

IN THE EUROPEAN COURT OF HUMAN RIGHTS

G.G. v. Turkey

(Application No. 10684/13)

WRITTEN COMMENTS

submitted jointly by

Transgender Europe (TGEU)

ILGA Europe

Kaos Gay Lesbian Cultural Research and Solidarity Association (Kaos GL)

Counseling Center for Transgender People (T-Der)

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A. Introduction

1. These written comments are submitted jointly by Transgender Europe (TGEU), the European Region of the International, Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), Kaos Gay Lesbian Cultural Research and Solidarity Association (Kaos GL) and the Counseling Center for Transgender People (T-Der) pursuant to leave granted by the President of the Second Section on 20 February 2014 in accordance with Article 36§2 of the Convention.¹

2. This submission is structured as follows. First we will present the main terms employed in relation to transgender people and gender identity, as well as the main findings from studies that describe the discrimination that transgender people face in our societies in every sphere of life, particularly health care. Second, we will outline the main findings from studies and reports regarding transgender persons' experience of incarceration. Third, we will review the position adopted in selected jurisdictions with respect to trans-specific health care in prison, as reflected in national policies and jurisprudence. Finally, we will present the extent to which trans-specific health care is available in Turkey, and the situation of transgender people in Turkish prisons.

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

3. **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.² Diversity within the transgender spectrum is large with 75% of transgender respondents not identifying as either male or female.³ **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.⁴

¹ For Interest of Interveners see Annex to the written comments.

² 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.

³ EU Fundamental Rights Agency 2012 LGBT Survey on Victimization and Discrimination.

⁴ 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 Ettlbrick 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 CoE 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*")

4. **Gender reassignment treatment** 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, cross-hormonal treatment, sex or gender reassignment surgery (such as facial surgery, chest/breast surgery, different kinds of genital surgery and hysterectomy), 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.

5. **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).⁵

6. **Transphobia** is defined as an "irrational fear of, and aversion to" transgender persons or gender non-conformity.⁶ Individual, structural or institutional manifestations of transphobia include discrimination, criminalisation, marginalisation, social exclusion and violence on grounds of (perceived) gender identity and gender expression.

7. Transgender people are subject to pervasive social disapproval and discrimination. They report high levels of harassment and even physical assault because of their gender identities and expression, including at school, at their workplace, on the street, or in the family.⁷ The problem of transphobic violence is particularly acute in Turkey, where 34 potentially hate-motivated killings of trans people have been reported in the past five years.⁸ In some countries, transgender people are afraid to come out and may keep their gender identity secret for fear of negative repercussions.⁹ They experience high rates of unemployment, and often have to change jobs when undergoing gender reassignment treatment.¹⁰ Transgender people are more likely to be homeless than the general population.¹¹

8. Many transgender people report feeling lonely or isolated, and some but not all experience mental health issues. Research undertaken in different European countries

⁵ WPATH SoC v7, see *infra* §11.

⁶ *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 131.

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](http://igvm-iefh.belgium.be/nl/binaries/34%20-%20Transgender%20ENG_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 See Transgender Europe: TDOR Press Release November 13th 2013, available at http://www.transrespect-transphobia.org/uploads/downloads/2013/TMM-english/TvT-TMM2013-Update-PR_EN.pdf.

⁹ The Belgium report, p. 114-115, 120, the Netherlands report, p. 99.

¹⁰ The Ukraine report, p 41-43, the Belgium report, p. 123.

¹¹ See for example the Scotland report, p. 71.

consistently shows higher suicide rates and self-harming behaviour among transgender people.¹² 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 misunderstood by health professionals and not feeling supported by gender identity specialists.¹³ Transgender people face systemic discrimination trying to access general health care services, which includes being treated with contempt or refused care.¹⁴ 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.¹⁵

B. Professional and legal standards on gender-affirming health care

9. *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)¹⁶ outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”.¹⁷ 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 dates from 25 September 2011.

10. 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 GRS procedures.¹⁸ If a trans person needs several of these procedures there is no specific order in which they have to be performed.¹⁹ 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, gender reassignment treatment is a necessary medical treatment, and not elective or cosmetic.²⁰ Research shows clearly that “surgery is essential and medically necessary to alleviate [trans people’s] gender dysphoria.”²¹ Furthermore, “relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.”²² Follow-up

¹² 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.

¹³ See for example the Ireland report, p 32.

¹⁴ 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/>.

¹⁵ *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.

¹⁶ Available here: http://www.wpath.org/uploaded_files/140/files/IJT%20SOC.%20V7.pdf.

¹⁷ WPATH SoC-7, p. 1.

¹⁸ See the definition above §6 listing the various procedures coming within the scope of GRS; WPATH SoC-7, p. 57 §f.

¹⁹ WPATH SoC-7, p. 59.

²⁰ WPATH SoC-7, p. 58.

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

²² *Idem*.

studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well-being, cosmesis, and sexual function.”²³ Research also shows that psychiatric treatment is not a viable substitute for gender reassignment treatment.²⁴

11. One of the largest studies on trans peoples’ health recently undertaken in Europe²⁵ 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”,²⁶ a significantly higher rate of satisfaction with their own body²⁷ and felt their mental health had improved.²⁸ 63% of those who transitioned reported that they harmed themselves less after transition.²⁹ 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 3% thinking about or attempting suicide more post-transition.”³⁰ The study also shows that lack of access “has a direct [negative] impact upon depression.”³¹

12. 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.”³² 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.”³³

13. 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”.³⁴ 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.”³⁵ For its part, the WPATH “urges health insurance companies and other third-party payers to cover the medically necessary treatments to alleviate gender dysphoria.”³⁶

²³ See scientific research cited in WPATH SoC-7, p. 54 f.

²⁴ For an overview on studies regarding the efficacy of gender reassignment treatment see SoC Annex D.

²⁵ The Scotland report.

²⁶ *Idem*, p. 17.

²⁷ *Idem*, p. 18.

²⁸ *Idem*, p. 50.

²⁹ *Idem*, p. 55.

³⁰ *Idem*, p. 59.

³¹ *Idem*, p. 52.

³² *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*, §35.

³³ Principle 17, §g.

³⁴ *Discrimination on grounds of sexual orientation and gender identity in Europe*, p. 111.

³⁵ *The Human Rights and Gender Identity Issue Paper*, Recommendation 5.

³⁶ WPATH SoC, p. 33.

C. Transgender people in prison

14. The UN Special Rapporteur on Torture singled out transsexual and 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.³⁷ The UN Committee against Torture (CAT) has drawn attention on several occasions to incidents of violence against transgender prisoners.³⁸

15. 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.³⁹ 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.⁴⁰ 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.”⁴¹ This practice is exemplified by this Court’s recent judgment in the case *X v Turkey*, where the placement of the applicant, a homosexual man, in long-term solitary confinement, taken as a measure to protect him from other prisoners, constituted a breach of Articles 3 and 14 of the Convention.⁴² 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.⁴³

16. There is some evidence, particularly from the United States, but also from the United Kingdom, showing that for trans people the offending behaviour that resulted in

³⁷ *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 *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/68/295, 9 August 2013, §47.

³⁸ 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.

³⁹ United Nations Office on Drugs and Crime, *Handbook on prisoners with special needs*, 2009, p. 108, 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 *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.

⁴¹ The 2001 Special Rapporteur on Torture report, §23, see supra note 37.

⁴² *X v. Turkey*, no. 24626/09, 9 October 2012.

⁴³ 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.

their imprisonment may be related to their unconventional gender identity or gender expression.⁴⁴ Social disapproval and widespread discrimination referenced above, as well as the inability to access necessary gender reassignment treatment, may lead trans people to stigmatised occupations such as sex work, dropping out from school, disproportionate poverty, illegal drug dealing, homelessness etc. At the same time, transgender people may be disproportionately likely to be arrested and sentenced to prison, due to transphobic bias among law enforcement officers. Human Rights Watch reported that many trans people in Turkey are commonly compelled to do sex work, which makes them vulnerable to police abuse in the form of “arbitrary arrest prohibitive fines, and repressive regimes of medical testing.”⁴⁵ The experience of incarceration, strictly segregated along gender lines, and with inflexible institutional regulations, may aggravate the plight of trans prisoners. In these circumstances, the work of probation officers to ensure that trans prisoners cease to reoffend and make a positive contribution to the community upon their release, should include addressing the criminogenic factors that brought them in prison in the first place, including by recommending gender-affirming treatment to those who need it.⁴⁶

D. Gender-reaffirming treatment in prison

17. 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.⁴⁷ 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.”⁴⁸ 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.”⁴⁹

18. 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 searching. 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.”⁵⁰ Convicted prisoners applying for GRS are

⁴⁴ For the UK see Stephen Whittle, Paula Stephens, *A Pilot Study of Provision For Transsexual and Transgender People in The Criminal Justice System, and the Information Needs of their Probation Officers*, 14 May 2001; for North America see for example Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 Colum. Hum. Rts. L. Rev. 167 2006-2007, p. 171-177.

⁴⁵ Human Rights Watch, *We Need a Law for Liberation: Gender, Sexuality and Human Rights in a Changing Turkey*, 2008, p. 8-9 available here: <http://www.hrw.org/reports/2008/turkey0508/turkey0508webwcover.pdf>.

⁴⁶ See Whittle, Stephens (2001), supra note 44.

⁴⁷ The 2013 Special Rapporteur on Torture report, §55, see supra note 37.

⁴⁸ Principle 9, b.

⁴⁹ *The Handbook on prisoners with special needs*, p. 121, see supra note 39.

⁵⁰ National Offender Management Service Agency Board, *Prison Service Instructions: The Care and*

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.⁵¹ Once approved, surgery relating to core commissioned services (such as GRS) is funded by the NHS.⁵² **Scotland** has adopted a similar approach to the provision of gender-affirming health care in prison.⁵³

19. 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.⁵⁴ 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.

20. In **Canada**, the issue of gender-affirming health care in prison formed the object of landmark litigation before the Canadian Human Rights Tribunal (HRT). Cynthia Kavanagh, a trans woman, was incarcerated for murder 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 HRT 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 HRT concluded that GRS was a “legitimate, medically recognized treatment for transsexualism, in properly selected individuals”, striking down the impugned ban.⁵⁵ 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.”⁵⁶ As a result of the judgment, the Canadian Correctional Service (CSC) 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 GID,⁵⁷ that GRS would be considered during incarceration based on medical advice,⁵⁸ and that the CSC would pay the costs of GRS.⁵⁹

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>.

⁵¹ *Idem*, at A.12.

⁵² *Idem*, at A.14.

⁵³ 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>.

⁵⁴ 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.cglpl.fr/2010/avis-du-30-juin-2010-relatif-a-la-prise-en-charge-des-personnes-transsexuelles-incarcerees/>.

⁵⁵ 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.

⁵⁶ *Idem*, §191.

⁵⁷ 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.

⁵⁸ *Idem*, §37.

⁵⁹ *Idem*, §38.

21. The practice 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, has 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.”⁶⁰ In August 2012, the U.S. Bureau of Prisons (BOP) 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.”⁶¹

22. In another important development, Michelle Kosilek, a transgender woman serving a life sentence for the murder of her spouse in 1990, sued the Massachusetts Department of Correction for denying her a state-funded GRS, against the recommendations of multiple doctors. Like the applicant in the present case, Kosilek mutilated herself and attempted suicide twice while being denied care. In September 2012, the District Court ruled that the refusal to provide Kosilek with GRS breached her eighth-amendment rights, which bar cruel and unusual punishment.⁶² The court placed weight on the testimonies from several medical professionals that GRS was medically necessary and the only appropriate treatment for the claimant, and that a very likely consequence of her not receiving it was a serious risk of harm, predominantly suicide.

E. Transgender prisoners in Turkey

23. No reliable information exists about the number of LGBTI prisoners in Turkey or the problems that they face. However, the Civil Society in the Penal System Foundation (*Ceza İnfaz Sisteminde Sivil Toplum Derneği*, CISST) has recently carried out research on prisoners with special needs, including LGBTI people.⁶³ Letters sent by LGBTI inmates to civil society organisations reveal additional information. A letter sent by a trans woman held in Bayrampasa Cezaevi Prison, published by Human Rights Watch described how prison guards had subjected her to physical abuse and humiliation, including rape, solitary confinement and substandard living conditions.⁶⁴

⁶⁰ *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

⁶¹ Federal Bureau of Prisoners, *Program Statement on Patient Care*, 23 August 2013, §30, available here: http://www.bop.gov/policy/progstat/6031_003.pdf.

⁶² *Kosilek v. Spencer*, C.A. No. 00-12455-MLW, 2012 U.S. Dist. LEXIS 124758, (D. Mass. Sept. 4, 2012). On 17 January 2014, the First Circuit Court of Appeals upheld the district court’s ruling: *Kosilek v. Spencer*, 2013 U.S. App. LEXIS 951, 2014 WL 185512 (1st Cir., Jan. 17, 2014). The state has requested a rehearing en banc, which was granted and is currently pending.

⁶³ Civil Society in the Penal System Foundation, *Report on the Prisoners with Special Needs*, Istanbul, Turkey, (the CISST report) chapter 5, p. 12-16, 2013: <http://www.cezaevindestk.org/duyuru-105-ozel-ihiyaclari-olan-mahpuslar-projesi-sonuc-raporu-kasim-2013>.

⁶⁴ Human Rights Watch, *Transgender Prisoners, Identity, and Detention: Policy Recommendations*, 1 March 2006, available here: http://www.outcast-films.com/films/cu/transgender_prisoners.pdf.

24. There are no legal provisions addressing the special needs of LGBTI inmates. Article 6 of Code No. 5275 on the Execution of Criminal and Security Measures states that “prisoners are securely held in order to prevent any attempt to escape from [prisons] in the frame of discipline, order and security”. Articles 23 and 24 of the Code that regulate how prisoners should be classified⁶⁵ are vaguely worded giving prison officials a wide degree of discretion. This facilitates the arbitrary treatment by public officials and the Directorate General of Prisons (DGP), under the pretext of guaranteeing the security of LGBTI prisoners.

25. According to data provided by the DGP,⁶⁶ there currently are 79 LGBTI inmates in prisons but the number of LGBTI prisoners is actually likely to be much higher. Furthermore, probably this number mostly refers to trans people, and not gay, lesbian or bisexual people who cannot be identified unless they declare their sexual orientation. “Sexual orientation” is explicitly mentioned as a criterion for grouping and classifying prisoners.⁶⁷ However, the clause concerning “prisoners who have a different sexual orientation” is generally interpreted as gender identity and is applied to the detriment of trans people, rendering them invisible. According to the CISST report, LGBTI prisoners live isolated in “a prison inside the prison”. The DGP states that “Prison managers assure the usage of common facilities and performance of social activities of LGBTI prisoners by placing them apart from other prisoners”⁶⁸ in the interest of guaranteeing their “security”. As a result, LGBTI prisoners are denied access to common facilities in prison, which resulted among others, in a finding of a breach of the Convention in the above-mentioned case *X v. Turkey*.⁶⁹

26. Personal statements by LGBTI people confirm the isolation/segregation policy practised in prisons. For example, in her letter from Bafra (Samsun) Prison, a trans woman prisoner confirmed that she shared the same cell with seven other trans prisoners.⁷⁰ Furthermore, the CISST report also found that in order to secure placement in a segregated ward, a LGBTI person would have to submit to a medical examination in order to prove their gender identity or sexual orientation.

27. For transgender prisoners, access to hormones and other necessary gender-affirming treatment are not facilitated by the State and regularly paid or reimbursed by the health insurance system. Transgender people may access hormones with the help of the prison doctor however they do not have the option to choose the type of hormones that suit best their medical needs. Other needs such as gendered clothing and grooming are not made

⁶⁵ These criteria include personal traits, health and mental conditions, their lives before the crime, social environment and personal relations, *moral proclivities*, art and professional activities, types of crime and their personal opinions on crime (Article 23). Prisoners are grouped based on their criminal records, need for a special criminal regime based on the age, mental or health needs, carrying a dangerous risk, terrorism, being member of a crime organization (Article 24).

⁶⁶ The CISST report.

⁶⁷ According to the regulation on Centers for Observation and Classification dated 17 June 2005 and Article 26 of the regulation on the Administration of Crime Execution Institutions and Execution of Crimes and Security Measures dated 06 April 2006 (Article 26). More information in Turkish is available here: <http://www.bianet.org/biamag/diger/149703-turkiye-de-lgbt-mahpus-olmak>.

⁶⁸ *Idem*.

⁶⁹ *X v. Turkey*, no. 24626/09, 9 October 2012; in that case apparently the authorities assumed the applicant was transgender and placed him in solitary confinement: “le juge de l’exécution des peines...s’est borné à invoquer le pouvoir discrétionnaire dont jouissaient les autorités pénitentiaires en la matière et évoquer un risque hypothétique, à savoir le « lynchage d’un travesti »”, at §61.

⁷⁰ Letter from A.T., held in Bafra Prison, dated 25 February 2014, on file with KAOS GL.

available in prisons. For example, a trans inmate held in Bafra Prison complained in a letter that her basic needs such as access to clothing were not properly met.⁷¹ Limited access to a lawyer and restrictions on conjugal visits by unmarried partners are other problems frequently mentioned by trans prisoners.

F. Gender-reaffirming treatment in Turkey

28. GRS is available in Turkey, but the procedure for accessing is unclear and very complicated.⁷² Under article 40 of the Turkish Civil Code, those applying for permission to undertake GRS must be 18 years old, unmarried and infertile. They must also prove that they have a “natural tendency” towards transsexuality and that GRS is necessary in order to preserve their mental health. Finally, they must apply to the court in order to change their gender marker on their identity card. Article 40 further provides that there are two stages to this process. First, trans people have to apply to the court to get the permission needed to undergo GRS. Even if the applicant meets all the above-mentioned requirements, courts may still withhold authorisation, which in practice may cause some problems. The applicant has to apply for permission from the court to undergo surgery leading to infertility. Because of that, in general, courts decide to give surgery permission if all conditions are well substantiated except infertility. However, in some cases courts do not accept the application under the pretext that the applicant still has the capacity to reproduce. In the absence of a favourable court decision, the gender reassignment procedure may be interrupted.⁷³

29. After the finalization of GRS, the applicant has to apply again to the court for permission to change their identity card. The court refers the applicant to an education and research hospital to verify that the “change of gender” had taken place. After obtaining a favourable report from the hospital, courts may decide to permit the change to the identity card. The court decision is then sent to the Directorate General of Registration, which updates the applicant’s entry. The identity card changes after “the change of gender” (in Turkey the identity card is blue for males and pink for females). But in the applicant’s identity file, it can be seen that the person has changed gender. Moreover, other documents issued before the GRS had taken place, such as school diplomas, cannot be changed even after legal gender recognition had been completed.

30. In practice trans people encounter a range of problems when attempting to access GRS and/or legal gender recognition, in the procedure regulated under Article 40 of the Civil Code. Trans people are referred to an education and research hospital to start the gender reassignment procedure. After a 6-8 months observation period in the hospital, the person may get a report certifying that “the person has a natural tendency of transsexuality and sexual reassignment is a necessity for their mental health”, on the basis of which they

⁷¹ Letter from M.Y. held in Bafra Prison, dated 26 February 2014, on file with KAOS GL.

⁷² See further Yasemin Öz, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - Legal Report: Turkey*, The Danish Institute for Human Rights, p. 43-47, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - Sociological Report: Turkey, The Danish Institute for Human Rights, p. 17-18*, Amnesty International, “Not an Illness nor a Crime”: *Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality*, 2011.

⁷³ See for example the statement of facts in the case *Y.Y v Turkey* (Application no. 14793/08), communicated on 31 March 2010. The applicant in that case, a trans man, applied to the first instance court for the permission to undergo GRS. The application was rejected under the pretext that he still had the capacity to reproduce.

may start hormonal treatment. According to anecdotal information, gender reassignment treatment is available in only nine education and research hospitals.⁷⁴ However, there are no publicly available guidelines on the gender reassignment procedure, and reports from people who had completed the process are often the only source of information in this respect. The gender reassignment procedure is lengthy and complicated, and during this time trans people are subject to daily acts of discrimination due to the disagreement between their appearance and the gender recorded in their personal document. It is not clear whether the costs of GRS cost are covered from the state health insurance system.

On behalf of the submitting parties,

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⁷⁴ <http://transsicko.blogspot.com.tr/2013/11/cinsiyet-gecis-surecinin.html>

Annex: Interest of the proposed third party interveners

Transgender Europe – TGEU (www.tgeu.org) founded by the European Trans Movement at the occasion of the first European Transgender Council 2005 in Vienna is a not-for-profit regional umbrella organization working for equality and the advancement of the human rights of transgender persons in Europe. To date, TGEU represents 77 member organizations and 127 individual members in 36 countries and is registered under Austrian law. TGEU advocates for the rights of transgender persons with European Institutions such as Council of Europe, European Union and Organization for Security and Cooperation in Europe, builds capacity of organizations and initiatives supporting transgender equality and rights on the national level and engages in research on the human rights situation of transgender people in Europe and different parts of the world. TGEU is member of the Conference of International Non-governmental Organisations of the Council of Europe – INGO, the European Network of Social NGO's – The Social Platform, participant at the Fundamental Rights Platform consulting the EU Fundamental Rights Agency. TGEU is registered in the EU Transparency Register. TGEU's expertise is well-received by several Council of Europe's bodies like the Steering Committee for Human Rights – CDDH, the European Commission on Racism and Intolerance – ECRI Secretariat, or the Committee of the Social Charter under the Health reporting cycle of the ESC. It was accredited observer status with the DH-LGBT⁷⁵ committee drafting the "Recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation and gender identity" (CoM/Rec(2010)05) and is actively cooperating with the Council of Europe LGBT unit on the implementation of the CoM/Rec(2010)05 beyond its pilot project in six Member States⁷⁶. TGEU advised the Council of Europe Human Rights Commissioner for his publications "Human Rights and Gender Identity" (2009) and "Report on Discrimination on grounds of Sexual Orientation and Gender Identity" (2011). TGEU has previously submitted third party interventions in transgender cases Joanne Cassar v. Malta (Application No. 36982/11, decided on 9 July 2013), and Hämäläinen v. Finland (Application No. 37359/09, pending before the Grand Chamber).

ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, (<http://www.ilga-europe.org>), was founded in 1996. It seeks to defend at European level the human rights of those who face discrimination on the grounds of sexual orientation, gender identity, or gender expression. It was granted consultative status with the Council of Europe in 1998 and with the United Nations Economic and Social Council in 2006. Its membership consists of over 400 non-governmental organisations from across the Council of Europe countries, whose members are mainly lesbian, gay, bisexual, transgender or intersex individuals.

ILGA-Europe has previously provided the Court with written comments in 15 cases dealing with discrimination on the grounds of sexual orientation.⁷⁷ Over the years it has also made input to many other institutions of the Council of Europe, including the Parliamentary Assembly, the Steering Committee on Human Rights, the European Committee of Social Rights, the European Commission against Racism and Intolerance, the Office of the Commissioner for Human Rights, and the Committee of Ministers (in relation to the execution of judgments process).

⁷⁵ Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT).

⁷⁶ Albania, Montenegro, Latvia, Poland, Serbia and Italy.

⁷⁷ Available at: http://www.ilga-europe.org/homelhow_we_work/litigation/ecthr_litigation/interventions.

Kaos Gay Lesbian Cultural Research and Solidarity Association (Kaos GL www.kaosgl.org) was founded in 2005, as the first registered LGBT association in Turkey. The purpose of Kaos GL is to support lesbian, gay, bisexual and transgender individuals to embrace libertarian values, to live a fulfilling life, and to cultivate themselves in order to contribute to the development of social peace and welfare together with the development of their individual, social and cultural life and behaviour.

Kaos GL conducts cultural, educational, artistic and sports activities so that LGBT individuals may embrace freedom, justice and peace as their fundamental values, so that they may conceive human rights as the rights of all human beings without discrimination based on language, race, colour, gender, sexual orientation, gender identity, philosophical conviction, religion, religious sect, locality, so that they may fight against homophobia and transphobia.

Kaos GL fights against the problems that LGBT people encounter in all spheres of life, such as family, education, employment, housing, law, human rights, media, health, sexual health, psychology-psychiatry, and access to goods and services. Kaos GL carries out its work under three main programs - Human Rights Program, Media Studies and Anti-Homophobia Activities.

Counseling Center for Transgender People (T-Der: www.t-der.org) was set up in July 2013 and is the only not-for-profit organization in Turkey that provides legal advice exclusively on the gender reassignment process. The current core of the organization is formed of one genderqueer person, two bisexuals and four transgender people. Within a six-month period since it was founded, T-Der has monitored the transition process for 80 transgender people. T-Der is planning to work primarily with the Turkish transgender community, LGBTI organisations, women's NGOs and public institutions.

T-Der aims to inform transgender persons regarding the legal, medical and social stages of their gender reassignment process, to inform them about their basic rights, to reinforce and to support them in order to render the gender reassignment process smoother. In addition, T-Der aims to report discrimination occurring during the gender reassignment process and to lobby for the amendment of current legislation on the gender reassignment process. Lastly, T-Der tries to strengthen the health institutions, to inform the medical staff, to work with public authorities on the right of transgender people to access adequate health care as a part of its corporate strategy plan.