



COMMISSIONER FOR HUMAN RIGHTS

COUNCIL OF EUROPE



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## **Memorandum to the Polish Government**

### **Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights**

For the attention of the Committee of Ministers  
and the Parliamentary Assembly

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CONTACT AND FOLLOW-UP VISIT  
OF THE COMMISSIONER FOR HUMAN RIGHTS TO POLAND

(4-7 December 2006)

## **Introduction**

1. The Commissioner for Human Rights, Alvaro Gil-Robles, undertook an assessment mission to Poland from 18–22 November 2002 on the invitation of the Polish Government. In the resulting Report<sup>1</sup>, the Commissioner identified a number of human rights concerns and made a series of recommendations to improve the country's effective respect for human rights. The issues addressed included the administration of justice, the conduct of the police, the situation in prisons, tolerance and non-discrimination, the situation of Roma, domestic violence and reproductive health, the status of foreigners, and freedom of expression.
2. The present memorandum was written in order to engage in continuous dialogue on human rights issues with the Polish government. It is based on the findings of Commissioner Thomas Hammarberg and members of his Office who visited Poland from 3–6 December 2006. The Commissioner would like to express his sincerest gratitude to the Government of Poland for the organization of this visit.
3. The purpose of this memorandum is to examine the manner in which the Polish authorities have implemented the recommendations made in the 2002 report. It follows the order of those recommendations, and also incorporates the subject of lustration which was highly topical at the time of the visit and which the Commissioner raised with the Polish authorities.
4. This memorandum takes into account information gathered during and after the visit, including written submissions from government Ministries, as well as reports by human rights experts, local and international non-governmental organizations and inter-governmental organizations as well as other public sources.

## **Judicial System**

### **a. Length of judicial proceedings**

5. In his 2002 report, the Commissioner recommended that the authorities implement reforms aimed at reducing the length of court proceedings. In the Commissioner's opinion the denial of prompt enforcement of rights leads to negative knock-on effects in a wide range of cases, including cases of domestic violence and pre-trial detention and generally hinders human rights' protection.
6. The Ministry of Justice has undertaken a number of reforms aimed at reducing the length of court proceedings. In respect of criminal proceedings, the amendments to the Code of Criminal Procedure, which became effective on 1 July 2003, provided for procedural mechanisms aimed at speeding up proceedings, for example, simplification of preparatory proceedings and proceedings involving more than one defendant, the possibility of interrogating witnesses by way of video conference, and the possibility of serving letters by fax or email.

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<sup>1</sup> Report of the Commissioner for Human Rights, Alvaro Gil-Robles, on his visit to Poland, 18-22 November 2002, for the Committee of Ministers and the Parliamentary Assembly, CommDH (2003)4.

7. The Act of 28 July 2005 on court fees in civil cases provides another mechanism aimed at improving the efficiency of court proceedings, dealing with both court fees (fixed court fees) and the court proceedings themselves (with no possibility of making a complaint against some decisions on court fees). Mediation was provided as an alternative way of settling disputes in civil cases. In addition, a new regulation concerning friendly settlements has been introduced.
8. The courts' budgets have been increased successively every year during the period 2003 – 2006. In its annual "Action Plan to supervise court activities" the Minister of Justice recommends supervisory activities to be taken by the presidents of the Polish courts with a view to reducing the length of proceedings and analysing the reasons for excessive length. A special programme has been established for computerisation of the judiciary.
9. The Commissioner was informed by a number of lawyers and judges during his visit that 'apprentice judges' ("asesorzy") were being assigned cases which were beyond their experience and competence. Apprentice judges are young trainee judges who were being called to adjudicate complex cases and make difficult decisions, for example, concerning pre-trial detention. The institution of the apprentice judge was the object of an appeal before the Constitutional Court, which gave a signal decision in 2006.
10. In 2006, legislation was enacted providing for the introduction of the so-called 24 hour courts, according to which persons accused of minor offences (such as damage to property, physical threats etc) may be prosecuted and brought to trial immediately.
11. Despite the measures taken by the Polish government, an important number of cases relating to the length of judicial proceedings continue to be brought against Poland before the European Court of Human Rights. Some of these applications additionally raise the issue of the alleged inefficiency of the new domestic remedy in this area of length of proceedings (see below).
12. The Commissioner is of the opinion that further reforms are still necessary to accelerate judicial proceedings in Poland. For example an additional increase in the number of auxiliary staff, court referees ("referendarzy sądowych") and assistants is a priority. Increasing the courts' budgets and improving the system of recording court proceedings should also be considered. The Commissioner welcomes the fact that the authorities are reviewing the law and practice by which apprentice judges are being asked to take on cases beyond their experience, as signalled by the Constitutional Court.

**b. A domestic remedy for length of proceedings**

13. In his 2002 report the Commissioner urged the Polish authorities to explore the possibility of introducing a domestic procedure to complain about the excessive length of judicial proceedings. In line with the judgment in *Kudła v Poland* (2000), the Act on Complaints for Violation of a Party's Right to Trial within a Reasonable Time, dated 17 June 2004, was enacted. This Act introduced a domestic remedy for excessive length of judicial proceedings.
14. However, according to NGO sources, domestic courts, in applying this Act, often fail to provide compensation for the harm caused, or agree on a level of compensation, which is notoriously low, even only symbolic. One case of this type, *Lendzion v Poland* has been communicated by the European Court of Human Rights in April 2006. In some other cases, courts calculate the duration of the proceedings by setting the starting date at the date of entry into force of the act, i.e. 17 September 2004, instead of the calculating it from the very date the proceedings actually started. In the case of *Majewski v Poland*,

judgment of 11 October 2005, the European Court of Human Rights found that the domestic court did not take into consideration the overall period of the examination of the case by the domestic courts as required by the case-law of the Convention organs.

15. While Poland should be congratulated on having introduced into its domestic law a remedy for the excessive length of judicial proceedings, the Commissioner considers that there is still room for improvement in this area. For the time being a complaint cannot be lodged against the excessive length of the whole set of proceedings but only concerning the length of the proceedings before one instance of jurisdiction. The Commissioner welcomes the training that the Polish authorities provide to the judiciary concerning complaints against excessive length of proceedings.

### **c. Judicial training**

16. The training of judges is conducted by the National Centre for the Training of Cadres for Common Courts and Prosecutors' Offices, a new institution established to provide continuing education to judges from across the country. Information concerning selected rulings of the European Court of Human Rights is presented in an Information Bulletin on European Law, which is published by the Ministry of Justice and sent out to all courts and prosecutors' offices; it is also available on the Ministry website.
17. The Council of Europe Information Office in Warsaw has also been conducting training on European Human Rights law and, more particularly, on the case-law of the European Court of Human Rights, for judges and public prosecutors. This training is voluntary and can only benefit a relatively small number of professionals. Most of the participants have to bear their own training costs and only some of them receive financial support from their institutions' budget.
18. The Commissioner welcomes the efforts made by the Polish authorities in judicial training. Judicial training and an efficient publication and dissemination of the Court's judgments by the Ministry of Justice are of crucial importance. The Commissioner recalls that one of the recommendations of the Report of the Group of Wise Persons on the effectiveness of the European Court of Human Rights (December 2006) deals with the need to improve the dissemination of the Court's case-law.

### **Police**

19. In his 2002 report, the Commissioner recommended that the authorities intensify efforts to eradicate police violence through training, effective investigation and prosecution of such cases.
20. According to government information, in the period from January 2003 to September 2006, 3,646 reports on police offences were filed with the prosecutor, including bodily injury, cruelty with an aim of extracting a statement, and infringement of bodily integrity. During this very period, final decisions were taken in 3,081 cases. Out of this number, 3,008 decisions were taken refusing to initiate proceedings or discontinuing proceedings. During the same period, 88 police officers were indicted, in 5 instances prosecutors requested discontinuation of cases already pending before the courts, in 12 instances investigation against police officers was discontinued and 3 cases were still pending at the time of the visit.
21. It appears, therefore, that the number of prosecutions is extremely low in comparison to the number of reports of ill-treatment. If a prosecutor decides not to raise charges against an abusive officer, the decision can in theory be appealed to a higher prosecutor, and, at

a later stage, to a court of law. However, in practice it appears very difficult to prosecute police officers. The fact that during the period in question (2003 – 2006) there was not one single conviction of a police officer, would seem to bear this out.

22. According to the Department of the Interior and Administration, all training programmes and professional improvement programmes for police officers integrate professional ethics and human rights issues into their curricula.
23. In 2004, Plenipotentiaries for the Protection of Human Rights were appointed at the Central Police Headquarters, at 16 Voivodship Police Headquarters, the Warsaw Police Headquarters and all the police academies. The Plenipotentiaries are tasked with monitoring the fulfilment by police of the recommendations of human rights organisations. They collect information on good practices in the sphere of human rights and victim protection, disseminate such information among fellow officers, monitor racial discrimination, anti-Semitism, and Xenophobia as well as police collaboration with national and ethnic minorities.
24. One of the tasks identified by the Minister of Interior and Administration in 2007 was the prevention of violence against women, particularly in rural areas. This involves educational work, provision of consultations, as well as training for women threatened or affected by domestic violence and police officers who come in to contact with victims.
25. As regards specialised training on trafficking in human beings, it is worth noting that a specialist training programme is underway for police officers from criminal units, who undergo an eight hour programme entitled “Trafficking in human beings and accompanying crimes”.
26. Moreover, the Ministry of Interior and Administration together with the Police, the Border Guard, the State Prosecutor’s Office, the Ministry of Labour and Social Policy and the La Strada Foundation have organised a series of trainings on “Procedures for handling a victim or witness of a case of trafficking in human beings”. One of the main subjects discussed in the course of the trainings is the identification of victims of trafficking in human beings. Approximately 200 police officers from all over Poland have already participated in training under the framework of the programme.
27. The Commissioner regrets the fact that no independent body has been established to investigate police misbehaviour. The independence of the body in charge of investigating allegations of improper police behaviour is essential for the effectiveness of the system. The creation of such a body would also enhance the climate of trust and confidence in the police force. The Commissioner welcomes the integration of human rights training into the police training programmes, also for in-service training. Efforts to provide specific training on trafficking in human beings and domestic violence are welcomed but should be provided on a larger scale and involve a larger number of police officers. Co-operation with NGOs is important in training in both areas and is very much encouraged by the Commissioner.

## **Prisons**

### **a. Overcrowding in prisons**

28. In his 2002 report the Commissioner recommended that the authorities further develop the system of alternative penalties to imprisonment and ensure sufficient funding for the construction of prisons in order to tackle the serious problem of overcrowding.

29. The government has stated that a reduction in overcrowding is a priority. The authorities appreciate that the challenge is enormous and its solution has to be linked to an overall reform of the justice system.
30. According to information provided by the Ministry of Justice, as of 20 November 2006, there were 88,832 Polish prisoners incarcerated, including those remanded in custody. However, correctional facilities only have enough beds for 72,274 prisoners, which leads to overcrowding of 123%<sup>2</sup>. The Ministry of Justice itself admits that actions taken since 2002 have turned out to be ineffective, with prison overcrowding still rising. The Decree on Overcrowding of 2006 permits placing prisoners in living areas smaller than 3m<sup>2</sup>, without stating the restriction for the minimal floor space of the cell per prisoner and without indicating the time limits for placement in such a cell.
31. The government has recently adopted two programmes with the aim of reducing prison overcrowding. The first permits convicts to serve their sentences outside prison under electronic supervision. The Bill was finalised by the Ministry of Justice in 2006 and will be soon discussed in the Parliament. The Bill for the second programme is currently being finalised and provides for the possibility of serving a sentence partly outside the prison and partly inside the prison (weekends only). One of the aims of these programmes is to free up a certain number of places in existing prisons. The Ministry of Justice is working towards improving the enforcement of non-custodial penalties, with the aim of encouraging courts to impose these types of penalties instead of prison sentences.
32. In addition, the Minister of Justice has established a specific team to deal with the more general issue of the reform of the prison system. The government "Programme for the Procurement of 17,000 Places in the Organisational Units of the Prison System in the Years 2006-2009" has resulted in the acquisition of 4,393 new prisons places to date.
33. There is a growing number of cases before the national courts, as well as before the European Court of Human Rights where applicants allege inhuman or degrading conditions of detention (Art. 3 of the European Convention on Human Rights) in Polish prisons, in particular because of the excessive crowding of cells.
34. The Commissioner is very concerned about the ever-worsening over-crowding in Polish prisons. The principle of humane treatment requires that the dignity of convicts and those individuals placed in pre-trial detention should be respected by according them sufficient living space while incarcerated. The European Committee for the Prevention of Torture has recommended that the standard floor space of each cell per prisoner be set at a minimum of four m<sup>2</sup>. The growth of the prison population has negative consequences in other areas, for example, it has also led to the deterioration of the working conditions of prison officers and the lack of activities for inmates. The Commissioner welcomes the measures taken so far to alleviate prison overcrowding, such as draft programmes mentioned above. While it is necessary for the authorities to construct more prisons, serious consideration should also be given to improving the application of alternative penalties which do not involve incarceration.

#### **b. Pre-trial detention**

35. The European Court of Human Rights has repeatedly found violations of Article 5 § 3 of the Convention (right of a person subject to pre-trial detention to be tried within a reasonable time) in respect of Poland. Examples of cases brought to Strasbourg where pre-trial detention has lasted between 4 to 6 years are not uncommon.

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<sup>2</sup> Data from the Polish Helsinki Foundation for Human Rights indicate that in practice the overcrowding is even greater.

36. According to the Code of Criminal Procedure<sup>3</sup>, pre-trial detention shall not exceed two years before a verdict passed by a court of first instance (and in preparatory proceedings 12 months). However, the court of appeal may extend these periods on certain grounds. Moreover, the law does not stipulate a maximum period of pre-trial detention. On 24 June 2006, the Polish Constitutional Court issued a judgment in which it deleted one of the grounds for prolonging pre-trial detention<sup>4</sup>.
37. Moreover, detention on remand may be ordered if there is a strong possibility that the accused has committed an offence, and cumulatively, if there is a risk of his or her absconding, obstructing the proceedings or in certain cases re-offending. According to Article 258 § 2 of the Code of Criminal Procedure, an accused may also be detained on remand if he or she risks a long term of imprisonment. On 4 June 2004, the Ministry of Justice sent a letter to all the Presidents of Courts of Appeal together with an analysis of the case-law of the European Court of Human Rights concerning the requirements relating to the reasons for placing and keeping of a person in detention pending trial. It was underlined that the reason evoked in Article 258 § 2, namely the risk of a long-term of imprisonment, cannot justify keeping someone in detention for a long period of time.
38. In February 2006, the Ministry of Justice issued guidelines for prosecutors concerning the application of pre-trial detention. Prosecutors were instructed to be flexible in their treatment of petty crime and to restrict their applications for pre-trial detention in such cases. On the other hand, detention applications were advisable in the case of the most serious offences. Since 2003, there has been a systematic fall in the number of persons in pre-trial detention: currently they constitute 15.6% of the total inmate population, which is the lowest in Poland for more than twenty years.
39. The Commissioner urges the Polish authorities to review the application and functioning of pre-trial detention in Polish law. The training of judges and prosecutors as regards European standards and case-law of the Strasbourg Court is crucial. The general rule should be the release rather than the detention on remand and this message needs to be strongly underlined to national judges.

### **c. Access to a lawyer**

40. In his 2002 report the Commissioner observed that officially appointed lawyers rarely visit detainees in prison. According to the Ministry of Justice, however, complaints concerning the lack of or insufficient number of contacts with a defence counsel are a small proportion of all complaints reviewed by the Organisational Department in the Ministry. The Ministry also points out that the accused may communicate with his or her defence counsel in writing. According to NGOs and lawyers, officially appointed lawyers are very poorly remunerated for their work, which may account for their lack of enthusiasm in making prison visits. The Ministry of Justice rejects this assertion, arguing that minimum fees for penal cases are not unreasonably low. The Commissioner would like to underline that direct contact with a lawyer is of crucial importance for those who face a threat of imprisonment, as well as for those already in prison.
41. As regards detainees' correspondence, routine interference and censorship of such correspondence, frequently concerning correspondence with the European Court of Human Rights itself, is the subject of a number of applications before the Court in Strasbourg. In 2006 there were nine judgments in which the Strasbourg Court found a violation of Article 8 as a result of censorship of correspondence with the Court.

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<sup>3</sup> Article 263 § 2 and § 3 of the Code of Criminal Procedure.

<sup>4</sup> Article 263 § 4 of the Code of Criminal Proceedings, subsection (vi) – “other important obstacles, the removal of which has not been possible”.

## Tolerance and Non-discrimination

42. The Commissioner recommended in his report that the Polish authorities intensify measures to combat xenophobia, anti-Semitism, and discrimination by *inter alia* promoting tolerance and strengthening anti-discrimination legislation.

### a. Legislative and Institutional framework

43. The Commissioner noted that Poland had little anti-discrimination legislation in areas such as housing, contractual relations, and access to public places. At the time of the mission in 2002, there was discussion concerning a draft amendment to the Labour Code, which would introduce a ban of any direct and indirect discrimination.

44. Amendments to the Labour Code, which entered into force on 1 January 2004 defined and prohibited direct and indirect discrimination in all its forms as well as obliged employers to fight discrimination in employment. These substantive amendments brought Poland largely in line with the EU Racial Equality and Employment Equality Directives. Indeed, there are certain areas in which the Polish legislation goes beyond the requirements of Equality Directives, for example the Polish legislation prohibits a wider ground of discrimination in comparison to the EU Directives<sup>5</sup>. However, there is still no comprehensive body of anti-discrimination legislation, which would cover discrimination as far as access to goods and services is concerned. Polish legislation also does not have any particular mechanism of combating discrimination in housing.

45. According to the government, a comprehensive law on equal treatment is in the phase of internal consultation at the Ministry of Labour and Social Policy.

46. In his Opinion on the creation of a national body for countering discrimination in Poland, published on 11 February 2004, the Commissioner expressed his firm opinion that Poland should create an independent institution which was separate from the government.<sup>6</sup>

47. The Government Plenipotentiary for Equal Status of Women and Men had been fulfilling some of the tasks of such a body since 2001 and had taken a number of initiatives welcomed by NGOs and international organisations concerned with the issues of racism and discrimination, in addition to its original mandate of working on gender equality. However, the function and the Office of the Plenipotentiary were abolished by the new Government on 3 November 2005. The Department for Women, Family and Counteracting Discrimination, subordinated to the Ministry of Labour and Social Policy has taken over a large part of the Plenipotentiary's duties. However, the emphasis of the work of the new department appears to be on fighting discrimination against women and supporting the family, rather than discrimination on all grounds.<sup>7</sup>

48. There is still no single specialized and independent body created with the exclusive aim of promoting equal treatment of all persons without discrimination<sup>8</sup>. Discrimination based

<sup>5</sup> Polish legislation prohibits all other possible grounds of discrimination stating that "any discrimination is prohibited" and then setting as examples: gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, beliefs, sexual orientation, employment for a definite or indefinite period of time, part time or full time employment.

<sup>6</sup> The EU Directive 2000/43 also obliges Member States to create a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.

<sup>7</sup> The department is responsible for the preparation and running of the European Year of Equal Opportunities for All 2007 (National Implementing Body) in Poland.

<sup>8</sup> The tasks pertaining to anti-discrimination policy are now fulfilled by: The Department for Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy, the Department of Denominations and

on disability is dealt with by the Government's Plenipotentiary for the Disabled. The Commissioner for Civil Rights (Ombudsman) is the institution with the strongest instruments to intervene in cases of discrimination. However, the Ombudsman is active in a number of different areas and can not concentrate solely on discrimination issues. Some of the tasks of a specialized body, for example, research on equality and discrimination and training programmes, would seem to go beyond the possibilities of the Polish Ombudsman. Indeed, in his Opinion of 2004, the Commissioner had advised against making significant modifications to the mandate of the Polish Ombudsman as it might unsettle the institution's primary role.

49. The Commissioner urges the Polish authorities to enact a comprehensive body of anti-discrimination legislation to fill the remaining legal lacuna in this area. The Commissioner reiterates the earlier recommendation that the Polish authorities set up a single specialised body to combat discrimination in all areas of life and on all grounds. The Commissioner also encourages the launching of visible, large-scale public campaigns informing the public and the authorities about the notion of equal treatment. Co-operation with civil society in this regard is strongly encouraged.

#### **b. Rights of Lesbian, Gay, Bisexual and Transgender Persons**

50. At the time of the 2002 mission, the NGO community drew the Commissioner's attention to specific instances of discrimination and incidents of hate crime against homosexuals. According to NGOs with whom the Commissioner met in December 2006, the situation for lesbians, gays, bisexual and transgender persons (LGBT persons) has worsened since then. Specific areas of concern expressed were homophobic statements made by leading public figures, which created an atmosphere of hate and intolerance and that the right to freedom of expression and freedom of association were not fully guaranteed for those with different sexual orientation in Poland. The Polish government vehemently rejects these assertions, citing the fact that in the last twenty years the Civil Rights Ombudsman has only received three complaints concerning violations of civil rights due to sexual orientation.
51. In June 2005 the Warsaw Equality March was banned, with municipal authorities citing threats posed to public safety (due to possible counter-demonstrations) as one of their reasons for banning the event. This case was brought to the European Court of Human Rights, which found violations of Article 11 (freedom of assembly), and Articles 13 and 14 in conjunction with Article 11<sup>9</sup>. In November 2005, the Poznań Equality March was banned and dispersed by the Police. Following appeals, the Polish Supreme Administrative Court declared that the reasons given for banning the March were insufficient to justify restrictions on freedom of assembly. While both the Equality Marches in Warsaw and Poznań took place in 2006, according to NGOs this is not indicative of a general improvement in the rights of LGBT groups.
52. In early 2006, the Polish version of "Compass – Human Rights Education with Young People", a Council of Europe anti-discrimination handbook and a manual on Human Rights for young people, was withdrawn from circulation by the Ministry of Education. On 8 June 2006, the Minister for Education dismissed the director of the National In-Service Teacher Training Centre (CODN), Mirosław Sielatycki, for having published the Compass handbook. The reason given for his dismissal was that that the contents of the chapter on

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National Minorities at the Ministry of Interior and Administration, the Civil Rights Ombudsman, the Office for Repatriation and Aliens, the Team for National Minority Affairs, the State Labour Inspection. Disability discrimination is the duty of a special Government Plenipotentiary and race and ethnic discrimination is dealt with within a special team of the Ministry of the Interior and Administration created in 2004.

<sup>9</sup> *Bączkowski and Others v Poland* (application No. 1543/06) Judgment of 3 May 2007.

homosexuality was in contradiction with the core-curriculum for general education and that the publication contained statements aimed at promoting homosexuality in schools.

53. During the Commissioner's visit, the Secretary of State for Education explained that while the Council of Europe manual had many positive chapters, the chapter on homosexuality was unacceptable, as it did not reflect Polish values. According to the Minister, homosexuality was not an 'issue' within Polish society and should not be discussed in schools. The Commissioner was given an example of the sort of manual which the Government considered suitable for the education of young teenagers; a publication entitled "Wygrajmy Młodość" ("Let's win youth"). The chapter on homosexuality from the manual was translated into English for the Commissioner. This chapter states that homosexuality is an unnatural inclination and that the person affected should be shown particular care and assistance in fighting this shameful deviation. The chapter links homosexuality to a fear of responsibility, an incorrect hierarchy of values, a lack of a proper idea of love and a hedonistic attitude, as well as prostitution.
54. The Commissioner finds this approach simply wrong. The portrayal and depiction of homosexuality is offensive, out of tune with principles on equality, diversity and respect for the human rights of all. While the Polish authorities are of course free to decide on which materials they use for human rights education, the human rights principles, including the principle of non-discrimination, contained within such materials are not optional. Moreover, the Commissioner is concerned about proposals that there should be legislation which would penalise alleged promotion of homosexuality in schools.
55. The Commissioner deplores any instances of hate speech towards homosexuals, which should not be tolerated by the Polish authorities. Adequate legal measures should be put in place to combat hate speech and discrimination of those with different sexual orientation or gender identity. All persons have a right to free speech, freedom from discrimination and to seek, receive and impart information. Education and awareness raising measures should be taken to increase the understanding and respect for diversity in cooperation with civil society.
56. The Commissioner encourages the Polish authorities to participate actively in the EU 2007 Year of Equal Opportunities as well as in the Council of Europe's "All Different, All Equal: Campaign for diversity, human rights and participation" and to ensure a visible national implementation of these campaigns.<sup>10</sup>

### **c. Anti-Semitism**

57. The Jewish community in Poland today is very small, commonly estimated at between 5,000 and 10,000 people<sup>11</sup>. According to NGOs and researchers, there is an increased discourse of anti-Semitism in the public sphere, which manifests itself mainly in anti-Semitic hate-speech and publications, which are readily available from numerous book-sellers, such as the "Ruch" network of kiosks.
58. According to provisions of the Polish Criminal Code<sup>12</sup>, criminal proceedings may be discontinued or not even initiated on the grounds that the "social harmfulness" of the offence are considered insignificant<sup>13</sup>. In other words, even though one may feel offended by a particular anti-Semitic comment, society at large has not been affected, therefore the

<sup>10</sup> The Polish government has not approved the Council of Europe's "All Different, All Equal" Campaign and will not be granting support for it. In response to the growing problem of violence in schools, the Ministry of Education has introduced a programme code-named "Zero tolerance for school violence", designed to reduce pathological phenomena among children and youth.

<sup>11</sup> During the 2002 national census, 1,055 Polish citizens declared their nationality as Jewish.

<sup>12</sup> Article 1, paragraph 2 and Article 17, paragraph 1, item 3.

social consequences of the crime are minimal. According to NGOs, this concept of “insignificant social harmfulness of an act” is often used by prosecuting authorities as a reason for discontinuing or not bringing forward the prosecution in cases with racist or anti-Semitic elements.

59. Pursuant to the National Prosecutor’s Office, from 2004 all preparatory proceedings involving racially-motivated acts have been subject to supervision by district prosecutors to prevent premature refusal of investigations or dismissal for reason of insignificant social harmfulness. Once every three months appellate prosecutors examine cases in this category of crime to check the legitimacy of such decisions, before reporting to the National Prosecutor’s Office on their findings and any further action taken. According to the National Prosecutor’s Office, not a single cases concluded in the years 2004-2006 was discontinued or the investigation refused on the basis of Article 17 § 1.3 of the Code of Penal Proceedings, i.e. for reason of insignificant social harmfulness. In most cases discontinued in the years 2004-2006 the reason cited for the decision was failure to find the perpetrator of the crime. However, the number of racist or xenophobic offences with the use of the Internet has begun to rise (mainly consisting in incitement to hatred for national, ethnic or religious reasons). In 2005, a total of 43 cases were reported.
60. According to the Ministry of Justice, the existing provisions of the Penal Code prohibiting racial discrimination will soon be strengthened with new regulations, following the conclusion of ongoing works on the amendment of the Penal Code. One of the proposed amendments to Article 256 § 1 will permit a more effective prosecution of preparations to disseminate Anti-Semitic materials and others inciting hatred for reason of national, ethnic, racial, religious differences or due to a lack of religious beliefs.
61. During the visit, the Commissioner was impressed by the numerous activities of the Polish civil society and academia engaged in combating anti-Semitism in creative ways; through education, research, writing, art performances and exhibitions. During his visit to Auschwitz, the Commissioner learnt of the increasing number of Polish school children who visit the museum as part of their school curricula. In addition, from 1998 Polish youth have taken part in the *March of the Living* (an international educational programme where every year Jewish teenagers from around the world walk from Auschwitz to Birkenau camps). He was also informed of the efforts to increase and improve teacher training on the holocaust. The Commissioner considers these activities, often implemented at the grass root level, vitally important in fighting anti-Semitism. They deserve the support and recognition of the authorities.
62. The Commissioner calls for determined efforts to be made by the authorities to ban racist and anti-Semitic publications and broadcasting. Such publications are far from harmless and their unrestricted distribution sends out the wrong message to the public. The Commissioner welcomes the monitoring of cases involving racially-motivated or xenophobic offences by the National Prosecutor’s Office. The Commissioner considers it extremely important that the existing articles of the criminal code relating to incitement to racial and ethnic hatred are effectively implemented. Judges, prosecutors and the police should be trained accordingly to be sensitive to this issue.

### **Situation of minorities**

63. In his 2002 report, the Commissioner noted that xenophobia, anti-Semitism and negative stereo-types of minorities were common and stressed the need to promote tolerance, starting with programmes at school. Difficulties in preserving culture and language,

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<sup>13</sup> The premise of insignificant social harmfulness of a deed is a general premise of penal responsibility and is not exclusively applied to acts of a racist or discriminatory character.

access to media and disadvantaged social situations in areas such as housing and employment were apparent. The Commissioner found an absence of detailed legislative provisions in certain areas. At the time of the visit, a draft law on National and Ethnic Minorities was under discussion, with establishment of a new government agency for protection of minorities foreseen.

64. On 6 January 2005, the Act on National and Ethnic Minorities and Regional Language was adopted by the Polish Parliament and was signed by the President on 24 January 2005. Article 6 of the Act prohibits discrimination resulting from affinity to national or ethnic minorities. The Act obliges the public authorities to institute appropriate measures in order to support full and actual equality in the area of economic, social, political and cultural life and to protect those who are targets of discrimination, hostility or violence.
65. NGOs and representatives of minorities drew the Commissioner's attention to the fact that increased efforts are needed to protect and preserve monuments and cemeteries of national minorities. The Commissioner himself had witnessed the sad condition of the Jewish cemetery in Warsaw during his October 2006 visit. The Commissioner also saw an impressive exhibition in the Galicia Jewish Museum in Krakow, which apart from paying tribute to the Polish heroes, also demonstrated how few traces are left of the once rich Jewish culture in Poland. The Commissioner strongly believes that the task of preserving the Jewish heritage and that of other national minorities is important for all Poles, not just for the minorities themselves.
66. The Commissioner encourages the Polish authorities to promote intercultural dialogue and understanding of different minorities, their culture and history within the media and the school curricula. Minority monuments and cemeteries should be preserved out of respect to minority groups and to preserve common heritage.

**a. The particular situation of Roma/Gypsies**

67. In his 2002 report the Commissioner recommended that the Polish authorities ensure adequate funding for the Małopolska pilot project for the Roma/Gypsy community and expand similar activities to other parts of the country, particularly in the field of education, employment, health and housing. The Commissioner also recommended that the national action plan for Roma/Gypsies be finalised without delay.
68. On 1 January 2004, the Polish authorities started implementing a long-term (2004-2013) National Programme for the Roma Community in Poland, which had been adopted by the Council of Ministers a few months earlier, i.e. on 19 August 2003. The aims of the national programme are to improve Roma living and health conditions, to reduce unemployment, to prevent racist crimes, to develop Roma culture and maintain their ethnic identity. The programme further aims at promoting Roma history, culture and tradition in the majority population.
69. Since 2006, budget resources in the amount of nearly PLN 23 million (approximately EUR 6 million) have been deployed for campaigns and activities conducted within the framework of the Małopolska and the National Programme. Nevertheless, the Ministry of Interior and Administration acknowledge that extensive further funding is needed. As regards funding, some Roma representatives complained to the Commissioner that public funding does not reach them. They called for more information sharing and participation in relevant decision-making in matters concerning Roma. According to the Ministry of the Interior, a Team for Roma Affairs will be created in the framework of the Joint Commission of the Government and National and Ethnic Minorities. The Team, which will include leaders of Roma organisations, will continue the work of the Sub-Team for Roma Affairs.

70. As regards education of Roma, and notwithstanding the success obtained by the Małopolska pilot project in increasing the level of school attendance of Roma children, many areas of concern remain to be addressed. The Ombudsman for Children informed the Commissioner of continuing irregularities in the education of Roma children in Poland. For example in Kłodzko, home to one of the largest Roma communities in Poland, 25 out of 35 Roma children at the obligatory schooling age attend special schools for disabled children. The reasons given for this by the Ombudsman for Children were the lack of Polish language skills when children started schooling, that their health and development suffered on account of parental neglect, and that Roma parents specifically sought such education because it entitled them to certain forms of social assistance (child care allowance or pension). The Roma families in this region face many problems, namely very low income and/or unemployment, deplorable housing conditions and inadequate conditions for learning at home.
71. Many Roma in Poland still suffer from exclusion and face difficult living conditions throughout the country. NGOs report that Roma are also occasionally targets of racially motivated violence.
72. The Commissioner welcomes the progress made, in particular in the field of education of Roma children. However, further measures in respect of education, housing, health and employment are still required as Roma continue to be disadvantaged and discriminated population in Poland. The Commissioner welcomes the National Programme and encourages the Polish authorities to allocate adequate resources to its implementation. Roma should be consulted and participate in the planning and implementation of all the activities of the Programme. The remaining separate classes for Roma pupils must be replaced with integrated education. The emphasis must be placed on pre-school education, which should be adequately funded, equipped with language training facilities and schools assistants.

## Children

### a. Education for children in rural areas

73. In his report, the Commissioner urged the Polish authorities to ensure that children in rural areas have access to quality education.
74. One of the ways in which the Polish authorities are attempting to ensure equal educational opportunities for those in rural areas is through increasing financial assistance for pupils and students in need. Specific state aid has been earmarked to provide equal educational opportunities to pupils and students coming from low-income and problem families. On 28 September 2004, the Polish government adopted a National Scholarship Programme, and on 16 December 2004 a new system of financial assistance to students was introduced, providing aid to students in the form of maintenance grants, student benefits, and scholarships for outstanding learning and sports achievement.
75. In 2006, two state programmes, aimed at bridging the educational gap among students from rural areas, have been developed and implemented<sup>14</sup>. In addition, the government is expected to adopt and start implementing shortly the *Strategy for the Development of*

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<sup>14</sup> 1. Government programme for supporting the development and implementation of regional or local programs for equal educational opportunities among children and Youth in 2006 Activation and Support for Local Administration Units and Non-governmental Organisations in the Scope for Providing Education-related Aid to Students. 2. Government program for bridging the educational gap among students coming from families of former employees of state-owned farms for the years 2006-2008.

*Education in Rural Areas for the years 2007-2013.* Twelve government departments, which prepare relevant programmes based on activities in the Strategy are involved in preparing its implementation.

76. Moreover, a number of grants and scholarships for students from rural areas have been funded by the European Social Fund and the State Budget. In the programming period for the years 2004-2006, funds amounting to 151 million € have been earmarked for grants and scholarships for primary and secondary schools students coming from rural areas, with 25 million € designated for scholarships for university students. Another relevant initiative sees schools in rural areas and small towns being equipped with computer rooms. According to the Polish authorities, EU funds within the framework of the Socrates Programme have also benefited rural areas in Poland.
77. The Commissioner welcomes the efforts of Polish authorities – with the support of EU funds - to improve access to quality education for those children coming from rural areas or small towns.

### **Domestic violence**

78. In his 2002 report, the Commissioner urged the Polish authorities to ensure greater protection and assistance to the victims of domestic violence through legislative and other means.
79. A new Act on countering domestic violence came into force on 21 November 2005. This law was adopted to increase the effectiveness of measures to counter domestic violence, as well as to improve social awareness of its reasons and consequences. According to article 13 of the new Act, the courts will be now empowered to restrain the perpetrator from contacting the injured party and to leave the family home.
80. In accordance with Article 10 of the above Act, the Polish government has adopted the *National Programme for the Prevention of Domestic Violence* on 25 September 2006, which is to be implemented by central and local government authorities during the period 2006 - 2016. Implementation of the Programme includes measures in the area of prevention, law, health, education and social work, and is addressed to victims of domestic violence, perpetrators and witnesses.
81. The first meeting of a working group under the Ministry for Labour and Social Affairs for countering domestic violence was held on 8 February 2007. The group was established for the purpose of implementing the Council of Europe campaign “Stop Domestic Violence Against Women”.<sup>15</sup>
82. Preventing and prosecuting domestic violence is one of the priority statutory tasks of the Police. Statistics from the authorities show that the number of home interventions connected to domestic violence has been systematically growing. However, according to NGO sources, the restraining powers within the law are weak and very rarely implemented. Since 2003, the emphasis has been on encouraging the police to work with other government departments for the benefit of families who have experienced domestic violence. According to information provided by the Polish government, training programmes with the aim of making police officers more sensitive to the problems of fighting domestic violence are also currently in operation.

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<sup>15</sup> The group has the following tasks: analysis of the ongoing programmes, identification of joint and separate areas of activity, determination of priorities, elaboration of uniform inter-ministry rules of report, drafting of action plans to pool efforts to enhance the results of ongoing programmes.

83. The Commissioner welcomes the new legislation in the field of domestic violence and the National Programme for the Prevention of Domestic Violence. Domestic violence is a serious human rights issue, addressing which requires effective responses of a multidisciplinary nature. The Commissioner encourages the authorities to evaluate the functioning of the new restraining order regime, also in light of the criticism voiced by the NGOs. In this regard, it could be useful to draw on the experiences and best practices from other countries, where such protection/restraining orders have been in use for a longer time. It is important that the new legislation provides protection and assistance for the victims of domestic violence, the majority of whom are women and children. Shelters with adequate services for victims should be made available across the country to provide safety for the victims in violent domestic situation. In this regard, the co-operation of local authorities with women's NGOs is strongly encouraged. The Commissioner welcomes the fact that in 2007 the Ministry of the Interior will be working with NGOs to counter violence against women, particularly in rural areas.

### **Trafficking in human beings**

84. In his 2002 report, the Commissioner stressed the need to ensure greater protection and assistance for victims of trafficking in human beings. Victim assistance was largely left to NGOs with some government assistance. The Commissioner noted that more shelters were needed, and better social assistance, health care, counselling and legal advice ought to be made available to victims.

85. On 16 September 2003, the Polish government adopted the *National Programme for Combating and Preventing Trafficking in Human Beings* prepared by the Minister of the Interior and Administration. On 5 March 2004, an *Inter-Ministerial Team for Combating and Preventing Trafficking in Human Beings* was established. The group consists of representatives of government, the police and NGOs working in this field. The group is an advisory body which meets on average twice a month. Both *The National Programmes for the years 2005-2006 and 2007-2008* have been developed as a result of the work of the above mentioned group. The *National Programme for 2007-2008* has been adopted by the Council of Ministers.

86. The 2005 amendments to the Aliens' law<sup>16</sup> include provisions on the protection of victims of trafficking. The amended legislation has improved the protection to foreign victims of human trafficking by providing for a possibility to grant them a visa or a residence permit for a limited time if they cooperate with law enforcement authorities in helping to bring traffickers to justice. Since the coming into force of the law, visas and temporary stay decisions have been granted in some instances to persons who are victims of trafficking in human beings.

87. The Ministry of the Interior and Administration and the La Strada Foundation have developed a Programme of support and protection for the victims of trafficking in human beings. It includes attending to the needs of victims of human trafficking by providing them with safe shelter as well as medical, psychological and legal care. Under the Programme, foreign trafficking victims are offered visas for two-month stays, treated as a reflection period, during which time they can decide to collaborate with the law enforcement organs. Those victims who decide to cooperate and testify against the perpetrators are offered visas for six-month stays in Poland, with another six-month extension possible. Participation in the Programme is voluntary.

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<sup>16</sup> Namely the Aliens Act of April 2005, following the Framework Decision of EU Council of 19.07.2002 and the Directive 2004/81/EC of 29 April 2004.

88. The years 2005-2006 saw the implementation of an International Partnership for Development Project: "IRIS: social and vocational occupation reintegration of women victims of trafficking in human beings". The project was partly financed out of the European Social Fund, in the framework of the EQUAL Community Initiative.
89. Since the first Commissioner's Report, Poland has signed the Council of Europe's Convention on Activities to Prevent Human Trafficking 16 May 2005, preparation for ratification being currently underway.
90. The Commissioner welcomes the 2005 amendments to the aliens' law which include provisions on protection of victims of trafficking. However, it appears that the new provisions have been very seldom used so far. The Commissioner encourages the Polish authorities to ensure that the provisions within the legislation which provide for victim protection are fully implemented. The Commissioner welcomes the co-operation between the Ministry of the Interior and the La Strada Foundation in providing support to victims. The Commissioner encourages the early ratification of the Council of Europe's Convention on Activities to Prevent Human Trafficking.

## **Women and Reproductive rights**

91. In his 2002 report, the first Commissioner for Human Rights recommended that the Polish authorities promote an adequate knowledge of reproductive health through school curricula. The Commissioner also urged the authorities to ensure that medical professionals, the police and prosecutors respect the provisions under which termination of pregnancy is allowed under the current law.
92. Reproductive health education is taught in Polish schools under the theme of *Education for life in the family*. Provision of sexual education is obligatory for all types of primary schools, gymnasiums, and post-gymnasiums. According to the Ministry of Education, sexual education supports the educational role of the family, and shapes a pro-family, pro-health and pro-societal attitude. NGOs with whom the Commissioner met were of the opinion that sexual education in schools was often misleading and sometimes inaccurate, for example stating that oral contraception leads to female infertility. The Ministry of Education rejects this opinion. According to the Ministry, teachers are obliged to convey objective, scientifically verified knowledge in line with the core curriculum of general education.
93. The Polish law on termination of pregnancy<sup>17</sup> is one of the most restrictive in Europe. It permits a termination in three defined conditions: if the pregnancy endangers the mother's life or health, or where there is a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease, or if there are strong grounds to believe that the pregnancy is a result of a criminal act. The Polish Parliament is currently discussing a proposed amendment to the Polish Constitution (Article 38) which would guarantee life from conception.
94. The current law is criticised by NGOs who claim that while the law allows termination of pregnancy where the health of the mother is threatened, in reality, doctors in Poland are hesitant to perform such terminations because of the highly charged nature of the debate. Doctors often refuse to issue a certificate required for termination of pregnancy (relying on the 'conscience clause'). Even when they do issue a certificate, the doctor who performs the termination can question the certificate's validity and refuse the service. A decision taken by a doctor to refuse a termination cannot be appealed. According to the

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<sup>17</sup> 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and related statutes.

Ministry of Health, invocation of the conscience clause by doctors refusing to carry out a legal termination of pregnancy does not constitute a risk to the patient because a hospital in which all doctors invoke the conscience clause has to have a contract with another facility that provides the service.

95. This issue has recently been taken to the European Court of Human Rights in the case of *Tysi c v Poland* (2005). In this case, the woman in question suffered from severe myopia and requested a termination of pregnancy on the grounds that her disability would worsen after a third pregnancy. She was refused a termination of pregnancy and alleged that her sight had worsened. In its judgment of 20 March 2007, the Strasbourg Court examined the complaint from the standpoint of the State's positive obligation under Article 8 to secure the physical integrity of mothers-to-be. The Court noted that once the legislature had decided to allow a termination of pregnancy, it must not structure its legal framework in such a way as to limit the use of that possibility. Furthermore, it should ensure some form of procedure before an independent and competent body, which after having had the opportunity to hear the pregnant woman in person, issued prompt and written grounds for its decision. In the applicant's case, the Court found that Polish law did not contain any effective mechanism capable of determining whether the conditions for obtaining a lawful termination had been met. Poland had therefore failed to safeguard Ms. Tysi c's right to the effective respect for her private life.
96. The UN Committee on the Elimination of Discrimination Against Women, in its comments on 2 February 2007, expressed concerns as regards the unavailability of termination of pregnancy in practice, as well as regards the lack of adequate sexual education. According to the Ministry of Health an estimated figure for illegal terminations of pregnancy in Poland may be 10,000 per year (although there are no official Ministry of Health data on the number of illegal terminations of pregnancy)<sup>18</sup>, while NGO sources believe that the true figures are dramatically higher. This is in stark comparison to the official figure for legal terminations of pregnancy which was 230 in 2005.
97. The Commissioner notes that access to legal abortion for women in Poland is frequently hindered. He urges the Polish government to ensure that women falling within the categories foreseen by the law are allowed, in practice, to terminate their pregnancy without additional hindrance or reproach. The very low number of legal abortions is a warning signal to the Polish authorities that illegal abortions are taking place in high numbers. Illegal abortions increase the risks for the woman undergoing the intervention and carry with them the stigma of breaching the law. Following the Strasbourg Court's judgment in *Tysi c v Poland*, the Polish authorities should consider creating an appeal or review procedure whereby the decision of a doctor not to issue a certificate permitting the abortion to be practiced legally can be subject to review. Furthermore, the Commissioner encourages the Polish government to undertake activities aimed at ensuring effective sexual education in schools.

## **Refugees and Asylum seekers**

98. In his 2002 report, the Commissioner encouraged the Polish authorities to continue the measures aimed at protecting separated refugee children and urged them to ensure full respect for the principle of *non-refoulement* for asylum seekers.

### **a. Legislation**

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<sup>18</sup> The Ministry of Health only has data on the number of illegal terminations identified as offences and prosecuted under Polish law. Fifty-six such cases were reported in 2006.

99. New legislation concerning aliens comprises three legal instruments: the Act of 14 July 2006 on EU citizens, the Act of 13 June 2003 on Aliens, and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland, which entered into force on 1 September 2003.<sup>19</sup>
100. The Act on Granting Protection to Aliens on the Territory of the Republic of Poland contains provisions relating to refugee status determination, unaccompanied children and traumatized persons, as well as rules on detention of asylum seekers. The law creates four types of protection status to non-citizens, namely, refugee status, tolerated status, temporary protection and asylum status. Tolerated residence is generally granted in three situations: as a form of subsidiary protection in the refugee procedure, when a person cannot be deported because the decision against him/her cannot be executed, or for those who on the basis of the decision of the court cannot be extradited. Tolerated residence is granted for an unspecified period of time, but can be cancelled. The introduction of the permit for tolerated stay has filled a gap in the system of international protection provided for aliens in Poland, although according to the UNHCR, this has resulted in the replacement of refugee status by a “worse” form of international protection. By way of example, in 2005, 335 persons received refugee status in Poland and 1856 persons received a permit for tolerated stay (an increase of 119% in comparison to 2004).<sup>20</sup> Over 90% of asylum seekers in Poland are from the Russian Federation and mostly of Chechen origin; tolerated stay is mostly used in relation to this group. In 2005, the number of asylum applications in Poland decreased in comparison with the previous year, which corresponds to the general trend in Europe.<sup>21</sup> 21% of all asylum applications in 2005 were repeat applications, and most of those were applications from Chechens who had already been granted a permit for tolerated stay.
101. Under the new legislation on integration, recognised refugees have the right to work, to social assistance, education and the enjoyment of the State integration programme. However, persons with a permit for tolerated stay do not enjoy access to this programme. This poses a problem for those with tolerated status, mainly Chechens, who need help with integration and social assistance. According to the Ministry of Education, however, persons with tolerated stay permits are entitled to the same education as Polish nationals in public schools.<sup>22</sup>
102. The Office for Repatriation and Aliens, supervised by the Ministry of the Interior and Administration deals with asylum claims. Asylum seekers have the right to stay in one of seventeen reception centres for asylum seekers in Poland. As of June 2006, over 3,300 asylum seekers remained in reception centres. Additionally, over 400 asylum seekers are financially supported by Polish authorities outside reception centres.
103. In 2005, the “Halina Nieć” Human Rights Association monitored Polish centres for detainees awaiting deportation and found that their living conditions were generally adequate. It noted however, that there were still a number of problems remaining, such as lack of access to information, lack of access to legal assistance<sup>23</sup> and translators, shortages of suitable clothing and lack of leisure time activities. According to the Polish Helsinki Foundation for Human Rights, legal NGOs are located far from some of the reception centres, as a result of which asylum seekers, especially those with disabilities find it difficult to have proper access to the services provided. Access to education for children in reception centres also remains a problem. In comparison to 2004, the number

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<sup>19</sup> Both these acts were significantly amended in 2005.

<sup>20</sup> Figures provided by the UNHCR.

<sup>21</sup> Ibid.

<sup>22</sup> Pursuant to Article 94a § 2 of the law of 7 September 1991 on the system of education.

<sup>23</sup> Work is in progress on a Law which will regulate the principles of access to free legal assistance. The act will also apply to aliens seeking refugee status.

of children from reception centres attending school has increased from approximately 10% to 50% in April 2006, mainly as a result of better cooperation between reception centres and local schools. The Commissioner was informed that this positive trend has continued.

104. The Commissioner encourages the Polish authorities to improve access to information, legal assistance and education for those asylum seekers residing in reception centres. In addition, the Commissioner urges the authorities to ensure that those also granted a permit to tolerated stay do benefit from measures leading to a proper and effective integration into Polish society.

**b. *Non-refoulement***

105. According to the Polish Office for Repatriation and Aliens, there have been no instances regarding non-admission of persons seeking protection at the Polish borders. In any case where an alien at the border requests protection on the territory of Poland, his/her application will always be received by the Border Guards and such a person will be permitted entry into Poland.

**c. *Unaccompanied minors***

106. The treatment of unaccompanied minors has improved with the new law on Granting Protection to Aliens on the Territory of the Republic of Poland, of June 2003. According to this Act, a guardian is appointed immediately by the district court to represent the unaccompanied minor during the procedure on granting refugee status. A custodian is also appointed to exercise custody over the unaccompanied minor. The custodian's role is to supervise the provision of appropriate accommodation and access to education and medical care, as well as to provide assistance in finding family members. Separated children seeking asylum are now interviewed in a child-friendly environment at the specialised Foundation "Nobody's Children", in the presence of a psychologist.
107. Since March 2004, unaccompanied minors are accommodated in two Custodian Educational Centres run by the Warsaw Municipality. According to the Office for Repatriation and Aliens the number of unaccompanied minors in the asylum procedure in Poland is very small. In 2003, there were 21 minors and in 2006, there were just 6.
108. According to NGO sources, there remains a problem with unaccompanied minors who do not apply for refugee status and therefore fall outside this system of protection. Minors are stopped while crossing the border and are placed in child care institutions. Many do not know that they have the right to apply for refugee status and very often they escape and try to cross borders further West. The Halina Nieć Human Rights Association has prepared an information leaflet for such children, which is being distributed in care institutions.

109. The Commissioner welcomes the improved treatment of unaccompanied minors asking for asylum in Poland following the new legislation on aliens. The care and protection of unaccompanied minors who fall outside the refugee system should not be overlooked.

## **Ratifications**

110. In his 2002 visit report, the Commissioner urged the Polish authorities to sign and ratify the Revised European Social Charter (including the Additional Protocol relating to collective complaints), the European Charter for Regional and Minority Languages and Protocol No. 12 to the European Convention on Human Rights on discrimination.

111. The Revised European Social Charter was signed on 25 October 2005. In September 2005, the Tripartite Socio-Economic Commission appointed a team to deal with certain changes to Polish legislation which would be needed following ratification of the provisions of the Social Charter. The team will firstly assess the progress of implementation of the European Social Charter. According to the government, Poland is not considering the ratification of the Collective Complaints Protocol.

112. Poland signed the European Charter for Regional or Minority Languages on 12 May 2003. A draft Act on Ratification of the Charter has been prepared and approved, but has yet to be adopted by the Polish Parliament.

113. The Commissioner welcomes the steps made by Poland towards ratification of the revised European Social Charter and encourages them to continue their efforts. The Collective Complaints Protocol should not be overlooked by the Polish authorities, however, as it is this Protocol which enables certain designated organisations to file complaints on the basis of the European Social Charter and makes the system effective. The Commissioner is firmly of the opinion that the Polish authorities should sign and ratify Protocol No. 12 to the European Convention on Human Rights. The Commissioner repeats his call for the early ratification of the Council of Europe's Convention on Activities to Prevent Human Trafficking.

## **Freedom of expression and freedom of the media**

114. In his 2002 visit report the Commissioner for Human Rights recommended that the Polish authorities carry out a legislative reform concerning the offence of insult, by abolishing the provisions that make this offence punishable by a prison sentence.

115. The penalty of imprisonment for defamation and insult remains in Polish law. There are no plans to amend provision 212 of the Penal Code in this respect. The Ministry of Justice drew the Commissioner's attention to a recent decision of the Polish Constitutional Court which found that the provision was not unlawful from the point of view of the Polish Constitution (although there were three notable dissenting opinions to that decision, and another case is still pending before the Constitutional Court on the same issue). They further drew the Commissioner's attention to the fact that during the period 2002 – 2003 public prosecutions against journalists did not result in any indictments and of the 361 cases brought by private proceedings, prison sentences (both suspended) were passed in only two cases.

116. The Commissioner reiterates that resorting to criminal law measures in this area should be avoided. Even when the number of persons imprisoned is low, the very fact that the provision remains sends out a clear message to journalists and others which may create a climate of fear.

## Lustration

117. The issue of lustration was not treated in the 2002 visit report, however, given the fact that a new lustration law had recently been prepared by the Government and was due to enter into force, the Commissioner discussed this issue with a number of his interlocutors during his 2006 visit. The Commissioner has taken into account in his brief analysis the law as amended in February 2007.

### a. The new legislation

118. The New Lustration Law<sup>24</sup> was adopted on 18 October 2006, and came into force on 15 March 2007. The law abolishes the previous Lustration Court and the Commissioner for Public Interest and gives the power to issue a certificate of collaboration or non-collaboration with the security organs of the Polish People's Republic to the Institute of National Remembrance (IPN).

119. The scope of applicability of lustration was considerably widened under the new law. In addition to all public officials, many other professions are included within the scope of the vetting procedure: tax advisors, certified accountants, journalists, university teachers, heads of public and private educational institutions, heads of state controlled companies, and members of the management and supervisory boards of companies listed on the stock exchange. Recent government figures put the number affected by the new law at an estimated 700,000 people.

120. In view of the severe criticism which the new Law faced, the President of Poland proposed several amendments to the Act. A person concerned has to submit a declaration as to collaboration with the secret service, and then this declaration is verified by the IPN. In case of doubts as regard the truthfulness of the statement, proceedings before criminal courts (not civil law courts) are started with guarantees of due process, including presumption of innocence. Under the old lustration law, the Commissioner for Public Interest was responsible for starting such proceedings. Under the new amendments, it will be up to the lustration office of the IPN. The government has pointed out that the law has the aim of disclosing the fact of collaboration and that negative consequences arise only when a false lustration declaration is made.

121. The new law also authorises the IPN to publish lists of the people who at any time were noted as collaborating – in one way or another – with the security organs of the Polish People's Republic<sup>25</sup> and does not require any act or declaration by the persons concerned. This could be done without any act or declaration by the persons concerned, who may also be refused access to their documents by the IPN.

122. The Commissioner is of the opinion that some of the amendments proposed by the President did remedy some of the procedural concerns expressed. In particular, the fact that any challenge to the lustration certificate should be brought before a criminal, rather than civil, court, is a clear improvement. This is because criminal courts require a higher standard of proof and ensure respect for the principle of presumption of innocence as well as other trial guarantees protecting the rights of the person accused.

123. Challenges to the New Lustration law were brought before the Constitutional Court by an opposition party and the Ombudsman. On 15 May 2007, the Constitutional Court

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<sup>24</sup> The Act on the disclosure of information on documents of State security apparatus from the period between 1944 – 1990 and the contents of those documents adopted on 18 October 2006.

<sup>25</sup> See A Resolution of the Faculty Council of The Faculty of Law and Administration of Warsaw University of 19 March 2007, on the so-called Vetting Act.

struck down a number of provisions of the new lustration law. The matter is back with the President and the Parliament to decide whether the law can apply in spite of the unconstitutional provisions, or whether the law has been rendered ineffective by the decision. Nevertheless, the Commissioner would like to reiterate here some of the general human rights concerns in relation to the 15 March law.

124. Firstly, concerning the wide scope of application of the Act. The number of persons who can be affected by lustration under the new amended Act is vast and includes categories of people who do not hold public functions. One can wonder whether people in all these professions really pose a significant danger to human rights or democracy, especially given the time that has elapsed since the system change.
125. Due to the very large number of effected people, who have to undergo the vetting procedures, doubts have been expressed of the ability of the IPN to manage the demand for certificates within a reasonable time. The delays could cause serious risks for the fundamental guarantees of individual rights, the right to personal security and legal certainty and could result in the lustrated parties being subjected to abuse and discrimination in employment and public life. Another concern relates to the definition of “co-operation” contained in the new Law, which appears to be too broad and vague and go beyond the notion of “active co-operation” required by the jurisprudence of the Constitutional Court of Poland.
126. The reliability of the information and files collected by the Secret Service Agents and preserved in the IPN archives has also been queried by many. The Commissioner has been informed that many files are incomplete and not in order, which, if indeed the case, poses additional difficulties for the fair conduct of the procedures and in particular the reliability of the evidence used in the legal procedures.
127. The question of sanctions foreseen in the law also raises serious human rights concerns. In particular, these sanctions apply to journalists and academics, who are included in the scope of the Act. The sanction as a consequence of submission of an untrue declaration consists of a prohibition of all publication for ten years. Such a sanction raises issues of freedom of speech and freedom of the media, and, in the case of teachers and academics, freedom to teach and conduct academic research, rights guaranteed in the Polish Constitution.
128. The Commissioner recognises that countries in transition need to find a sensible approach to those who collaborated with the security organs of the former Communist system. Where lustration is deemed necessary, however, it must be carried out with all the guarantees of a state based on the rule of law and respect for human rights. The current law does not uphold to these standards in many respects. The Commissioner refers the Polish authorities to the relevant case law of the European Court of Human Rights. In addition, the Council of Europe’s “Guidelines to ensure lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law” provide a useful reference text in this regard.<sup>26</sup> In particular, the

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<sup>26</sup> See the Parliamentary Assembly’s Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.

Commissioner would like to draw the Polish authorities' attention to the following subparagraphs of the above mentioned guidelines, which address some of the Commissioner's concerns as set out above:

"d. Lustration should be limited to positions in which there is a good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

g. Disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated; lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries.

m. In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal".

## **Summary of Recommendations**

1. Continue efforts to accelerate judicial proceedings for example by increasing the number of legal staff, court budget and improving the system of recording court proceedings. Review the law and practice by which apprentice judges are being asked to take on cases beyond their experience.
2. Settle outstanding matters related to the domestic remedy for excessive length of judicial proceedings.
3. Improve dissemination of the European Court of Human Right's case-law and ensure that legal training for judges reaches a wide audience.
4. Establish an independent body to investigate police misbehaviour. Provide specific training on trafficking in human beings and domestic violence on a larger scale and involve a greater number of police officers, in cooperation with NGOs.
5. Take urgent measures to combat over-crowding in prisons and improve the application of alternative penalties which do not involve incarceration.
6. Review the application and functioning of pre-trial detention in Polish law. Improve training of judges and prosecutors as regards European standards and case-law of the European Court of Human Rights in this area.
7. Ensure that detainees have direct contact with a lawyer.

8. Enact a comprehensive body of anti-discrimination legislation. Set up a single specialised body to combat discrimination in all areas of life and on all grounds. Launch visible, large-scale public campaigns, in cooperation with NGOs to inform the public about the notion of equal treatment.
9. Put in place adequate legal measures to combat hate speech and discrimination of those with different sexual orientation or gender identity. Take appropriate measures to raise awareness of diversity in cooperation with civil society.
10. Ban racist and anti-Semitic publications and broadcasting. Implement effectively the existing articles of the criminal code relating to incitement to racial and ethnic hatred.
11. Promote intercultural dialogue and understanding of different minorities, their culture and history within the media and the school curricula. Preserve minority monuments and cemeteries out of respect to minority groups and to preserve the common heritage.
12. Take further measures in respect of Roma education, housing, health and employment. Consult Roma in the planning and implementation of the activities of the National Programme. The remaining separate classes for Roma pupils must be replaced with integrated education.
13. Evaluate the functioning of the restraining order regime with the new Act on countering domestic violence. Make available shelters with adequate services for victims across the country.
14. Ensure that the provisions within the 2005 amendments to the Aliens' law, which provides for victim protection, are fully implemented. Ratify the Council of Europe's Convention on Activities to Prevent Human Trafficking.
15. Ensure that women falling within the categories foreseen by the Polish abortion law are allowed, in practice, to terminate their pregnancy without additional hindrance or reproach. Create an appeal or review procedure whereby the decision of a doctor not to issue a certificate permitting an abortion be subject to review. Undertake further activities aimed at providing effective sexual education in schools.
16. Improve access to information, legal assistance and education for those asylum seekers residing in reception centres. Ensure that those granted a permit to tolerated stay benefit from measures leading to a proper and effective integration into Polish society.
17. Ratify the revised European Social Charter and the Collective Complaints Protocol. Sign and ratify Protocol No. 12 to the European Convention on Human Rights. Ratify the Council of Europe's Convention on Activities to Prevent Human Trafficking.
18. Refrain from resorting to criminal law measures for the offence of insult.
19. Ensure that lustration procedures comply with all the guarantees of a state based on the rule of law and respect for human rights.

## APPENDIX

### Comments by the Government of the Republic of Poland

#### Introduction

The Government of the Republic of Poland wishes to thank the Commissioner for Human Rights of the Council of Europe, Mr. Thomas Hammarberg, for his visit to Poland on 3-6 December 2006 and the Memorandum on the implementation by Poland of the recommendations contained in the Commissioner's 2002 report. At the same time, the Government of the Republic of Poland wishes to supplement its position with regard to selected issues taken up in the report.

#### Commentary to paragraph 6:

The Polish Government is aware of the significance of the need to reduce the duration of court proceedings and consistently strives to upgrade the effectiveness and efficiency of the judiciary, with particular reference to speeding up proceedings. The number of judges in Poland has doubled over the last ten years. Comparative data of the Council of Europe<sup>27</sup> indicate that Poland is among the European countries with the highest number of professional judges per 100 thousand of the population. However, increasing the number of judges alone does not resolve the complex problem of excessive duration of proceedings and only brings extemporaneous and short-lasting improvement.

#### Commentary to paragraph 10:

As concerns apprentice judges (*asesorzy*) being assigned cases beyond their experience, it should be noted that the matter is the subject of legislative works in the Polish Sejm (draft law submitted by the President).

#### Commentary to paragraph 13:

Acceleration of judicial proceedings requires deep reforms of the entire judiciary, which are being systematically implemented in Poland. The reforms involve, among others, improvement of the recording of trial procedures through the introduction of devices recording picture and sound, which, combined with the introduction of IT technologies in the courts should substantially reduce the duration of court proceedings.

#### Commentary to paragraph 16:

The Commissioner's comment about the need for changes in the application by the courts of the Law of 17 June 2004 on *complaints against the violation of a party's right to a court hearing without unreasonable delay* referred to the lack of option to lodge a complaint against the excessive length of proceedings before several instances and was based on an analysis of inconsistent case law of the Supreme Court. The Court assumed that the law primarily served the disciplining of procedures relating to an ongoing case. However, that approach is not universal in the judgment practice. Under article 2 of the cited law, a party may lodge a complaint, demanding ascertainment of violation of the party's right to a court hearing without undue delay if the proceedings last longer than necessary to determine the factual and legal circumstances, which are significant for the resolution of the case, or longer than necessary to resolve an executory or other case, relating to the implementation of a court ruling (excessive duration of proceedings). However, in order to determine whether proceedings have been excessively long in the given case, it is essential to assess the timeliness and propriety of the actions taken by the court for the purpose of handing down a

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<sup>27</sup> CEPEJ report: European judicial systems / Edition 2006.

decision concerning the substance or actions taken by the court, or a court executive officer, for the purpose of conducting and concluding an executory case, or other case relating to the implementation of a court ruling, taking into account the nature of the case, the degree of its factual and legal complexity, the significance of the issues involved for the party that has lodged the complaint, and the conduct of the parties, with special note to the party that has claimed excessive duration of the proceedings. The Supreme Court assumed that the 2004 law primarily served the disciplining of actions taken in the course of ongoing proceedings, rather than addressing a closed stage of the case.

Neither Article 2 of the 2004 law, nor its other provisions, contain any temporal or substantive criteria for evaluating the efficiency of court proceedings. No provision of the law stipulates that such evaluation should be limited to court proceedings before one instance of jurisdiction. Thus, the interpretation made by the Supreme Court is a viability interpretation that is not binding on the courts relative to other issues than the one specifically addressed by the Supreme Court in its ruling.

**Commentary to paragraph 23:**

On 24 October 2006 Poland joined the ODHIR Law Enforcement Officer Programme on Combating Hate Crime. The program involves the training of Police officers in various aspects of hate crimes, including investigative work, exchange of information and cooperation with prosecutors. The Programme envisions the elaboration of a strategy of combating hate crime, based on collaboration with engaged communities and the introduction of an effective system for collecting and disseminating data on hate crime.

**Commentary to paragraph 31:**

The data of 20 November 2006 have substantially changed. As of 28 May 2007, there were 90202 incarcerated prisoners, including those remanded in custody, while the penitentiary institutions had 75206 places, which resulted in overcrowding of 120.2%.

**Commentary to paragraph 35:**

It is worth emphasising that in addition to the proposed introduction of new types of penalties, the Ministry of Justice has been elaborating a programme of broader application of the existent system of alternative penalties, which prominently includes the penalty of restriction of freedom and fines. At present there is a need for their broader utilization, which, in the past, was hindered by problems with their execution. The initiated works are designed to remove that barrier and improve the execution of these penalties, which is meant to encourage courts to impose such penalties rather than prison sentences.

The Polish Government is convinced that investments to boost the holding capacity of prisons, introduction of electronic surveillance of convicts and weekend prisons, as well as improved execution of the penalties of fine and restriction of liberty, will bring about a significant improvement in the situation of the Polish prison system. At the same time, the Polish Government wishes to underline that it is making efforts to compensate and minimize the inconveniences caused by overcrowding by taking other measures that contribute to the overall conditions of incarceration. And so, inmates in Polish prisons have at their disposal social facilities and can attend cultural or educational activities.

**Additional commentary:**

The Polish Government recognizes the seriousness of the problem of prison overcrowding and emphasizes that improvement in the prison situation is one of its priorities. Poland attaches the highest importance to the standards elaborated in the framework of the Council of Europe. Guided by the recommendations contained in the Report of the Human Rights Commissioner after his visit to Poland in 2002, the Government has launched a broad

investment programme designed to increase the holding capacity of the correctional institutions. It has also prepared draft laws that introduce new alternatives to incarceration (draft law on electronic surveillance of convicts and draft law on weekend prisons).

**Commentary to paragraph 41:**

Under Polish law defendants and convicts have full right of direct, personal contact with their lawyers. Under article 73 § 1 of the Code of Penal Procedure a defendant in pre-trial detention may communicate with his lawyer in private and by correspondence, while a convict – under article 102 point 7 of the Penal Executive Code - has the right to communicate with his lawyer, plenipotentiary, probation officer or a chosen representative.

Polish law does not envisage the possibility of an investigative organ or prison administration refusing a detainee the right of contact with lawyer.

As a result, lawyers have every possibility of establishing direct contact with their incarcerated clients. Failure to make use of these possibilities may be seen as violation of professional rules and ethics, possibly leading to disciplinary proceedings. The efficiency and effectiveness of disciplinary proceeding was enhanced – also by boosting the prerogatives of the Minister of Justice relative to his supervision of disciplinary proceedings – by the law of 29 March 2007 amending the law on the advocates' profession and certain other laws, which entered into force on 9 June 2007.

The Ministry of Justice also monitors instances of unjustified failure by lawyers to attend court sessions. Information gained in this way additionally exposes instances of a lack of contact by lawyers with their clients. If improper conduct is ascertained, motions are lodged for disciplinary measures against the lawyers concerned.

**Commentary to paragraph 42:**

As concerns instances of censoring of detainees' correspondence with the European Court of Human Rights, an analysis of these cases indicates that the censorship is connected with improper conduct during the sorting of mail.

**Commentary to paragraph 49:**

Footnote 8: as part of the efforts to counter racial and ethnic discrimination, a Team for Monitoring Racism and Xenophobia (incorrectly called a "department" in the Memorandum) was established in 2004 at the Ministry of Interior and Administration.

**Commentary to paragraph 53:**

The Ministry of National Education upholds its position that the Minister of National Education has the sovereign right to conduct personnel policy, including the appointment and dismissal of the director of the National In-Service Teacher Training Centre.

**Commentary to paragraphs 54-56:**

The Ministry of National Education upholds its position concerning the statement in the publication "Let's Win Youth" that homosexuality is an unnatural inclination. Furthermore, we are surprised that the Commissioner takes issue with the assertion that persons displaying homosexual tendencies should be shown particular care and assistance in fighting the problem. Polish society has Christian roots and it adheres to the relevant values. Accordingly, it would be hard to expect praise in our society for inclinations other than those stemming from natural law.

It should be reiterated that over the last twenty years the Human Rights Ombudsman has received just 3 complaints concerning violation of human rights due to sexual orientation. The Commissioner's assessment of the situation of sexual minorities in Poland is not based on fact. It is a political position that interferes in Poland's internal affairs.

**Commentary to paragraph 57:**

At present the lack of acceptance of others does not constitute a problem in Poland. However, no reaction against the pathology, that often emerges among young people, appears to be a problem. It concerns the victims of aggression and violence. Recognizing that this is a growing problem among young people, the Ministry has elaborated and is implementing the programme “Zero Tolerance for School Violence” , designed to reduce pathological phenomena among school youngsters. Without questioning the substantial benefits of the “All Equal, All Different” campaign, the Ministry of National Education – motivated by concern for proper education of children and youth in Polish schools – has decided not to implement the campaign. In view of the above, no support will be granted for implementation of “All Different, All Equal”.

**Commentary to paragraph 58:**

Statistics on the number of anti-Semitic attacks indicate that Poland is a relatively safe country in this respect, with only sporadic incidents of this kind. The statistically small number of cases does not mean that it is possible to underestimate their harmfulness and extremely destructive impact on a democratic society. This is the position of the Polish Government. It has led to consistent upgrading of the countermeasures, including legislative changes as well as enhanced supervision of penal proceedings and the work of law enforcement institutions. It should be stressed that Poland has made international commitments under the Framework Decision of the EU Council on combating racism and xenophobia.

**Commentary to paragraph 59:**

It should be stated unequivocally that the criterion of “ the social harmfulness of an act being greater than negligible” - as condition of penal culpability under Polish law - in no way diminishes the effectiveness of regulations directed against manifestations of racism or anti-Semitism. Insignificant social harmfulness finds no practical application in the exemption of penal responsibility in the case of racist deeds. This is affirmed by statistical data provided by the National Prosecutor’s Office in connection with the last visit.

Since doubts concerning the substance and application of the criterion of “insignificant social harmfulness” already appeared in the report connected with the 2002 visit, it seems advisable to explain the concept in greater detail.

First of all, the concept of social harmfulness of a deed in no way depends on the number of people affected in society by the negative consequences of that deed. It would run counter to the goals of penal responsibility to suggest that harm done to only a small group of people or a single individual somehow diminishes the harmfulness of a deed.

The possibility provided under the Penal Code to determine that an illicit act carries insignificant social harmfulness does not apply only to such deeds as propagation of racial hatred or discrimination, but is a general rule of penal culpability applied to all types of felonies.

Every unlawful act, different kinds of which are described in the Penal Code, is by definition socially harmful and its perpetrator deserves punishment. Under article 1 § 2 of the Penal Code an unlawful act of insignificant social harmfulness does not constitute a crime. The concept of “insignificant social harmfulness of an act” was introduced into the Penal Code as a kind of safety valve, preventing unfair judgments. The trial consequence of finding that the social harmfulness of a deed is not greater than negligible is refusal to open proceedings or decision to discontinue proceedings already initiated (article 17 § 1 point 3 of the Code of Penal Procedure).

The qualification of specific deeds as having insignificant social harmfulness is not discretionary. The evaluation of the degree of social harmfulness is an objective assessment, conducted on the basis of criteria specified in the law (article 115 § 3 of the Penal Code). That assessment cannot undermine the statutory traits of a crime. The very fact that crimes relating to discrimination or racial and ethnic hatred have been introduced into the Penal Code indicates that, as a rule, they are considered socially harmful.

**Commentary to paragraph 63:**

Poland has developed a broad scope of penal instruments to counter manifestations of racism, including, obviously, laws banning racist speech and publications. Racist publications are banned in Poland and the ban is being enforced. The ban relating to physical persons is contained in the Penal Code, while a law on the responsibility of corporate persons for unlawful acts elaborates their culpability. Seeking to eliminate racist, xenophobic and anti-Semitic content disseminated through the Internet, the Ministry of Interior and Administration is collaborating with “Hotline Poland – Dyżurnet.pl”, a team operating in the framework of the Research and Academic Computer Network. That cooperation has resulted in charges being brought for propagation of ethnic or national hatred, i.e. crimes under articles 256 and 257 of the Penal Code.

**Commentary to paragraph 68:**

In 2007, state budget funds earmarked for the financing of *the National Programme for the Roma Community in Poland* amount to 10 million PLN, which is double the funds allocated in recent years (5 million PLN was earmarked for the purpose in 2004, 2005, and 2006). Furthermore, measures have been taken to obtain additional financing for *the Programme* out of European funds. For that reason, a so-called *Roma component* has been introduced into the Human Capital Operational Programme.

**Commentary to paragraphs 71 and 73:**

The problems of the Roma in Kłodzko are not typical of the whole Roma community in Poland. Such accumulation of social problems and their adverse impact on the education of Roma children is characteristic of part of the community of the Carpathian Roma in southern Poland. It is especially acute in rural areas and such post-industrial towns as Kłodzko. For that reason the greatest funds under *the National Programme for the Roma Community in Poland* are directed to Małopolskie and Dolnośląskie Voivodships.

In order to counteract the overrepresentation of Roma children in special schools, *the Programme* has focused on educational tasks, with particular note to integrated schooling, including pre-school education. In addition to material aid (free textbooks and other school utensils), Roma children get school tutoring (additional classes) provided by Roma education assistants and auxiliary teachers.

It should be underlined that most of the problems afflicting the Roma minority in Poland (unemployment, poverty, social exclusion) stem from very low education levels and the resultant lack of vocational qualifications, and not discrimination. For that reason, improvement of education levels is a prominent goal of *the Programme*.

The great majority of Roma children get their education in integrated schools, while the number of separate “Roma” classes is steadily decreasing. At present, there are six such classes in the entire country, following the same curriculum as integrated classes.

The Memorandum does not take into account the observations conveyed by the Ministry of National Education in December 2006, concerning the education of the children in Kłodzko, whose parents want them moved to special schools.

That case and the existence of the few remaining Roma classes is treated in a generalized way and presented as negative phenomena, representative of the entire education for the Roma. At the same time, measures that are clearly and consistently contributing to the improvement of Roma education in Poland have been ignored.

**Commentary to paragraph 81:**

The National Programme for the Prevention of Domestic Violence was adopted by the Polish Government on 25 September 2006 (not 2005, as mistakenly reported in the Memorandum).

**Commentary to paragraph 92:**

The Minister of Health is tasked, on behalf of the Council of Ministers, with preparation of reports on the fulfilment of the 1993 Law on family planning, protection of the human foetus and conditions of permissible termination of pregnancy<sup>28</sup>. In March 2003 and March 2005, the Minister of Health sent written instructions to the voivodes (province heads) concerning the obligation to rigorously implement the provisions of the cited law.

**Commentary to paragraph 93:**

Polish schools work in accordance with the mandatory core curriculum of general education, which elaborates the goals, tasks, content and achievements of the respective classes, including those on education for life in the family. The curricula and textbooks, before being put on the list on the Minister of National Education and endorsed for school use, are reviewed by experts.

The uniform core curriculum ensures that classes in a given subject across the whole country cover the same subject matter.

School work in the given subject is detailed in the appropriate curriculum. A textbook is a teaching aid in the implementation of the core curriculum. It is the teachers who choose the textbook and curriculum and selects the information conveyed to the pupils.

The textbooks and curricula approved by the Ministry of National Education do not contain any misleading or inaccurate information.

In 2003 the textbook that provoked the greatest controversy was deleted from the list of textbooks, while corrections were introduced in several others.

**Commentary to paragraph 94:**

The assertion that “The Polish law on termination of pregnancy is one of the most restrictive in Europe” is, in the opinion of the Ministry of Health, subjective and unsubstantiated by any official comparisons or research known to us. It is hard to determine if that opinion corresponds to reality, especially since similar regulations are in force elsewhere, e.g. Malta and Ireland.

As concerns the statement that “The Polish Parliament is currently discussing a proposed amendment to the Polish Constitution (Article 38) which would guarantee life from conception”, it should be pointed out that Parliament had conducted work on amending article 38 of the Constitution, but the proposed amendments did not gain a parliamentary majority and were rejected by the Sejm.

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<sup>28</sup> In accordance with the law, the duty of drafting and presenting to the Sejm a report on its implementation rests with the Council of Ministers. The Minister of Health prepares the draft report on the basis of data received from other ministries and institutions functioning in the sphere regulated by the law.

**Commentary to paragraph 95:**

In 2006, the national obstetrics and gynaecology consultant did not receive any reports or complaints concerning refusals to terminate an abortion compatible with the law. The Patients' Rights Bureau attached to the Minister of Health did not receive such complaints either.

*The Regulation of the Minister of Health of 6 October 2005 on the general conditions of contracts for the provision of health services* (Journal of Laws No.197, item 1643 – entered into force on 10 October 2005) regulates the question of the right to reproductive services (including legal abortion) in the event of the conscience clause being invoked by a doctor who refuses to perform the abortion (possibility to refuse in the situation specified in article 39 of the Law of 5 December 1996 on the professions of physicians and dentists – Journal of Laws of 2002 No.21, item 204, as amended). Under the Regulation, a doctor who works on the basis of labour or service relation and invokes the conscience clause is obligated to indicate a realistic possibility of the abortion being performed in another facility. The medical service-provider is obligated to have a contract with another medical facility prepared to provide the given service. The provision also applies when the mentioned circumstances appear in the course of carrying out the contract for the provision of health services.

In the instructions cited above in the comments to paragraph 92, the Minister of Health also pointed out that the conscience clause could be invoked only by a specific doctors in a specific case and that it could not be applied by an entire medical facility as a manifestation of collective conscience, affirmed through general declarations by the management of the facility. Under Polish law the conscience clause cannot be invoked in an informal way, because of the obligation to maintain medical records and inform superiors, i.e. a need to fulfil procedures laid down in the law.

**Commentary to paragraph 96:**

Poland wishes to underline that the judgement of the European Court of Human Rights of 20 March 2007 in the case of *Tysi c v. Poland* is not final and the appeal period has not yet expired. The Polish Government is planning such an appeal. In this connection, the measures recommended by the Commissioner will be enacted if the Court upholds its judgment of 20 March 2007.

**Commentary to paragraph 97:**

It can be assumed that the conclusions in the Commissioner's report are largely based on a subjective assessment made by one of the NGOs and presented at the UN in January 2007 (as a shadow report). Poland, in its report on the implementation of the UN Convention on discrimination against women refuted those accusations. The UN Committee on the Elimination of Discrimination Against Women accepted the explanations of the Polish Government regarding the availability of abortion in Poland.

The data on illegal abortions in Poland are not official data of the Ministry of Health and constitute estimates by medical specialists. No official statistics on illegal abortions are prepared in Poland, so the Ministry of Health only has data on the number of illegal abortions identified as offences and prosecuted under Polish law. These data are published in the form of reports on the implementation of the cited law.

**Commentary to paragraph 98:**

*This point in the Commissioner's report constitutes a summing-up and its respective provisions have already been addressed above.*

Regardless of the divergences of position identified above, Poland is open to multilateral dialog on the reproductive rights of women, even though any domestic measures in this sphere must comply with internal law and the consensus reached in the framework of the European Union. As noted above, the Minister of Health is striving to ensure adherence to the regulations on the reproductive rights of women and thus, the fulfilment of the inalienable right to freedom, legal protection of private and family life, maternity and health.

**Additional commentary:**

Poland endorses the interpretations, positions and references to reproductive health issues compatible with the Action Programme of the International Conference on Population and Development, held in Cairo in 1994, and the Beijing Declaration and Platform for Action of the 4<sup>th</sup> World Conference on Women, signed in Beijing in 1995<sup>29</sup>. It should be underlined that Poland's position on reproductive health must not only comply with international documents and guidelines, but must also strictly adhere to domestic law and protect the right of Poland to its separate stance. Since abortion in Poland is permitted in three precisely defined situations, Polish representatives must display extreme caution when preparing all positions on "sexual and reproductive health care, services and rights" so as to avoid creating the impression that Poland approves "abortion on demand"<sup>30</sup>. In view of the above, the wording of Polish positions on reproductive health is subject in each instance to consultations at national level. Since this matter provokes much controversy, also at international level (e.g. interpretation of the scope of medical services and women's rights in the sphere of procreative health), in international negotiations (including those at the EU), in each case Poland has to make the reservation that the question of consent to abortion on conditions other than those specified in Polish law is excluded at national level from the sphere of reproductive health.

**Commentary to paragraph 104:**

It is the rule that detainees awaiting deportation or aliens in reception centres have access to leaflets with information on their status and with the addresses and telephone numbers of foundations providing assistance to aliens. The leaflets are printed in four languages: English, French, Russian and Polish, and they are constantly available. Furthermore, various foundations have the right to distribute their leaflets in such facilities, providing information on the available forms of assistance.

Moreover, every alien admitted into a deportation facility or reception centre is informed in his own language about his rights and obligations, and is provided information about the organizations that offer assistance to aliens and the possibility of contact with them.

**Commentary to paragraph 105:**

Work is currently in progress on a law that will allow most aliens granted the right of tolerated stay to receive integration assistance in Poland.

**Commentary to paragraph 109:**

As in the case of minors applying for refugee status, aliens in this category are also immediately assigned court-appointed guardians who represent them in the deportation proceedings. Furthermore, pursuant to the provisions of the 1993 law on aliens, a minor is deported only in the care of a statutory guardian and is transferred directly to a representative of the competent authorities of the country to which the deportation is taking place.

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<sup>29</sup> Belgium, France and the Scandinavian countries are proposing with increasing frequency the inclusion in documents (e.g. EU speeches at the UN, draft resolutions) formulations that go beyond the language of those conferences, e.g. "sexual and reproductive health care and services", "sexual and reproductive health and rights", "reproductive health rights".

<sup>30</sup> Reference to abortion for social reasons.

**Commentary to paragraph 112:**

The Polish Government feels it is necessary to:

- delete the reference in the third sentence to the planned conferences since those plans have been cancelled,
- delete in the last sentence the words “According to the Ministry of Labour and Social Affairs”, since ratification is a competence of the Government and not the Ministry.

**Commentary to paragraph 116:**

The penalization of defamation, also perpetrated by way of the mass media, is common in European countries, so the Polish regulations are not exceptional. A person’s good name and dignity is a legal interest subject to protection; in particularly justified cases that protection may be affected through the application of penal law. Free media serve the freedom of public debate and democracy, but their activity can also have negative side effects, such as endangerment of the personal rights of the individual whose position – as compared with the power of the media – is incomparably weaker. The application in specific cases of penal measures for the protection of a person’s good name and dignity makes it possible to balance the position of the victim and perpetrator, and also, in a broader perspective, to prevent degeneration of public debate.

**Commentary to paragraph 117:**

It is fully agreed that resorting to criminal law measures to protect a person’s good name and dignity should be treated as exceptional, and justified only in cases of glaring abuse of the freedom of public debate. That is why the penalization of defamation under article 212 of the Penal Code should be considered jointly with article 213 of the Code, which stipulates that true charges and those raised in the public interests do not constitute an offence, even though they may have defamatory content.

Furthermore, the offence of defamation is subject to private prosecution by the individual concerned, which means that law enforcement authorities do not interfere with the freedom of speech. Such regime of penal responsibility does not pose a danger of constraining the freedom of expression and public debate, but serves to maintain and balance between potentially contradictory interests that are subject to protection. Neither the regulations in force, nor the practical interpretation and application of article 212 of the Penal Code can be considered restrictive. Furthermore, there are no grounds to suggest that the balance between the need to protect good name and dignity – and the need to protect freedom of speech - could be shifted in favour of the former, to the detriment of the freedom of public debate.

**Commentary to paragraph 118-123:**

Paragraphs 118-123 contain a factually accurate description of the process of elaboration of the new lustration law. After ten years of operation of the 1997 lustration law, there was broad agreement that the lustration procedures should be streamlined. Since its introduction in 1997, the old law had provoked controversy. It was essential to accelerate procedures and minimize the uncertainty of both the lustrated persons and authorities appointing specific individuals to managerial state posts. The law of 18 October 2006, with amendments submitted by the President, had the objective of introducing the appropriate changes.

**Commentary to paragraph 124:**

On 11 May 2007 the Constitutional Tribunal, acting upon a motion of a group of MPs, ruled that certain provisions of the new law were unconstitutional. Those provisions lost their binding force on the day the Constitutional Tribunal’s ruling was published in the Journal of Laws, that is on 15 May 2007. The law of October 18 2007 is an extensive and complex act. After some of its provisions were struck down, doubts arose as to the application of the

remaining provisions, which – while compatible with the Constitution – were to some degree linked to the challenged provisions. As a result, the lustration process has been largely suspended. The legislature will have to respond after the Constitutional Tribunal presents a written substantiation of its ruling, which is expected in the near future.

**Commentary to paragraph 125:**

As concerns the scope of application of the new law, it should be pointed out that the Polish legislature has full freedom in determining the categories of people covered by the lustration procedures. The basic criterion in selecting such persons is their potential to influence public life. The fundamental goal of lustration is to ensure transparency of public life, which must not be restricted exclusively to persons performing public functions *sensu stricto*.

**Commentary to paragraph 126:**

The ability of the IPN to process, without undue delay, incoming lustration statements does not pose a threat to the basic rights of the individual, the right to personal security and legal certainty. The lustration law introduced the assumption of veracity of the submitted statements. This means that as long as a court does not pass a legally binding judgement that a given statement is false, no one may challenge its veracity. Thus, any delays by the IPN would have no impact on the personal and professional situation of the lustrated person.

**Commentary to paragraph 127:**

The planned and intentional destruction of secret police files by the authorities of the former totalitarian state must not be treated as an obstacle to lustration in Poland. The fact whether files are complete and in order – or otherwise, is irrelevant to the reliability of the findings made in the course of the lustration procedure. These findings are the subject of autonomous assessment by an independent court, in proceedings based on the assumption of innocence. The judgement has to be based exclusively on the totality of the evidence presented to the court, so incompleteness of files would not pose a threat to the lustrated person.

**Commentary to paragraph 128:**

As a result of the ruling of the Constitutional Tribunal of 11 May 2007, journalists and the rectors and deputy rectors of private academic schools have been exempted from the lustration procedure, so they cannot be prohibited from working in their profession, which includes publishing activity.

**Commentary to paragraph 129:**

The solutions incorporated by the Parliamentary Assembly of the Council of Europe in Resolution 1096 of 27 June 1996 on measures to dismantle the heritage of former communist totalitarian systems and the provisions of Report 7568 of the Committee on Legal Affairs and Human Rights on the same subject had obvious influence on certain legal formulas applied in the Polish lustration law. The law guarantees a lustrated person's right to use defence lawyer, appeal to a court of the second instance and to move for resumption of proceedings. A lustrated person can also demand that the court affirm that in secretly and consciously collaborating with the security organs of the totalitarian state that person was acting under coercion, in fear of loss of his life or that of persons close to him.

**Commentary to paragraph 129 d:**

See commentary to paragraph 125.

**Commentary to paragraph 129 g:**

The systemic transformations and the eradication of socially negative remnants of the totalitarian system constitute a complicated and protracted process, not susceptible to planning ahead. The recommendation made in the mid-Nineties for lustration measures to be concluded by 31 December 1999 is not feasible.

Shortening the period of disqualification for office, imposed following lustration - as a postulate of the Commissioner for Human Rights of the Council of Europe – will doubtless be considered by the legislature, on condition that the new regulations, necessary after the ruling of the Constitutional Tribunal, will retain the present model of lustration.

**Commentary to paragraph 129 m:**

Lustration is conducted in accordance with the rules of the Code of Penal Procedure, so lustrated persons enjoy the relevant rights and guarantees. The law of 18 October 2006 introduced the rule of open hearings in lustration proceedings.

