has on the individual. Compared to those who wanted to transition but had no access, those who did transition showed a “substantially higher life satisfaction”,²³ a significantly higher rate of satisfaction with their own body²⁴ and felt their mental health had improved.²⁵ 63% of those who transitioned reported that they harmed themselves less after transition.²⁶ Access to medical treatment saves lives: “Suicidal ideation and actual attempts reduced after transition, with 63% thinking about or attempting suicide more before they transitioned and only

¹² See for example the Ireland report, p 32.

¹³ United Nations Development Programme, *Discussion paper: Transgender Health and Human Rights*, 2013, p. 17, available here: <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights/>.

¹⁴ *The Human Rights and Gender Identity Issue Paper*, Section 3.3; Whittle, Turner, Combs, Rhodes, *Transgender Eurostudy: Legal Survey and Focus on the Transgender Experience of Health Care*, 2008, p. 11, available here: http://www.ilga-europe.org/home/issues/trans_and_intersex/trans/ie_resources.

¹⁵ Available here: http://www.wpath.org/uploaded_files/140/files/IJT%20SOC.%20V7.pdf.

¹⁶ WPATH SoC-7, p. 1.

¹⁷ See the definition above §6 listing the various procedures coming within the scope of GRT; WPATH SoC-7, p. 57 §f.

¹⁸ WPATH SoC-7, pp. 33, 58.

¹⁹ WPATH SoC-7, p 33.

²⁰ WPATH SoC-7, p 36.

²¹ See scientific research cited in WPATH SoC-7, p. 54.

²² The Scotland report.

²³ *Idem*, p. 17.

²⁴ *Idem*, p. 18.

²⁵ *Idem*, p. 50.

²⁶ *Idem*, p. 55.

3% thinking about or attempting suicide more post-transition.”²⁷ The study also shows that lack of access “has a direct [negative] impact upon depression.”²⁸

14. The Committee of Ministers emphasized in its Recommendation 2010(05) that States should facilitate access to GRT: “Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender health care, without being subject to unreasonable requirements; no person should be subjected to gender reassignment procedures without his or her consent.”²⁹ The Parliamentary Assembly emphasized that member states should “ensure that [gender reassignment procedures] are reimbursed by public health insurance schemes.”³⁰ According to the Yogyakarta Principles, States need to “facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support.”³¹

15. According to research published in 2011 by the Commissioner for Human Rights, 31 Council of Europe Member States provide “partial or full reimbursement for gender reassignment treatment”, whereas the situation in the remaining countries is “unclear”.³² The Commissioner had previously recommended that Council of Europe Member States should “make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender persons, and ensure that they are reimbursed by public health insurance schemes.”³³ For its part, the WPATH “urges health insurance companies and other third-party payers to cover the medically necessary treatments to alleviate gender dysphoria.”³⁴

Consequences of withdrawal of medically necessary hormone replacement therapy

16. Interrupting hormone intake can have serious consequences and is by definition a decision to be taken by the individual concerned, on medical advice. Immediate physical consequences may include joint and muscle aches, tiredness and irritability, and increased sweating and flushes. In the long term, the client will develop osteoporosis, and will have increased risk of type 2 diabetes and cardiovascular disease. Unwanted withdrawal of medically necessary hormone replacement therapy will also have serious psychological consequences, such as an acute reduction in well-being, depression, anxiety, and possibly self-harm and suicidality.³⁵

17. The SoC cites research to the effect that “The consequences of abrupt withdrawal of hormones when medically necessary include a high likelihood of negative outcomes, such as surgical self-treatment by autocastration, depressed mood, dysphoria and/or suicidality.”³⁶

Gender reassignment treatment in prison

²⁷ *Idem*, p. 59.

²⁸ *Idem*, p. 52.

²⁹ *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*, Appendix §35.

³⁰ Parliamentary Assembly's *Recommendation on Discrimination against transgender people in Europe* - § 6.3.1 (see § 9 *supra*)

³¹ Principle 17, §g.

³² *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 111.

³³ *The Human Rights and Gender Identity Issue Paper*, Recommendation 5.

³⁴ WPATH SoC-7, p. 33.

³⁵ Hembree WC, Cohen-Kettenis P, Delemarre-van de Waal H, Gooren LJ, Meyer WJ, Spack NP, Tangpricha V, Montori VM, HA D de W, Meyer III WJ. (2009). Endocrine treatment of transsexual persons: an Endocrine Society clinical practice guideline. *Journal of Clinical Endocrinology & Metabolism* 94:3132–54.

Gooren, L. (2011). Care of transsexual persons. *New England Journal of Medicine*, 364, 1251-1257.

³⁶ WPATH SoC-7, p. 67.

18. The UN Special Rapporteur on Torture emphasized the importance of adopting special measures to address the particular health needs of persons deprived of liberty belonging to vulnerable and high-risk groups, including transgender people.³⁷ Referring to the needs of trans people in prison, the Yogyakarta Principles explicitly stated that States shall “provide adequate access to medical care and counseling appropriate to the needs of those in custody, recognizing any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to ... therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired.”³⁸ The United Nations Office on Drugs and Crime recommended that relevant stakeholders “meet the special health care needs of LGBT prisoners, including treatment available in the community for gender dysphoria, such as hormone therapy, as well as sex reassignment surgery, if available in the community.”³⁹

19. The **United Kingdom** National Offender Management Service Agency Board released in 2011 a set of guidelines on the “care and management of transsexual prisoners”, covering medical treatment, living in an acquired gender role, location in the estate, and body searches. In relation to medical treatment, the guidelines state that “establishments must provide prisoners who have been diagnosed with gender dysphoria with the same quality of care (including counselling, pre-operative and post-operative care and continued access to hormone treatment) that they would expect to receive from the National Health Service (NHS) if they had not been sent to prison.”⁴⁰ Convicted prisoners applying for GRS are assessed, inter alia, in terms of risk: risks the applicant may face from other prisoners, risks the applicant may pose to other prisoners, and risks the applicant may pose to the public.⁴¹ Once approved, surgery relating to core commissioned services (such as GRS) is funded by the NHS.⁴² **Scotland** has adopted a similar approach to the provision of gender-affirming health care in prison.⁴³

20. In **France**, the *General supervisor of places of detention* published in 2010 the results of an investigation into the problems faced by trans people in detention.⁴⁴ The Supervisor found that information on trans-specific prison health care was generally lacking, that trans prisoners did not have access to health care offered outside the prison system, and that, in the absence of adequate guidelines, prisons took a variety of approaches to the management of transgender prisoners. The Supervisor took this opportunity to clarify that Article 46 of the 2009 Penitentiary Law, according to which “the quality and continuity of care are guaranteed to detained persons in equivalent conditions as those benefiting the entire population”, also applied to trans prisoners, who had a right to access health care inside prison, but also outside prison, as necessary.

21. In **Canada**, the issue of gender-affirming health care in prison formed the object of landmark litigation before the Canadian Human Rights Tribunal. Cynthia Kavanagh, a trans woman, was

³⁷ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/68/295, 9 August 2013, §55.

³⁸ Principle 9, b.

³⁹ United Nations Office on Drugs and Crime, *Handbook on prisoners with special needs*, 2009, p. 121, available here http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf. The Handbook provides “an overview of the main needs [of prisoners with special needs including LGBT inmates] and possible responses in line with international standards”, and is intended for the use by actors involved in the criminal justice system including policymakers and prison managers.

⁴⁰ National Offender Management Service Agency Board, *Prison Service Instructions: The Care and Management of Transsexual Prisoners*, (Ministry of Justice (UK), PSI 07/2011, 2 March 2011, at 2.2, available here: <http://www.justice.gov.uk/offenders/psis/prison-service-instructions-2011>.

⁴¹ *Idem*, at A.12.

⁴² *Idem*, at A.14.

⁴³ Scottish Prison Service, *Gender Identity and Gender Reassignment Policy for those in our Custody*, October 2013, 6.7, available here: <http://www.sps.gov.uk/MediaCentre/GenderIdentityAndGenderReassignmentPolicyLaunch.aspx>.

⁴⁴ Contrôleur général des lieux de privation de liberté, *Avis du 30 juin 2010 relatif à la prise en charge des personnes transsexuelles incarcérées*, available here: <http://www.cgplp.fr/2010/avis-du-30-juin-2010-relatif-a-la-prise-en-charge-des-personnes-transsexuelles-incarcerees/>.

incarcerated at a time when she was living as a woman and was taking female hormones. Once in prison she initially had to interrupt her hormone therapy, although that was later reinstated. Ms. Kavanagh complained to the Human Rights Tribunal against the state's blanket policy prohibiting inmate access to GRS. Based on a number of expert testimonies, and relying on the WPATH SoC, the Human Rights Tribunal concluded that GRS was a "legitimate, medically recognized treatment for transsexualism, in properly selected individuals", striking down the impugned ban.⁴⁵ Since GRS was "an essential service for a particular inmate" it had to be paid for by the state, "as would any other essential medical service."⁴⁶ As a result of the judgment, the Canadian Correctional Service had to change its previous "freeze frame" policy, keeping trans prisoners at the level of treatment they received at incarceration. The new policy provided that the principle of continuity of care would apply to those diagnosed with gender identity disorder,⁴⁷ that GRS would be considered during incarceration based on medical advice,⁴⁸ and that the Canadian Correctional Service would pay the costs of GRS.⁴⁹

22. The practices in many state jurisdictions in the **United States of America** that either almost completely deny gender-affirming health care to trans inmates, or operate "freeze-frame" policies, have recently come under intense court scrutiny, resulting in some notable outcomes. In 2006, the Federal District Court for the District of Wisconsin struck down as unconstitutional state legislation banning gender reassignment treatment, including hormonal treatment and genital surgery. The court noted that "[i]t is well established that prison officials may not substitute their judgments for a medical professional's prescription," and held that the Wisconsin law impermissibly mandated such substitution of judgment whenever a medical professional considered "hormone therapy or gender reassignment as necessary treatment for an inmate."⁵⁰ In August 2012, the U.S. Bureau of Prisons changed its longstanding policy on access to health care for trans inmates as part of a legal settlement. Under its new wording, the policy affords trans inmates "individualised assessment and evaluation services", as well as "treatment options that will not be precluded solely due to level of services received or lack of services prior to incarceration."⁵¹

D. Transgender persons' vulnerability to abuse in prison

23. The UN Special Rapporteur on Torture singled out transgender inmates, especially female, as a group that is "at great risk" of physical and sexual abuse by prison guards and fellow prisoners if placed within the general population in men's prisons.⁵² The UN Committee against Torture (CAT) has drawn attention on several occasions to incidents of violence against transgender prisoners.⁵³ The Committee of Ministers has likewise stressed the need to protect transgender prisoners.⁵⁴

⁴⁵ CHRT, *Synthia Kavanagh and Canadian Human Rights Commission v. Attorney General of Canada*, 31 August 2001, confirmed on appeal before the Federal Court of Canada - *Attorney General of Canada v Canadian Human Rights Commission*, 2003 FCT 89, §182.

⁴⁶ *Idem*, §191.

⁴⁷ Current version of the policy - The Commissioner of the Correctional Service of Canada, Directive on Health Services, no. 800/18 April 2011, available here: <http://www.csc-scc.gc.ca/text/plcy/cdshtm/800-cde-eng.shtml#GenderIdentityDisorder>, §33.

⁴⁸ *Idem*, §37.

⁴⁹ *Idem*, §38.

⁵⁰ *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

⁵¹ Federal Bureau of Prisons, *Program Statement on Patient Care*, 23 August 2013, §30, available here: http://www.bop.gov/policy/progstat/6031_003.pdf.

⁵² *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, A/56/156, 3 July 2001, §23 and the 2013 Special Rapporteur on Torture report, §47 (see *supra* note 37).

⁵³ For example, in its 2011 concluding observations on Bulgaria, the CAT referred to the high incidence of sexual violence, harassment and beatings which have occasionally resulted in suicide, as well as to the high mortality rates in custody, and recommended that specific measures be taken to protect transgender prisoners and other vulnerable individuals from inter-prisoner violence. Concluding observations of the Committee against Torture: Bulgaria, CAT/C/BGR/CO/4-5, 14 December 2011, §23.

⁵⁴ *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*, Appendix §4 and the Explanatory Memorandum, §4.

24. Transgender prisoners are often accommodated according to their birth gender, becoming exposed to an increased risk of sexual abuse and rape, particularly where trans women are concerned, or in solitary confinement, ostensibly framed as a measure of protection.⁵⁵ The US Supreme Court considered this issue in a case involving a trans woman who had been repeatedly raped and beaten by other inmates after she was transferred to a high security men's prison.⁵⁶ The Supreme Court ruled that a prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the cruel and unusual punishment clause of U.S. Constitution's Eighth Amendment. The UN Special Rapporteur on Torture also noted that "those members of sexual minorities are often detained in worse conditions of detention than the larger prison population."⁵⁷ This practice was an element in a recent case before this Court, *X v Turkey*. The placement of the applicant, a homosexual man, in long-term solitary confinement as a measure to protect him from other prisoners, was found to constitute a breach of Articles 3 and 14 of the Convention.⁵⁸ In some jurisdictions courts have taken into account the risks of ill treatment faced by transgender inmates in order to reduce their sentence. For example, the Israel Supreme Court reduced a transgender convict's sentence for robbery from 15 to 10 months, considering the unusual harsh prison conditions as a mitigating factor.⁵⁹ The Rio de Janeiro state department of prisons offers transgender inmates the choice between prisons for either men or women, citing dignity and security as reasons.⁶⁰

The situation of transgender persons in Russian prisons

25. The interveners are not aware of any research specifically into the situation of transgender persons in Russian prisons. However the existence of informal hierarchies among inmates has for long been a matter of concern. In 2005 rapporteurs for the Parliamentary Assembly commented as follows: "Abuse of prisoners by other prisoners [...] continues to be a serious problem [...] in the Russian Federation. Violence among inmates, including beatings and rape, appears to be quite common. There are elaborate inmate-enforced caste systems in which informers, homosexuals, rapists, prison rape victims, child molesters, and others were considered to be "untouchable" and were treated very harshly, with little or no protection provided by the prison authorities."⁶¹

26. The Statement of Facts in a case against Russia pending before this Court provides recent information about how "untouchables" were treated in one prison. They were assigned to do menial chores, like cleaning bathrooms and toilets, were forbidden from touching other inmates' personal property, were not allowed to put their food in communal fridges, and were frequently given rotten or perished food to eat. They were expected to provide sexual services to other inmates.⁶²

⁵⁵ The *Handbook on prisoners with special needs*, p. 108, see *supra* note 39.

⁵⁶ *Farmer v. Brennan*, 511 U.S. 825 (1994). Also see *DiMarco v. Wyoming Department of Corrections*, 2004 WL 307421 (D. Wyoming), where the US Court of Appeals for the Tenth Circuit ruled that state prison officials violated the 14th Amendment Due Process rights of Miki Ann DiMarco when they consigned her to 14 months in a dungeon-like high security lock-up without affording any kind of hearing process for her to challenge that decision.

⁵⁷ The 2001 Special Rapporteur on Torture report, §23, see *supra* note 52.

⁵⁸ *X v. Turkey*, no. 24626/09, 9 October 2012.

⁵⁹ See "Transgender Convicts Deserve Leniency, Supreme Court Says", Haaretz, available here <http://www.haaretz.com/news/national/premium-1.546826>; also see the *Handbook on prisoners with special needs*, p. 119, see *supra* note 39, recommending that LGBT offenders who have committed non-violent offences and who do not pose a risk to society should benefit from non-custodial sanctions and measures better suited to their social reintegration.

⁶⁰ *ABC Transgender prisoners in Rio given choice between male or female prison*, 31 May 2015, available here:

<http://www.abc.net.au/news/2015-05-31/rio-to-allow-transgender-inmates-to-choose-male-or-female-prison/6509764>

⁶¹ David Atkinson and Rudolf Bindig, Rapporteurs, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe - Report on the Russian Federation – Doc. 10568, 3 June 2005 – § 213; see also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment, Russian Federation: Visit 2012 – CPT/Inf (2013) 41 | Section: 8/36 | Date: 03/12/2012, § 24.

⁶² *X v. Russia* - Application no. 36463/11; The applicant in the case complains that his treatment on account of his status in this caste system amounted to inhuman or degrading punishment under Article 3 of the Convention.

27. Accounts of this caste system usually include “homosexuals” amongst the “untouchables”. However, as described in more detail below (see § 32), a lack of awareness has meant that transgender persons in Russia are often included under the heading “homosexual” in public discourse. There is little doubt that a prisoner identified as transgender would run a high risk of being designated “untouchable”.

Consequences of disclosure of transgender status in prisons

28. This Court has long held that disclosure by the authorities of a person’s transgender status can amount, *per se*, to a violation of the right to respect for private life.⁶³ Legislation on legal gender recognition in a number of States specifically reflects this position.⁶⁴

29. Transgender status qualifies as medical information, whose confidentiality this Court has also emphasised States have a duty to protect. It has noted that “disclosure of such data may seriously affect a person’s private and family life, as well as their social and employment situation, by exposing them to opprobrium and the risk of ostracism.”⁶⁵

30. A recent case before the High Court of Kenya illustrates the type of situation which can arise in prisons when the authorities do not strictly enforce protection of confidential information relating to a person’s sexuality or gender. Prison officers exposed an intersex prisoner’s genitalia to other inmates - behaviour that was found to amount to degrading and inhuman treatment.⁶⁶

31. Given the serious risk of abuse of transgender prisoners, the requirement to protect confidentiality must apply *a fortiori* in the case of prison authorities and unquestionably gives rise to positive obligations on the part of States under Article 3 of the Convention.

E. The situation of transgender persons in Russia

Discrimination in the public sphere

32. Activism in support of the rights of transgender people in Russia is a recent phenomenon. As a consequence there is little information on the extent of transphobic discrimination. There is also little understanding of transgender persons in Russian society generally. Indeed, transgender status is often equated with homosexuality, so that transgender persons are generally subject to the same forms of discrimination as lesbian, gay, and bisexual persons. A representative survey found that more than 60% of Russians feel irritation or indignation towards transsexual people.⁶⁷

33. While long ignored in the political sphere, there are signs that this is changing, and, regrettably, not for the better. Three of the regional laws prohibiting so-called “propaganda of homosexuality to minors” (those of St Petersburg,⁶⁸ Samara oblast and Bashkortostan) also prohibited “propaganda of transgenderism to minors”. That for St Petersburg was used to ban a picket planned in that city for the

⁶³ *B. V. France*, no. 13343/87, 25 March 1992.

⁶⁴ See for example, the UK’s Gender Recognition Act 2004, Section 22; Malta’s Gender Identity, Gender Expression and Sex Characteristics Act, 2015, Article 12.

⁶⁵ *Avilkina and Others v. Russia* (no. 1585/09).

⁶⁶ *Richard Muasya v. the Hon. Attorney General*, High Court of Kenya (2 December 2010).

⁶⁷ Levada Center *Отношение россиян к нудистам и транссексуалам* (attitude of Russians towards Nudists and Transsexuals), available here: <http://www.levada.ru/21-06-2014/otnoshenie-rossiyan-k-nudistam-i-transseksualam>.

⁶⁸ The St Petersburg law was repealed in November 2013, following the introduction of the Federal Law on propaganda of non-traditional sexual relations among minors.

Transgender Day of Visibility on March 31, 2013.⁶⁹ In May 2015 a bill was tabled in the State Duma⁷⁰ which, if adopted, would prevent legally recognised transgender persons from entering into a different sex marriage, contravening the judgment of this Court in *Goodwin v. UK*.

34. Individuals demonstrating in support of the rights of transgender persons have met with hostility both from law enforcement officials and counter-demonstrators. In October 2011 five activists were detained by police for picketing the Ministry of Health with banners calling for an end to the pathologisation of transgender status,⁷¹ while in September 2013 a transgender activist carrying a banner protesting at the compulsory sterilisation of trans women was attacked by counter-demonstrators.⁷² In August 2013 a lecture on “Propaganda of transgenderism and transfeminism”, scheduled as part of a school of gender studies in Moscow, was banned by the organisers who were afraid that it would fall under the federal law prohibiting “propaganda of non-traditional sexual relations to minors”.⁷³

35. There are no statistics concerning the level of discrimination or hate crimes against transgender persons in Russia. A community-based survey by Coming Out with 412 trans-identified respondents found: “One of the most problematic aspects for trans* people is the physical violence they experience. Trans* people meet [physical violence] in all stages of life, in very different places and situations; sources of violence are close ones and family members, or unknown persons in the streets.”⁷⁴ A recent report by Human Rights Watch on violence and harassment against LGBT people in Russia documented three examples of hate crimes against transgender persons. In one case four attackers forced a transgender woman into their car and drove to the outskirts of the city, where they stripped her naked, beat her, and pulled out two of her toenails with pliers. Another transgender woman recorded how she was routinely verbally and physically assaulted because of her gender identity.⁷⁵ Human Rights Watch also found that transgender women had been victims of a vigilante group called Occupy Paedophilia, whose principal target has been gay people.⁷⁶

36. In 2014 eight individuals belonging to a transgender peer-support group in St. Petersburg are reported to have lost their jobs and/or education as a result of anonymous calls and letters revealing their trans status to their employers and educational institutions.⁷⁷

Procedures for the legal recognition of transgender persons in Russia

37. The general indifference, and even hostility, towards transgender persons in Russian society is reflected in inadequate procedures governing their change of name and legal gender, and the arbitrary way in which these procedures are administered. According to Article 70 of the Federal Law N143 “Concerning Acts of Civil Status”, it is possible for appropriate changes to be made to the birth record of a transgender person on presentation to the civil registration authorities of an official form provided

⁶⁹ *Transgender activism in Russia* – Yana Sitnikova - January 2014 – p 3 – accessible at: <http://www.freedomrequireswings.com/2014/01/report-transgender-activism-in-russia.html>.

⁷⁰ Draft Law No. 790069–6: On introducing amendments to Article 14 of the Family Code of the Russian Federation.

⁷¹ *Transgender activism in Russia* – p 3.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Coming Out - Gender Identity in the epicenter of discrimination*, 2014, available here: http://issuu.com/coming_out_spb/docs/transgender.

⁷⁵ Human Rights Watch – *License to Harm – Violence and Harassment against LGBT People and Activists in Russia* – 2014 – p 38.

⁷⁶ *Idem* p 27.

⁷⁷ Transgender Europe in private correspondence with a victim, 23 July 2014

by a medical institution that confirms the change of sex.⁷⁸ A 1988 Decree requiring the Ministry of Health to establish this form⁷⁹ has never been complied with.

38. This absence of proper procedures gives civil registry offices and courts the latitude to make their own judgements about the medical conditions for authorising legal gender recognition. In most cases two documents are required – confirmation that sex reassignment surgery has taken place, and a psychiatric diagnosis of ‘transsexualism’.⁸⁰ Since 2013 the latter has been governed by a document entitled the “Standard of primary medical care in the case of sexual identity disorders”. It imposes significant burdens on transgender persons, requiring examinations by a psychotherapist, psychiatrist, sexologist, endocrinologist and medical psychologist. It specifies a list of hormonal drugs to be used in gender reassignment treatment.⁸¹

39. In some cases individuals are additionally required to stay in a psychiatric institution for around 30 days, where they may be accommodated with other patients according to their legal gender, rather than the gender with which they identify. This can lead to hostility and violence from other patients.⁸²

40. A survey into the practices regarding legal gender recognition by civil registry offices in different regions of Russia found that some required surgery, others a court decision, others any document issued by a medical organisation provided it included a diagnosis of ‘transsexualism’, while in yet others decisions were taken on a case by case basis.⁸³

41. Moreover, the procedure for changing one’s gender marker in all documents is expensive and lengthy – generally taking several years, during which transgender persons are particularly exposed to violence and discrimination.

The availability of gender-reaffirming treatment in Russia

42. Adequate gender reaffirming treatment is available only in a small number of the larger Russian cities. Most medical professionals, especially in rural areas, are reported to have little or no up-to-date knowledge in this field.⁸⁴ Moreover hormone replacement therapy and gender reassignment surgery are only available at the patient’s expense.⁸⁵

43. Some transgender patients complain of rudeness and transphobic attitudes by medical professionals. This can include constantly addressing the individual in the wrong gender, offensive remarks about a person’s appearance, or even attempts to dissuade them from gender reassignment treatment.⁸⁶

⁷⁸ Article 70 of the federal law "On the acts of Civil Status" states that "Amendments or changes to the statement of the act of civil status are made by the civil registry, where... a document of the established form about the change of sex issued by a medical organisation is submitted."

⁷⁹ Decree of the Government No 709.

⁸⁰ *Psychiatric abuse of transgender people in Russia* – Yana Sitnikova - 13 March 2015 – p 2; available at: <https://www.opendemocracy.net/od-russia/yana-sitnikova/psychiatric-abuse-of-transgender-people-in-russia>.

⁸¹ *Ibid.*

⁸² *Idem* p 3.

⁸³ *Transgender activism in Russia* p 1.

⁸⁴ *Discrimination on grounds of sexual orientation and gender identity in healthcare, education, employment and social security in the Russian Federation - An alternative report* – submitted to the 46th Session of the UN Committee on Economic, Social, and Cultural Rights by Russian LGBT Network – May 2011 - p 17.

⁸⁵ *Idem* p 30.

⁸⁶ *Psychiatric abuse of transgender people in Russia* – Yana Sitnikova - 13 March 2015 – pp 2 & 3.