



RZECZNIK PRAW OBYWATELSKICH

# The legal situation of non-heterosexual and transgender persons in Poland

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International standards for the protection of LGBT persons'  
human rights and compliance therewith from the perspective  
of the Commissioner for Human Rights

REPORT SYNTHESIS

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**The legal situation of non-heterosexual and transsexual persons in Poland.  
International standards for the protection of LGBT persons human rights and  
compliance therewith from standpoint of the Commissioner for Human Rights.**

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## Why has the Commissioner for Human Rights drawn up this report?

The Commissioner for Human Rights (CHR), pursuant to the Act of 3 December 2010 on the implementation of certain regulations of the European Union regarding equal treatment<sup>1</sup>, has been entrusted by the legislature with tasks relating to the implementation of the principle of equal treatment. As an independent equality body<sup>2</sup>, the CHR analyzes, monitors and supports the compliance with the principle of equal treatment of all persons, as well as draws up and publishes reports and recommendations concerning problems relating to discrimination<sup>3</sup>.

Poland is currently ranked 39<sup>th</sup> out of 49 countries in the ILGA-Europe's annual review of the state of legal protection provided to LGBT persons (lesbians, gays, bisexual and transgender persons) in European countries, issued on the occasion of the International Day Against Homophobia, Biphobia and Transphobia<sup>4</sup>. Poland occupies second-last place among European Union Member States.

Poland's highest-rated area of compliance with LGBT protections standards is freedom of association; the lowest-rated area has long been protection against hate crimes, the right to respect for family life and protection against discrimination. While standards of legal protection for LGBT persons have not changed under Polish law for years, slow progress has been evident in national case law due to the fact that courts are increasingly taking into account international law as well as the rulings of the European Court of Human Rights and the Court of Justice of the European Union.

It is difficult not to have the impression that this is a consequence not only of the courts' increasing knowledge about the application of international

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<sup>1</sup> 1 Act of 3 December 2010, Journal of Laws 2016, item 1219; hereinafter also referred to as: the Equal Treatment Act.

<sup>2</sup> The Act also charged the Government Plenipotentiary for Equal Treatment with tasks relating to the implementation of the principle of equal treatment (Article 18).

<sup>3</sup> See Article 17b in connection with Article 1 clause 2 of the Act of 15 July 1987 on the Commissioner for Human Rights, Journal of Laws 2018, item 2179, as amended.

<sup>4</sup> The findings of the review can be accessed on the website of ILGA Europe at: <https://rainbow-europe.org/#8653/0/0>.

legal standards and rulings, but also of the shrinking distance that society in general has displayed with respect to homosexual, bisexual and transgender people.<sup>5</sup>

The role of independent courts in guaranteeing legal protection for LGBT persons in Poland has become particularly crucial in the face of escalating prejudices against this social group in 2019. According to a survey conducted by the Public Opinion Research Center (CBOS) in 2019, public acceptance of non-heteronormative persons decreased compared to 2017, although previously it had been growing for a number of years.<sup>6</sup>

This is undoubtedly related to the verbal oppression that LGBT persons have recently been subjected to in public debate – a phenomenon highlighted in the aforementioned report<sup>7</sup>. Stereotypes about sexual orientation and gender identity repeated and amplified by some politicians and media personalities, often in the form of statements bearing the signs of hate speech, are reflected not only in public attitudes, but in real-life restrictions and violations of LGBT persons' rights, including by government authorities.

Considering the socio-political context, calm discourse about the legal situation of LGBT people in Poland is undoubtedly difficult. Nevertheless, the CHR report is an attempt to meet this challenge and to focus on legal issues – the rights and freedoms that are the most important from the standpoint of the CHR in the context of protecting the rights of LGBT persons, as well as the relevant legal regulations and assessment of their functioning, based on examples from court rulings.

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<sup>5</sup> In the 2011 study "Equal treatment as a standard of good governance. Survey report", when asked, "Would you feel comfortable if a gay man became your neighbor" 56% of respondents answered affirmatively; in the "Legal Awareness in the Context of Equal Treatment" study commissioned by the CHR in 2018, this question was answered affirmatively by 61% of respondents.

<sup>6</sup> Research report by the Public Opinion Research Center, „Poles' attitudes to homosexual relationships", no. 90/2019, July 2019.

<sup>7</sup> Ibidem, p. 1.

## What's in the report?

The structure of the report is based to a large extent on the recommendation of the Committee of Ministers of the Council of Europe of 31 March 2010 on measures to combat discrimination based on sexual orientation or gender identity<sup>8</sup>. However, European Court of Human Rights rulings in recent years have significantly raised the standards of protection laid out in the 2010 recommendation – accordingly, the report's framework has been extended somewhat beyond the content of that recommendation. For example, the report refers to the obligation imposed by the Court's rulings on Member States to create a legal framework for the functioning of same-sex relationships, and contains recommendations regarding protection against discrimination in areas other than those spelled out in the recommendation.

### **The report consists of the following chapters:**

- 1. Protection against discrimination.**
- 2. Right to life, safety and protection against violence (prejudice-motivated crimes and hate speech).**
- 3. Freedom of association.**
- 4. Freedom of expression and peaceful assembly.**
- 5. Right to respect for private and family life.**
- 6. Right to employment.**
- 7. Right to education.**
- 8. Right to health care.**
- 9. Right to housing and right to property.**
- 10. Right to seek asylum.**

Each chapter consists of a description of the given international standard for the protection of individual human rights (international legal regulations and case law of the European Court of Human Rights and the Court of Justice of the European Union), together with guidance and recommendations as well as an assessment of the state of Poland's compliance, taking into account national statutes and case law. The report mainly covers rulings, court orders as well as administrative decisions in cases in which the Commissioner for Human Rights was involved. The report also contains a number of references to cases and issues handled by NGOs.

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<sup>8</sup> Recommendation CM/Rec (2010) 5 of the Committee of Ministers to member states on measures to combat discrimination based on sexual orientation or gender identity; adopted by the Committee of Ministers on 31 March 2010 at meeting 1081 of the Deputies of Ministers – available in electronic version at: <https://www.coe.int/en/web/sogji/rec-2010-5> (access: 22.03.2019).

Because the report mainly covers legal issues, it does not focus on international standards, or the state of compliance with them in Poland, regarding the inclusion of the specific situation of LGBT people in national policies and programs. For instance, in order to ensure that the right to benefit from the highest attainable level of physical and mental health care is fully exercised, the European Parliament has called for taking the concerns and health issues particular to LGBTI persons into account in the framework of relevant national health plans and policies<sup>9</sup>. Analyses of such programs performed by NGOs have found that the specific problems of LGBT persons are not reflected in them<sup>10</sup>.

Inclusion of issues that specifically concern LGBT people in health programs and policies – in particular, taking into account the greater number of suicides and suicide attempts among non-heterosexual persons when establishing suicide-prevention counseling and programs for children and adolescents – are recommendations that have been made by the CHR in, *inter alia*, the report “Equal treatment of patients - non-heterosexual persons in healthcare”<sup>11</sup>. But because LGBT persons have not been included in national programs or policies covering other areas of social life, this type of analysis was deemed irrelevant in the present report.

Therefore, the report focuses on analyzing the legal situation of LGBT people in Poland – legal regulations as well as their application by courts and public administrative bodies. The juxtaposition of this picture of Polish legal reality with international standards in particular spheres allows us to draw conclusions about the degree to which Poland has abided by international obligations and recommendations. The CHR’s recommendations resulting from this analysis point to the most alarming legal problems requiring legislative intervention, and thus may serve as guidelines for measures necessary to ensure the full realization of LGBT people’s human rights in Poland.

When performing a comprehensive assessment of the practical implementation of human rights for LGBT people in Poland, the social context is undoubtedly not without significance. Thus, the CHR report should be read in tandem with analyses of sociological research findings, including those regularly commissioned by the CHR and published – together with legal commentary, conclusions and recommendations – in the reports appearing in the series “The principle of equal treatment. Law and practice”<sup>12</sup>.

<sup>9</sup> European Parliament resolution of 4 February 2014 on the EU plan to combat homophobia and discrimination on the grounds of sexual orientation and gender identity, *let. E*.

<sup>10</sup> See “LGBT Health. Guide for medical staff”, edited by Robert Kowalczyk, Ph.D., Marcin Rodzinka and Marek Krzystanka, Ph.D., the *Kampania Przeciw Homofobii* [Campaign Against Homophobia] association, Warsaw 2016.

<sup>11</sup> “Equal treatment of patients – non-heterosexual persons in healthcare”, report from the series *The Principle of Equal Treatment. Law and Practice*, No. 14, Bulletin of the Commissioner of Human Rights, No. 7, Warsaw 2014.

<sup>12</sup> Reports have been published to date on equal treatment of non-heterosexual patients, bias-motivated crimes, including those perpetrated against homosexuals, and equal treatment in employment regardless of gender identity. All reports from the series *The Principle of Equal Treatment. Law and Practice* are available in their electronic versions on the website: <https://www.rpo.gov.pl/pl/kategoriaprawna-i-organizacyjna/zasada-r%C3%B3wnego-traktowania-raporty-rpo-prawo-i-praktyka>.

# What conclusions and basic recommendations has the Commissioner for Human Rights formulated on the basis of the analysis?

## 1. Protection against discrimination

Under the Constitution of the Republic of Poland and the provisions of international law in force in Poland, discrimination on the grounds of sexual orientation or gender identity is expressly prohibited. Actual legal protection against this kind of discrimination depends, however, on the wording of the specific legal regulations: primarily, the Equal Treatment Act. Unfortunately, the scope of protection guaranteed to LGBT persons under this statute is insufficient. Although it implements anti-discrimination measures set out by EU directives, the Act fails to meet international standards concerning equal legal protection for victims of discrimination.

Protection against discrimination based on sexual orientation is limited in the spheres of access to services, education and healthcare. In particular, the lack of provisions for pursuing LGBT compensation claims in areas other than employment under article 13 section 1 of the Equal Treatment Act, which enables such claims for persons experiencing discrimination based on race, nationality or ethnic origin, raises doubts when compared to the broad prohibition of discrimination enshrined in the Constitution. It appears that by not expressly prohibiting discrimination based on gender identity, the Act may render itself inapplicable to claims of discrimination against transgender persons.

Irrespective of the Equal Treatment Act's limited applicability, numerous objections have been raised to it, including but not limited to its failure to include an explicit provision enabling victims to demand compensation or an apology. As



a result, the Act is not properly applied even in cases where discrimination occurs in the area of employment. However, legal protections provided for in other laws, such as the Act on Patients' Rights and Commissioner for Patients' Rights and the Civil Code, are gaining importance in this situation. Unfortunately, as of 4 July 2019 – i.e. the date the ruling of the Constitutional Tribunal of 26 June 2019<sup>13</sup> went into effect repealing the provision under article 138 of the Act of 20 May 1971 - the Code of Misdemeanors,

penalizing refusal to render a service without just cause – victims of discrimination in the sphere of access to services no longer have recourse to any protective provision under Polish criminal law.

### Recommendations

- ▶ Increasing protection against discrimination outside the sphere of employment by amending the Act of 3 December 2010 on the implementation of certain regulations of the European Union regarding equal treatment, so that it prohibits discrimination on the basis of sexual orientation and gender identity in all areas indicated therein, i.e. not only in employment, but also in education and higher education, conditions for using social security, healthcare and access to services, including housing services.
- ▶ Ratifying Protocol No. 12 to the European Convention on Human Rights establishing a blanket prohibition of discrimination pursuant to which the exercise of any right provided for by law should be ensured without discrimination on any ground such as sex, race, skin color, language, religion, political or other beliefs, national or social origin, national minority status, property, birth or any other reason.

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<sup>13</sup> Case ref. no. K 16/17; Dz. U. (Journal of Laws), 2019, item 1238.

## 2. Right to life, safety, protection against violence (prejudice-motivated crimes and hate speech)

The international standards of protection against hate speech and hate crimes, including those related to prejudices based on sexual orientation and gender identity, obliges states to take all necessary steps to counteract these phenomena. International standards clearly indicate, *inter alia*, the obligation to adopt national regulations and procedures ensuring that the specific motives of persons charged with committing hate crimes are determined and that such acts carry higher penalties.

The Polish legal system is currently far from implementing the above-mentioned standards in relation to LGBT persons. Under the country's laws, committing a crime because of the victim's sexual orientation or gender identity does not require law enforcement to establish the homo-, bi- or transphobic motive of the perpetrator. This may lead to law enforcement officials "turning a blind eye", as the European Court of Human Rights has put it, to the bias motivating crimes committed against LGBT people.

The offenses of verbal abuse and violation of bodily integrity are prosecuted *ex officio* if committed on the basis of race, nationality, ethnicity, religion or non-denominational status, but are prosecuted only upon submission of a complaint if perpetrated on account of sexual orientation or gender identity. The individual cases where these crimes have been prosecuted *ex officio* due to the particular character of the prejudice motivating them are praiseworthy.

Hate speech and verbally abusing a group of people because of their sexual orientation or gender identity are not crimes in Poland. Only if a hateful statement is directly aimed at a specific person can the victim file a private criminal complaint of verbal abuse. Thus, in cases where hateful slogans or symbols directed against groups of people are publicly displayed, only provisions of the Code of Minor Offenses *may* be applicable – pursuant to this Code, it is an offense to display an "indecent" announcement, inscription or drawing in a public place, or to use "indecent" words.

In the absence of legal regulations guaranteeing full protection against

violence motivated by homo-, bi- and transphobia and hate speech based on prejudices against LGBT persons, law enforcement should be particularly engaged in combatting these phenomena, employing all applicable legal provisions. The lack of specific regulations against these phenomena does not mean that violence or hate speech on the grounds of sexual orientation and gender identity should be permitted under any circumstances.

Our analysis of court rulings, including judgements in civil lawsuits, leads us to conclude that Polish courts grant legal protection to statements with the attributes of homophobic hate speech, ruling that such statements are covered by freedom of speech – but not to statements critical of public persons who use hate speech.

Statements that violate the dignity of LGBT persons may also be grounds for filing civil suits for infringement of personal rights. In these cases, plaintiffs have succeeded in prohibiting the dissemination of homo- and transphobic content.

## Recommendations

- ▶ Increasing protection against crimes motivated by homophobia, biphobia and transphobia by:
  - criminalizing hate speech and verbal abuse, including public insults, of specific groups because of actual or alleged sexual orientation or gender identity;
  - amending article 119 §1, article 256 §1 and article 257 of the Penal Code<sup>14</sup> so that offenses motivated by prejudice based on actual or alleged sexual orientation or gender identity are prosecuted ex officio and punished;
  - providing victims of crimes motivated by homophobia, biphobia and transphobia with genuine access to the protection measures set forth in the Act of 28 November 2014 on protection and assistance for victims and witnesses<sup>15</sup>, in order to implement the standard of protection set forth in Directive 2012/29 of the European Parliament and of the Council 2012/29/EU of 25 October 2012<sup>16</sup>.
- ▶ Amending article 18 of the Act of 29 December 1992 on radio and television<sup>17</sup> in order to provide protection against discrimination based on sexual orientation not only in advertising materials, but also in broadcasts and other communications.

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<sup>14</sup> Journal of Laws, 2019, item 1950.

<sup>15</sup> Journal of Laws, 2015, item 21.

<sup>16</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>17</sup> Journal of Laws, 2017, item 141.

### 3. Freedom of association

International obligations require Poland to respect, protect and fulfil the freedom of association, which is one of the cornerstones of democracy and a pluralistic society. This obligation is particularly important for minorities and human rights defenders acting on their behalf. According to our research and analysis, people and organizations working for the rights of LGBT people are exposed to attacks, stigmatization and abuse due to the cases they are dealing with. Providing them with support and protection that enables them to carry out their work safely and without interruption is therefore a particularly important duty of the state.

Polish law in no way restricts LGBT persons' right of association. However, the CHR is aware of one case in which a foundation's registration application was rejected because of its planned activity on behalf of transgender and intersex people. Although this is only a single case, it appears important to monitor the NGO registration process in the event it happens again.

People who work for LGBT associations and foundations have been experiencing fear and anxiety due to increasingly frequent attacks on the headquarters of such NGOs, which can result in the inhibition of their statutory activities. Therefore, although in principle Poland does not violate its international obligation to ensure that LGBT persons can exercise their freedom of association, the CHR cannot state that the provision of special protection to organizations defending LGBT rights – an international standard – is currently being satisfactorily implemented in Poland.

#### Recommendations

- Ensuring that organizations defending the rights of LGBT persons can operate undisturbed, with a feeling of safety, by increasing protection for victims of crimes motivated by homophobia, biphobia and transphobia.

## 4. Freedom of expression and peaceful assembly

Freedom of speech, creative expression and expression of one's views as well as freedom of assembly to express them are cornerstones of democracy and guarantee its development. This is emphasized by international standards, in particular those articulated under the Council of Europe. Accordingly, any interference with the exercise of these rights must therefore be narrowly defined, in accordance with the law, applied on the basis of objective criteria and not arbitrarily, and subject to independent judicial review. This is extremely important in cases where freedom of expression must be reconciled with respect for human dignity and protection of the reputation and rights of others.

The rulings being handed down by common courts indicate that they are ready to protect statements with the attributes of homophobic hate speech, but not statements critical of public persons expressing such speech. Although it falls to independent courts to strike a balance between the various rights and interests of the parties involved in such cases, it should be noted that international standards grant special importance to the freedom of expression of persons with minority views. Strasbourg case law also shows that persons holding important public functions should demonstrate particular restraint when exercising their freedom of speech. Thus, a district court that ruled on appeal that a government official had defamed an LGBT rights activist because the official should have been guided by a high degree of caution in expressing his views and been aware that freedom of expression is not unlimited, met the international standard in this matter.

The CHR sometimes receives complaints about restrictions on the freedom of artistic creation due to sexual orientation. The premature closing of an exhibition and cancellation of a documentary film projection about same-sex couples solely because of their potential to generate controversy among local residents are glaring manifestations of restrictions on the freedom of artistic creativity, freedom of expression and discrimination based on sexual orientation, all of which are incompatible with both Polish and international legal standards for the protection of the right to express opinions and to peaceful assembly.

In 2016, the CHR noted with satisfaction that, almost a decade after one of the key rulings ensuring genuine implementation of freedom of assembly for

participants of LGBT pride marches – i.e. the European Court of Human Rights' ruling in the case of *Bączkowski and Others v. Poland* – was issued, security provided by police officers for these peaceful gatherings has become more professional and effective. Unfortunately, despite the police's efforts, the 2019 marches were marred by many cases of physical and verbal aggression perpetrated by opposing protesters against participants in these peaceful assemblies. In situations such as this, actions taken by the police before and during pride marches to ensure the safety of LGBT persons should be followed up by systematic efforts to identify the perpetrators of crimes and offenses against them.

However, the CHR is concerned by and objects to the increasingly frequent incorrect application of the Act of July 24, 2015 – Law on Assemblies by the mayors of cities in which pride marches are held. By issuing march bans, municipal governments are disproportionately and unreasonably restricting the right of LGBT people to peaceful assembly, thus forcing march organizers to challenge these decisions in court.

### Recommendations

- ▶ Enabling the unrestricted exercise of freedom of assembly by giving it due respect when applying the law by administrative bodies, i.e. issuing decisions to ban assemblies only in exceptional cases and based on real threats posed by their participants, not by their opponents.
- ▶ Ensuring the safety of participants in all pride marches as well as other peaceful gatherings of the LGBT community, through the proper and professional activities of local police units.

## 5. Right to respect for private and family life

Infringements of LGBT persons' right to respect for their private and family life in Poland can be attributed primarily to the unregulated legal situation of families formed by same-sex couples and transgender persons as well as to the lack of provisions specifying procedure for legal gender recognition.

According to international standards, states are obliged to adopt measures guaranteeing full legal recognition of gender reassignment in a fast, transparent and accessible manner in all areas of life, including changes and corrections of all official identity documents as well as key documents issued by non-state entities, such as employment certificates or documents confirming educational attainment.

The Polish legal system does not currently regulate the legal gender reassignment procedure in a manner consistent with the aforementioned standards. This gap has been filled, out of necessity, by courts and public administration bodies. At present, legal gender recognition is possible by bringing an action against one's parents pursuant to article 189 of the Code of Civil Procedure. The Supreme Court ruled on 6 December 2013 that it is also necessary to summon the spouse of a transgender person if the plaintiff is married, and children, at the time this person petitions the court for gender reassignment. However, the Supreme Court changed its position in its ruling of 10 January 2019, holding that the children of a plaintiff in a gender recognition procedure need not be summoned to court, and that the requirement to sue one's parents results solely from the specific nature of the proceedings, not their legal interest relating to the subject of the proceedings.

Despite these positive changes in Polish jurisprudence, the gender reassignment procedure developed by the court system fails to satisfy the international criteria of speed and accessibility. Moreover, due to the necessity of suing one's parents and of not being married by those intending to reassign their gender, the current procedure also fails to meet the requirement of respect for the private and family life of transgender people.

In view of the above, Polish civil registry offices merit recognition for inscribing added information in the birth certificates of transgender persons on the basis of foreign decisions, thereby eliminating the necessity of further proceedings that would

infringe the dignity of the applicant. Allowing people to change their given names in an administrative procedure prior to obtaining a gender reassignment judgement by a court would ease the lives of persons who are transitioning. Unfortunately, the practices of Polish administrative bodies currently remains inconsistent in this respect, contrary to statutory provisions and European Court of Human Rights rulings.

Likewise unsatisfactory in the light of international standards are Polish legal regulations concerning the effects of court decisions reassigning gender. In accordance with the principle of full legal recognition of a gender reassignment in all areas of life, transgender persons should be able to obtain changes to all documents, including employment certificates issued by private entities.

However, the fact that transgender persons are not required under Polish law to be surgically deprived of the ability to have children is consistent with international standards, respect for human dignity, the right to bodily inviolability and the prohibition on conducting medical interventions without the informed consent of the person concerned. Thus, transgender women can sire children in Poland, and transgender men can give birth to them. What will appear in the birth certificates of children of transgender parents remains an open question.

Polish law does not currently enable same-sex couples to get married, nor does it provide for any institutionalized form of partnership. Thus, it conflicts with international standards in this area, in particular with rulings of the European Court of Human Rights, which, while leaving countries free to open the institution of marriage to same-sex couples, clearly states that the lack of regulations guaranteeing legal recognition and protection of such relationships is a violation of article 8 of the European Convention on Human Rights.

Administrative courts have consistently upheld the refusals of civil registry offices to transcribe foreign same-sex marriage certificates – thus, same-sex couples married abroad cannot have their marital status reflected in the Polish civil registry. Moreover, Polish courts also refuse to issue Polish citizens certificates enabling them to marry a person of the same sex abroad.

According to international standards, the legally defined rights and duties of non-married couples should not discriminate between homosexual and heterosexual couples. Polish courts sometimes grant protection to same-sex couples in situations where national law grants certain rights to informal relationships. While this legal practice abides by the indicated standard, it does so only to a limited extent. Many rights ensured for spouses are not provided to partners in informal relationships, whether of the same or of different sexes. Heterosexual partners, however, have the option to acquire these rights through marriage, while same-sex partners are deprived of this opportunity. The courts fail to see the indirect discrimination that accompanies their unwillingness to grant same-sex partners access to the rights that heterosexual non-married partners can access if they decide to get married.



Regarding the issue of same-sex parenting, international jurisprudence has consistently held that, irrespective of the regulations adopted in a given country, the principle of the best interest of the child should take priority in all child-related matters. Polish regulations do not provide for parenthood by same-sex couples, but this does not mean that such parenthood does not in fact occur. Many countries allow their birth certificates to list two same-sex parents, and Polish citizens living abroad – including same-sex parents – often start families there. Thus, Polish administrative bodies and administrative courts are increasingly facing the necessity of reviewing cases concerning the transcription of foreign birth certificates or confirming the citizenship of underage Poles born abroad. Until recently, administrative decisions were unanimous in these cases: due to non-compliance with the basic principles of the legal order of the Republic of Poland, heads of registry offices refused to transcribe these foreign birth certificates, and voivodes (provincial governors) refused to confirm the Polish citizenship of these children, thus preventing them from being issued Polish identity documents or identity numbers (PESEL).

In 2018, the Supreme Administrative Court ordered the transcription of a foreign birth certificate in which two mothers, Polish citizens, were indicated as the parents, stating that it was in the best interests of the child; and confirmation of the Polish citizenship of children born abroad through surrogacy and parented by two fathers, one of whom was a Polish citizen. This ruling complies with international standards for handling cases of this type by affording priority to the child's best interests.

Outside of this ruling, however, transcriptions of foreign birth certificates in which persons of the same sex are listed as parents continue to raise interpretational disputes, and application of the law in administrative practice remains inconsistent. All disputes and inconsistencies in this regard are to be resolved by a seven-judge panel of the Supreme Administrative Court, which is currently examining the legal issues relating to the admissibility of such transcriptions in the light of the *orde public* clause<sup>18</sup>. Furthermore, the Supreme Court will decide a legal issue raising doubts about LGBT parenthood: the District Court in Szczecin has asked the Supreme Court to rule on how to understand the best interests of a child in a suit appealing a lower court's refusal to recognize a paternity claim by a transgender man, and whether the inclusion of the child's good in the proceedings should lead to recognition of the claim or not.

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<sup>18</sup> After closing this report, on December 2, 2019, a seven-judge panel of the Supreme Administrative Court adopted a resolution stating that transcription of a foreign birth certificate, in which persons of the same sex are listed as parents, is unacceptable in the light of the *orde public* clause. However, in the justification of the resolution, the Court indicated that the refusal could not lead to a situation in which a Polish citizen would not be able to obtain a Polish passport, identity card or identity number (PESEL), which should be therefore issued on the basis of a foreign birth certificate.

## Recommendations

- ▶ Enacting legal regulations for gender reassignment that, at a minimum, implement the standard formulated in the Act of 10 September 2015 on gender reassignment<sup>19</sup> and are in compliance with international standards, i.e. enabling gender reassignment in a procedure that:
  - is fast, transparent and accessible;
  - takes into account the need for temporary documents to be used during a transition;
  - satisfies the obligation to fully recognize the transgender person's new identity in all spheres of life, including changing all documents issued before the transition.
- ▶ Ensuring effective implementation of the right to respect for LGBT family life by:
  - institutionalizing same-sex relationships to ensure equal treatment irrespective of the sexual orientation of the persons living together, in accordance with the European Consensus standard set by the European Court of Human Rights in the ruling it handed down in the case of *Oliari and Others v. Italy*<sup>20</sup>;
  - regulating the legal situation of children from same-sex unions born abroad whose birth certificates list two mothers or two fathers as the parents;
  - regulating the legal situation of children born after gender reassignment by their transgender parents.

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<sup>19</sup> Act of 10 September 2015 on gender reassignment; because of the President's veto, has not entered into force.

<sup>20</sup> Ruling of the ECoHR of 21.7.2015 *Oliari and Others v. Italy*, complaints no. 18766/11 and 36030/11, § 185.

## 6. Right to employment

Protection against discrimination based on sexual orientation and gender identity in employment is relatively broad in Poland. It is guaranteed by both the Labor Code and the Equal Treatment Act, and the regulations in effect can be deemed to comply with international standards in this area. The application of these provisions in practice, however, shows that they are rarely used by LGBT persons to protect their rights, which could suggest insufficient awareness of their existence and the protection they provide. The CHR is aware of only two court cases concerning violation of the principle of equal treatment in employment based on sexual orientation, and only one ruling on discrimination against a transgender person in this area. Thus it is difficult to say whether in practice the legal measures against gender-based discrimination in employment provide adequate protection against discrimination for transgender people as well. The dearth of cases in this area makes it impossible to assess whether the standards established by the Court of Justice of the European Union – i.e. the principle of equal treatment irrespective of gender, including gender identity – have in fact been fully implemented.

Regulations currently in force in Poland restricting transgender access to active military service should be considered inconsistent with the Recommendations of the Committee of Ministers of the Council of Europe.

The lack of a satisfactory legal framework defining the procedure for gender reassignment and its effects also has the potential to result in discrimination against transgender people in the area of employment, among other reasons, due to the need to use employment certificates issued prior to their transition which are now inconsistent with their current gender status.

### Recommendations

- ▶ Amending the Regulation of the Minister of Family, Labor and Social Policy of 30 December 2016 on employment certificates<sup>21</sup> so as to enable transgender persons to obtain employment certificates with new personal data after they have obtained a court decision determining their gender in accordance with their gender identity.
- ▶ Amending the Regulation of the Minister of National Defense of 24 January 2018 on adjudication of the capability to perform active military service as well as the procedure followed by military medical commissions in such cases<sup>22</sup> by eliminating “transsexualism” from the list of diseases that prevent active military service.

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<sup>21</sup> Journal of Laws, 2018, item 1289.

<sup>22</sup> Journal of Laws, 2018, item 258.

## 7. Right to education

The Equal Treatment Act does not provide protection against discrimination based on sexual orientation and gender identity in the area of education. The only form of legal protection available to LGBT persons in this are civil lawsuits. However, using the Civil Code to redress damages caused by discrimination is much less favorable to victims than submitting claims for compensation under the Equal Treatment Act.

LGBT students in Polish schools are particularly vulnerable to discrimination, stigmatization and bias-motivated violence. The scale of these negative phenomena could be significantly reduced by universal and compulsory anti-discrimination education. The necessity to conduct such education stems not only from the recommendations of international human rights bodies, but also from Poland's legal obligations under the Convention on the Rights of the Child. The CHR has repeatedly petitioned the Minister of National Education about the need to implement anti-discrimination education, recommending that the core curriculum be expanded to include human rights and equal treatment, thereby bringing the Polish education system into line with international standards. Unfortunately, the Minister of National Education takes the position that the solutions currently in effect are satisfactory and the curriculum does not require any changes. Moreover, the Minister has discouraged people from undertaking initiatives to counteract discrimination in education, and even taken actions aimed at stopping such initiatives and imposed disciplinary sanctions against schools involved in them.

### Recommendations

- ▶ Supplementing the core curriculum for all types of schools with content on human rights and anti-discrimination education that is in line with international standards.
- ▶ Amending the Act of 3 December 2010 on the implementation of certain European Union provisions on equal treatment so that it is possible to seek compensation and redress if the principle of equal treatment in the field of education is violated on the basis of sexual orientation or gender, including gender identity.

## 8. Right to Healthcare

Research commissioned by the CHR shows that the level of health care provided to LGBT patients may be lower than for the general population due to stereotypes and prejudices prevalent among medical staff. LGBT patients are also exposed to inappropriate comments, degrading treatment and even attempts to “treat” them for their sexual orientation – gay conversion therapy is still practiced in Poland.

One of the problems most frequently reported by homosexual patients is questioning of their patient’s rights in relation to loved ones/ same-sex partners. The CHR has received individual complaints about the unlawful disqualification of homosexual men as blood donors or bone marrow donors.

Considering the threats of unequal treatment in healthcare faced by LGBT persons, the available means of legal protection are insufficient. The Equal Treatment Act does not provide protection against discrimination based on sexual orientation and gender identity in healthcare. The only way LGBT persons can protect themselves from discrimination in healthcare are civil lawsuits for redress of personal rights violations. However, using the Civil Code to redress damages caused by discrimination is much less favorable to victims than submitting claims for compensation under the Equal Treatment Act. However, the CHR is not aware of a single case of this kind. Discrimination experienced by homosexuals and transgender people in healthcare may, however, constitute a violation of patients’ rights, as stated in decisions issued by the Commissioner for Patients’ Rights.

Although the Polish legal system does not discriminate against LGBT persons in access to health care, neither does it provide them with sufficient protection against unequal treatment based on sexual orientation and gender identity, which such persons may encounter mainly due to prejudices held by medical personnel. Thus, the provisions of international law and international standards obliging states to properly educate health care workers, ensure a friendly environment for LGBT persons and accommodate their special needs, appear to remain unfulfilled in Poland.

Nevertheless, the fact that there is no requirement under Polish law to be surgically deprived of the ability to sire children in order to complete gender reassignment proceedings should be recognized as consistent with international standards.

## Recommendations

- ▶ Amending the Act of 6 November 2008 on Patient Rights and the Commissioner for Patients' Rights<sup>23</sup> so that any discrimination, including discrimination based on sexual orientation, is considered a violation of patient's rights for which redress can be sought under the Patients' Rights Act.
- ▶ Amending the Act of 3 December 2010 on the implementation of certain European Union provisions in the field of equal treatment so that it is possible to seek compensation and redress in the event of a breach of the principle of equal treatment in the field of healthcare based on sexual orientation and gender (including gender identity).
- ▶ Establishing a ban on all conversion practices based on the assumption that LGBT people can be "cured", in keeping with the 21 October 2018 Final Remarks of the Committee on the Rights of Persons with Disabilities<sup>24</sup>.
- ▶ Regulating the legal situation of intersex persons, including prohibiting sex "normalizing" operations without the informed consent of such persons (provided such an operation is not necessitated by threat to life or health).

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<sup>23</sup> Journal of Laws, 2019, item 1127.

<sup>24</sup> See the Final Remarks of the Committee on the Rights of People with Disabilities, issued 21 October 2018 after the Committee reviewed Poland's preliminary report on implementation of the Convention on the Rights of Persons with Disabilities, CRPD/C/POL/CO/1, pp. 30-31.

## 9. Right to housing and right to property

According to international case-law concerning LGBT persons exercising their right to housing, unequal treatment of such persons must be not only justified by very important reasons, but necessary in the given circumstances. With this principle in mind, the European Court of Human Rights found that in *Kozak v. Poland*<sup>25</sup> the state had violated the Convention by restricting the possibility of entering into a rental relationship after the decease of a male or female partner only to heterosexual couples. Therefore, the Supreme Court's interpretation of Article 691 §1 of the Civil Code – i.e. in the event of the death of a tenant of a dwelling, the tenancy may be assumed, *inter alia*, by the person who cohabitated with the deceased tenant, regardless of whether this person was the opposite sex or same sex – should be regarded as consistent with international standards.

International standards also oblige the state to protect LGBT persons against discrimination in access to housing services. Unfortunately, the Equal Treatment Act does not provide protection against discrimination based on sexual orientation in this area. However, transgender persons can claim compensation under the Act, as it prohibits unequal treatment in access to services, including housing services, based on gender (including gender identity).

The CHR is not aware of a single case in which persons injured by discrimination on the basis of sexual orientation or gender identity in the area of access to housing services attempted to sue the perpetrator for discrimination under the Civil Code.

### Recommendations

- ▶ Amending the Act of 3 December 2010 on the implementation of certain regulations of the European Union regarding equal treatment so that it is possible to seek compensation and redress in the event of a breach of the principle of equal treatment in the area of access to services on the basis of sexual orientation.

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<sup>25</sup> Ruling of the ECoHR of 2 March 2010, *Kozak v. Poland*, complaint no. 13102/02.

## 10. Right to seek asylum

If a foreign national seeking asylum satisfies all the other conditions necessary to obtain refugee status, the fact that this person is LGBT may be the basis for granting such status in Poland. This results from both the Act of 13 June 2003 on Granting Protection to Foreigners within the Territory of the Republic of Poland and the provisions of international law binding Poland.

Information available to the CHR indicates that the Head of the Office for Foreigners has received very few applications for international asylum due to persecution based on sexual orientation or gender identity. The CHR knows of only two cases where refugee status was granted due to persecution of homosexuals in the applicant's home country, and one case due to persecution of a transgender woman in her home country.

Due to the small sample size of asylum proceedings involving LGBT persons, it is impossible to assess whether international standards for conducting such proceedings are currently being implemented in Poland. The CHR will therefore continue to analyze this issue.

It should be noted, however, that correspondence conducted by the CHR with the Chief of the Border Guard and the Head of the Office for Foreigners on the subject of LGBT persons seeking asylum in Poland raises potential concerns as to whether the specific situation of these persons is being adequately taken into account in the respective entities' operations.

### Recommendations

- ▶ Ensuring that the right to apply for asylum can be exercised by persons persecuted on the basis of sexual orientation or gender identity, through the appropriate training of Border Guard officers.

### The electronic version of the full report (Polish version):

