

REPORT ON DRAFT LAW ON PENITENTIARY SYSTEM (# 5293 FROM 22.03.2021)

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RANDEL BARROWS

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INTRODUCTION

The Draft Law N5293 is intended to replace the existing Law N2713-IV On the State Executive Service of Ukraine, upgrade the legal frame for the Penitentiary System of Ukraine and introduce new approaches to the system's operation, including management and engagement of penitentiary staff. The Draft Law addresses the purpose, objectives and structure of the system and the legal status, powers and obligations of staff. To provide a full understanding of the place of the new law within Ukrainian penitentiary framework, it is necessary to consider the draft law alongside of existing legislation and regulatory framework. It includes the Criminal Code of Ukraine, The Criminal Executive Code and various Ministerial Orders for the Penitentiary system including Internal Regulations for Penitentiaries; Types of Penitentiary institutions and the Allocation of prisoners thereto and others. The legal framework also reflects the actual criminal and sentencing policy in Ukraine. This is defined in the Strategy for the Penitentiary System until 2026 and the Strategy Implementation Plan for the period 2022-2024. The document sets a clear and strong statement of purpose and objectives for the Penitentiary system that, if achieved, would meet the best European and International Standards. However, the specific mechanisms and measures for achieving these objectives remain insufficiently detailed. The same concerns the principles of the Strategy, which are formulated in a progressive way, but would present a challenging task for any penal institution.

The European frame for the draft law includes Committee of Ministers Recommendations and Rulings, decisions of the European Court of Human Rights (ECtHR) and reports on the Ukrainian Penitentiary System of the Committee for the Prevention of Torture. There are also established international standards, primarily from the United Nations. (see References for a full list of relevant documents). Both international and national sources make clear that Ukrainian Penitentiary system requires further modernisation and reform, despite some noted improvements.¹

The Draft Law is accompanied by a complementary draft law on the Disciplinary Charter of the Penitentiary System (2021). This issue is to be addressed in a separate report, however it contains provisions that overlap with the Penitentiary draft law.

The Importance of Adopting the Draft Law

Though the Ukrainian Penitentiary System still retains features inherited from the Soviet Union, it has undergone significant transformations since Ukraine gained its independence. These changes include the adoption of the Law on Probation in 2015, the dissolution of the Penitentiary Service and the transfer of its powers to the Ministry of Justice, and the penitentiary reform being included in the Government Action Plan for 2016. In 2016, the state institution Health Care Centre of the State Criminal Executive Service of Ukraine was established. In 2018, the reform passport was approved by the Ministry of Justice, and since 2021, new approaches have been introduced for working with inmates, including the implementation of risk assessment of reoffending, case-management and correctional programmes.

In 2022, there was adopted the Strategy of Penitentiary Reform until 2026. The achievement of the goals

¹ See, for example the CPT report of its October 2023 visit to Ukraine. CPT/Inf (2024) 20 (summarised at Appendix1)

set forth in the Strategy — including the establishment of an effective system for the prevention and eradication of torture, cruel, inhuman, or degrading treatment or punishment; the protection of the right to healthcare and social services in penal institutions and remand centers; the enhancement of methods and tools for the correction and reintegration of offenders; the development of a modern system for training and managing penitentiary personnel; and the expansion of digitalization within the penitentiary system — requires the adoption of corresponding legislative reforms.

Meanwhile, the Law on the State Criminal Executive Service, adopted in 2006, remains outdated despite several amendments. This Law refers to the Criminal Executive Inspection as the body responsible for enforcing community sanctions, even though this body was dismantled in 2017 following the establishment of probation. Furthermore, it does not address rehabilitation, which both the prison and probation sectors are expected to implement. The Law also overlooks the needs of the staff, including tools for their motivation, retention, and training. Therefore, new legislation is needed to reflect the changes already made to the system and lay the groundwork for future reforms.

EXECUTIVE SUMMARY

An in-depth analysis of Draft Law No. 5293 On the Penitentiary System was conducted for the purpose of the assessment of the draft law's provisions for their compliance with the strategic objectives of the criminal justice system, the Ministry of Justice, and the penitentiary service, particularly in the context of implementation of the Penitentiary Reform Strategy and the requirements arising from the European integration process. The analysis draws upon enforcement practices, comparative legal approaches in EU Member States, as well as applicable international standards and recommendations.

The following key recommendations arise from the analysis:

- ✓ Establishing a separate Probation Agency allows for a stronger focus on further developing non-custodial sentences in collaboration with judicial and prosecutorial authorities, ensuring that alternatives to incarceration are effectively implemented.
- ✓ Transferring responsibility from the Ministry of Justice to the Ministry of Health in line with WHO and CPT recommendations, to make sure that prisoners receive medical care similar to that provided in the general healthcare system. To facilitate this transition, a two-year implementation period is proposed, during which the Ministry of Justice would still manage prison healthcare before full integration into the general state system.
- ✓ Improving policy regarding the prevention of torture and responding to such cases. The provisions should be amended to make sure that any such cases are timely reported to law enforcement and properly investigated by both internal and external bodies.
- ✓ Providing for all incidents where firearms or other means of lethal weapon are deployed are investigated by the Inspectorate and a 'lessons learned' report prepared.
- ✓ Shifting in the way prisons enterprises and workshops operate within the penitentiary system. Instead of focusing solely on serving the needs of prisons, they should prioritize skill development and employment opportunities for inmates.
- ✓ Strengthening the Inspection function, including providing for their powers to make unannounced inspections and develop a programme of both location and thematic inspections with the focus of inspections on policy implementation and standards compliance as well as aspects of quality assurance
- ✓ Introducing safeguards that are necessary to align with European data protection rules to prevent abuse of personal data in the Unified Register of Convicts
- ✓ Introducing the concept of staffing arrangements in penitentiary and probation settings based on workload calculations that take account of complexity, convict risk and need levels and variable location factors.



RECOMMENDATIONS

General characteristics of the Draft Law

The Draft Law covers a very broad spectrum of issues. It describes the Objectives and Purpose, Structure of Penitentiary System, Resources, Functions, Inspections, Protection of Human Rights, Facilities, Health Care and Probation. The Draft Law contains an extensive and detailed section related to the staff of penitentiary system. *Section III* addresses staff recruitment, training, promotion, incentives, re-assignment and dismissal; *Section IV* addresses competencies of the staff and *Section V* concerns the conditions of service including working hours, leave, remuneration, medical care, living accommodation and pensions.

The inclusion of such provisions within the text of the Penitentiary Law appears uncommon, given that matters pertaining to staffing are generally regulated by subordinate normative acts, such as ministerial regulations or administrative ordinances.

There may be some justification for this, including the previous intention of partial de-militarisation of the Penitentiary system and the need to clarify roles, responsibilities, duties and rights.

However, inclusion of all this Human Resource section, which is input focused, in the Penitentiary Law, is not aligned with the output and outcome focused elements related to achieving the key strategic objectives. It might therefore be preferable to have a separate law covering the scope of Sections III, IV, V, (together with *Article 12* on staff education) and framework piece of legislation on the Penitentiary system including management structure, facility development, establishment of custodial regimes, allocation of prisoners, improvements to healthcare, training and employment, reporting of ill-treatment, inspections, partnerships with other bodies, Probation, financing etc, namely *Sections I, II, VI, VII and VIII* of the Draft Law. This would provide a greater focus on the reforms of the Penitentiary System that contribute to the broader goals of security, human rights, rehabilitation and the reduction of re-offending.

Recommendation 1

It is proposed to consider splitting the Draft Law N5293 into two pieces of legislation. One being the framework law describing the structure of penitentiary system, its principles, goals, objectives etc. Another – to be specifically dedicated to the staffing issues

Reporting on torture and ill-treatment

The draft law appropriately outlines the expected standards of conduct for staff in their interactions with prisoners; however, it lacks sufficiently detailed provisions regarding the mechanisms or consequences applicable in cases of non-compliance with these standards.

Where a substantial cultural shift is necessary, such change can only be effectively achieved through the adoption and consistent application of a zero-tolerance approach to non-compliance.

This means that the desired behaviours must be encouraged and rewarded and that deviations must be swiftly prosecuted and treated respectively. The relevant response measures should be in place to ensure compliance and reinforce the intended standards.

According to Article 4 of the Draft Law, the personnel have to report the facts of torture to the immediate supervisor. However, according to Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec 10, 1984), each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. As European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stated in the report from 2023, such crimes as torture or intentional bodily harm are usually investigated by the State Bureau of Investigation (SBI) and tried by courts. Prosecutors' offices currently supervise legal compliance in penitentiary authorities and facilities. And as CPT stated with respect to ITTs (temporary detention centers of National Police) "32... Information on injuries (and ill-treatment allegations) should be directly transmitted from ITTs to the SBI..."²

According to Paragraph 9, section XV of the Constitution of Ukraine, 9. The prosecutor's office shall, in accordance with the laws in force, continue to perform the function ...of control over compliance with laws in the execution of court decisions in criminal cases and in the application of other coercive measures related to the restriction of personal liberty of citizens until the effective date of the law on the establishment of a dual system of regular penitentiary inspections.

Recommendation 2.

If any Penitentiary staff member is aware of facts of torture, s/he must report them to law enforcement to ensure accountability, preservation of evidence and prevention of such cases in the future. Moreover, it is proposed that internal investigations should take place in all cases when facts of torture become known to penitentiary staff, not just where there is a suspicion of hiding these facts. The penitentiary officers should be trained to recognize such cases and keep abreast of bodies responsible for conducting investigations of these offences. Where any form of torture, cruel, inhuman or degrading treatment or punishment is detected or reported, the central executive body that implements state policy for management of criminal sentences should conduct an independent investigation. The management of the penitentiary institution should facilitate the investigation and cooperate with the investigatory team. The Ombudsman (Parliamentary Monitoring Body) could be invited to nominate a member of the investigatory team.

Penitentiary Staff

Paragraph 3 of Article 4 appears misplaced within this section of the Draft Law, given that the rights and obligations of staff are addressed in detail in other provisions of the text. It is proposed to focus the Art. 4 on the protection of prisoners' rights. Furthermore, 'High standards' needs a context. All staff should have a professional focus on security, human rights, decency, individualised sentence planning and encouragement of purposeful and rehabilitative activity by prisoners.

Recommendation 3

It is proposed to remove the paragraph 3 of Art.4 and focus this provision of the protection of prisoners' rights

Paragraph 4 of Article 5 sets out staffing levels for penitentiary and probation institutions, expressed as ratios of staff to prisoners and probationers, respectively. This appears arbitrary, an exercise in workload

² CPT/Inf (2024) 20

calculations might provide a more accurate forecast than a ratio of staff to service users. Internationally, there is usually a workload calculation to determine staffing where Probation caseloads include a weighting for complex /high risk cases, number of reports written. Similarly, penitentiary staffing takes account of the nature of the institution and the inmate population. A Juvenile facility, for example would have more staff than an adult institution.

Recommendation 4.

The Law should introduce the concept of staffing arrangements in penitentiary and probation settings based on workload calculations that take account of complexity, convict risk and need levels and variable location factors. Ĩ

Structure and Organisation of the Penitentiary System

These Articles describe the structure of the system including the Central Executive Body (CEB), penal and detention facilities, probation bodies, educational and healthcare facilities and other enterprises and organisations.

The desired reforms in the Penitentiary system require significant resources and continuous focused effort. There is a question about the current structure as far as focus is concerned. If a central objective of state penal policy is to enhance the use of non-custodial penalties, either at the point of sentencing or through greater use of early conditional release, the Probation function may need to be strengthened politically and institutionally. The operating environment, key stakeholders and methodology of Probation are all significantly different from the Penitentiary system. For example, Probation needs to understand, be understood by and co-operate with local communities, municipalities and civil organisations and elicit close co-operation, understanding and trust of prosecutors and courts. Currently the Probation function is part of the Central Executive Body (CEB). It could be fully independent, with a director reporting to a Deputy Minister or have greater operational and budget freedom and responsibility within the current structure. In the current Draft Law (at Art. 10), the central executive body that forms state policy of the execution of criminal punishment and probation, may establish a state institution within the structure of which branches and authorized bodies on probation issues operate. It is unclear who establishes and rules over probation bodies if this “state institution” is not established.

There are similar questions about the CEB responsibilities for Educational Institutions and Health Bodies. Education and Health care are two of the areas where offenders have been disadvantaged. Indeed, as the CPT has pointed out an inadequate level of health care can lead rapidly to situations falling within the scope of the term ‘inhuman and degrading treatment’ and a report on Ukraine identified the impact of poor penitentiary conditions and lack of access to exercise and fresh air ³. As in a number of European countries, the health and education services received in prison should at least match that provided to other citizens in the community. In Ireland, for example, the prison healthcare service provides prisoners with access to the same range and quality of healthcare services as that available under the Medical Card scheme in the community. Additionally, educational services are available in all prisons and are provided in partnership with a range of educational agencies including the Educational Training Boards (ETBs), Public Library Services, the Open University and the Arts Council. The Department of Education and Skills provides an allocation of 220 whole-time teacher equivalents.⁴

In fact, because of their disadvantages, there is a strong argument for a ‘premium’ service for prisoners in these areas. This is not altruism. There are strong correlations between education (and related

³ Paragraph 57-60, on Ukraine; General Report CPT/Inf (2018) 28

⁴ Source: Irish Prison Service ; irishprisons.ie

employment) disadvantages and criminal behaviour. There are strong correlations between health (especially mental health and substance misuse) and criminal behaviour. The statement in this document about health responsibilities in the law is located in Section VIII on 'Transitional Provisions'. There should be a more robust approach.

Recommendation 5

In furtherance of strategic objectives, the law should strengthen the role of the Probation Service. It should have greater strategic and financial autonomy and consideration should be given to the longer-term creation of a separate Probation Agency. A clear list of functions and authorities that such a Probation Agency will have; including putting in place clear rules on who creates and liquidates probation bodies, appoints their heads, issues instructions and orders obligatory for compliance, etc., should be set in the DL

Recommendation 6

The health care of prisoners is recognised across Europe as a crucial factor in ensuring human rights and supporting rehabilitation. The Law should introduce a timetable for the transfer of this function to the Ministry of Health in Ukraine.

Penitentiary inspections

The inspection function is critical for the achievement of the stated objectives. Inspection reports, if acted upon, can be a key driver for change and improvement. The focus and nature of inspections is crucial as is the selection and training of staff who will undertake inspection work. There is a risk that inspections only consider what is written down and do not really observe the reality of life in a prison. An effective national inspection system should be able to identify issues that need addressing before any external or international inspection takes place e.g. CoE CPT inspections. A decision should be made as to whether the Inspectorate should make 'unannounced' inspections.

A well-designed programme of inspection should include two elements. The first is general inspections of Penitentiaries that determine whether specific laws, rules and procedures are complied with within the different structural units of each Penitentiary; the second can be described as thematic inspections. These inspections look at one area of policy or procedure across several prisons. For example, it could be a thematic inspection on Reception arrangements or on vocational education etc, etc. Inspection teams should include a diverse group of staff. This might include people with relevant professional background (e.g. former staff of the CEB, Penitentiary or Probation; psychologists, lawyers, health professionals, pedagogues) together with civil society actors. In addition to full-time staff, it is desirable to include people contracted for specific prison inspections and/or areas of specialist knowledge or interest.

Recommendation 7.

The Inspection function should be significantly strengthened. It should make unannounced inspections and develop a programme of both location and thematic inspections. The focus of inspections should be both policy implementation and standards compliance as well as aspects of quality assurance e.g. written assessments, the level of meaningful out of cell activity, preparation for release. Inspection teams should be diverse and include professionals on short-term contracts.

Part 6 of the Article 7 relates to social educational and psychological work and vocational training and employment. These are crucially important areas both in terms of the promotion of dynamic security within the prison and in the helping realise key objectives of rehabilitation and reducing the risk of re-offending following release. Education, Training and Employment are internationally recognised as the most frequent factors in determining criminal behaviour. These criminogenic factors can and should be addressed in prison. The spectrum of interventions includes remedial work with those who lack basic maths and reading/writing ability, professional and vocational study and work experience. Ideally, education should be provided through the Ministry of Education. This would 'mainstream' the provision of education (as with the proposals for prisoner healthcare).

Vocational training and prison employment opportunities should build on previous qualifications and work experience wherever possible. Attention should be paid to the analysis of future economic trends: Where are the areas of potential labour market growth? Can prisoners be trained in these areas? (Examples might include a post-war boom in building trades and tourism from Europe and elsewhere).

Recommendation 8.

It is clear from the available data that there is a strong link between lack of money and acquisitive crime. In addition, the means of securing a regular income – employment – conveys status and 'belonging' and provides a stake in society. Rehabilitation work in prison can improve employability and education and training can enhance knowledge and skills. The law should state that Workshops in prison should aim to provide national vocational qualifications and be developed in areas of work where there are demonstrable job opportunities.

Recommendation 9.

CEB may research labour market trend data to determine the areas of future labour market growth in Ukraine. Wherever possible, new workshop and employment opportunities developed in Penitentiaries should provide skills and experience in areas where there are job opportunities.

Penal Institutions and their facilities

As with regime, form should follow function. In other words, Penitentiaries and facilities therein should be organised to achieve objectives – broadly security, rehabilitation and preparation for release for re-integration into a law-abiding life.

Part 3 of Article 9 relates to the provision of Workshops. Detail on the nature and organisation of Workshops is not provided. The Workshops might usefully be developed in partnership with private or public bodies that are potentially able to provide post-release employment for those who show interest, motivation and aptitude. They should seek to replicate such workplaces in the community as far as possible and teach skills/provide experience for which there is a demand in society.

Recommendation 10.

In all aspects of Penitentiary Management, including the appointment of senior staff and development of a regime or regimes, the Central Executive Body should seek to optimise security, particularly dynamic security, the human rights and safety of inmates, staff and

visitors and preparation for release towards a law-abiding life. To maximise links with family, community and other pro-social influences, it could be specified that the workshops could be established in partnerships with potential employers and focus on enhancing the employability of released prisoners.

Probation Service

As discussed above (see Recommendation 5), given the challenges for the Penitentiary system, there is an argument for having a separate executive body for Probation so that there is sufficient strategic focus on the development of non-custodial sentences in co-operation with other criminal justice stakeholders in the community such as the judiciary and prosecutors. Indeed Part 2 of Article 10 identifies the need for a State Institution for Probation functions though as things stand it would be part of the CEB.

Healthcare

In accordance with the recommendations of the WHO European Regional Office, to ensure the right of prisoners to proper medical care, the application of the principle of equivalence in the provision of medical and sanitary services in the institutions of the DKVS, medical facilities in such institutions should be integrated into the state health care system. They should be managed and controlled by the Ministry of Health. The strength of this recommendation is reinforced by CPT findings and recommendation in Ukraine. In the report on its 2017 periodic visit to Ukraine, the CPT called upon the authorities to step up their efforts to transfer the responsibility for prison healthcare services from the Ministry of Justice to the Ministry of Health.⁵

The draft Law stipulates the establishment of a state institution for Penitentiary healthcare. But **there are no terms or deadlines for such a transition**. According to the Concept of Reforming (Developing) the Penitentiary System of Ukraine Approved by the CMU Order of September 13, 2017 No. 654-r, "... the Ministry of Justice plans to establish a state institution "Health Care Centre of the State Penitentiary Service", which will allow to ensure the implementation of the reform of the medical service of penitentiary institutions and make the doctor independent of the head of the penitentiary institution ...

The next step will be to take a set of measures for the planned transfer of the function of providing **medical care to convicts and persons taken into custody from the Ministry of Justice to the Ministry of Health**".

Recommendation 11

We recommend stipulating by the DL (in the main body of the text) that healthcare is provided to convicts and persons taken into custody by healthcare institutions under the responsibility of the Ministry of Health and set a transitional period (in Transitional Provisions), e.g. two years, during which these institutions could be managed by MoJ within prison system.

Educational Institutions for staff

The draft law (Article 12) locates overall responsibility for these institutions with the CEB. There are various staff functions within the Penitentiaries, including management and staff supervision, security duties,

⁵ CPT/Inf (2018) 41

social work, psychology and various service functions including catering and building maintenance. It is usually helpful to consider education requirements in three-ways: pre-entry requirements, initial or induction training and ongoing training or continuous professional development. A clear distinction should be made between pre-entry educational qualifications and specific training for work in Prisons or Probation.

European Prison Rules provide that «before entering into duty, staff shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests. Management shall ensure that, throughout their career, all staff maintain and improve their knowledge and professional capacity by attending courses of in-service training and development to be organized at suitable intervals”

The key objectives and goals of the system should be reflected in the job descriptions and person specifications for staff roles -particularly those in leadership positions. This exercise would make pre-entry qualifications clear and a change in key objectives might lead to a change in recruitment priorities. Additionally, the CEB might develop partnerships/ memoranda of co-operation with academic institutions to encourage interest in a Penitentiary career. This could include Criminal Justice options on bachelor’s or master’s degrees in law, Psychology, Social Work and Pedagogical courses. Interested students might have familiarisation visits or even a short field placement.

Initial or Induction training conducted by Penitentiary Educational Institutions should also reflect the developing key objectives. All staff should have some understanding of the psycho-social causes of crime and the role they can play in rehabilitation simply by behaving in pro-social ways. Given that effective prison management requires close teamwork, initial and induction training should have multi-disciplinary elements.

Further training or continuous professional development should also reflect key objectives and be linked to staff appraisals. It can and should include training in Penitentiary Educational Institutions and relevant external training opportunities. Both Induction training and further training can include online or remote learning. Staffing within Educational Institutions should equip Penitentiary staff with the necessary skills and experience to assist in the delivery of both induction and further learning. Finally, mentoring of new staff should not be left to chance. The selection of suitable mentors amongst staff in all functions can provide ongoing support and training and provide career enhancement for those selected as mentors.⁶ Finally, to promote recruitment and staff retention, potential career paths should be clear and transparent to all staff. To address the current penitentiary staff shortage further attention should also be given to the conditions of service, including salary, pension, shift patterns, leave etc for all grades of staff.

Recommendation 12.

Staff training should be conceptualised in the law as pre-entry training and education followed by in-service training. The potential of remote or online learning should be fully developed. The Penitentiary and Probation services should engage with relevant educational faculties to develop options on bachelor’s and master’s degrees to improve knowledge and understanding of criminal justice execution functions. This might include familiarisation visits or placements for students.

Recommendation 13.

The law should require Initial induction training followed by workplace mentoring for all staff. All staff in criminal executive functions should be educated in the basics of crime causes and human development. Ongoing training or continuous professional development should be linked to key system objectives and individual staff appraisals.

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A good example of a well-developed mentoring scheme can be found in the Irish Prison Service. A long history of informal staff mentoring was formalised in 2012 and is a key element in staff development. www.irishprisons.ie

This part of the draft law could provide a legal basis for encouraging business enterprises to develop partnerships with the Penitentiary system. However, the current drafting does not facilitate this. Indeed, it expressly prohibits external business enterprises and gives a monopoly of any such enterprises to the CEP. Furthermore, the focus of such enterprises is primarily the ‘functioning of the Penitentiary system’. The needs of the Penitentiary system should be secondary to the provision of employment and training opportunities for convicts. In some cases, for example, hospitality, there will be overlap but the primary focus should be on skill development in areas where there are post-release employment opportunities. Workshops should provide ‘real-life’ working conditions combined with vocational training. In practice this requires a partnership with enterprises in the community from both state and private sectors. There are numerous European examples. In Germany and Netherlands, for example, a partnership with major engineering companies has created prison workshops that provide high standards of training. Inmates can complete a recognised engineering qualification. Indeed, some re-enter the prison-based facility daily after their release in order to complete their training.

Recommendation 14.

The realisation of partnerships that contribute to key strategic objectives requires active engagement and partnership with employers in sectors that might provide future employment for released prisoners. Safeguards are required so prisons do not just become a source of cheap labour but there are many international examples to draw on. The law should actively encourage public-private partnership in this area.

The necessity of keeping the state-owned enterprises within CEP should be reconsidered in light of new regulatory framework for SOEs, notably the Law №4196-IX «On the specific regulation of the activities of legal entities of certain organisational and legal forms during the transitional period and of associations of legal entities.»

Unified Register of Convicts

This database is an essential information management tool for any modern Penitentiary Service. The draft law makes its purpose and function clear. It provides an individual electronic record for each inmate and aggregate data on the prison population and its characteristics.

In the context of Ukraine’s accession process to the European Union, the state is required to align its national legal framework with the *acquis communautaire* and the legal standards of the European Union.

The Directive (Eu) 2016/680 of the European Parliament and of the Council of 27 April 2016 “On the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data”, and repeals Council Framework Decision 2008/977/JHA

(Article 22 Processor) states that Member States shall, where processing is to be carried out on behalf of a controller, provide for the controller to use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of this Directive and ensure the protection of the rights of the data subject.

The Preamble (33) provides that where this Directive refers to Member State law, a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned.

However, such a Member State law, legal basis or legislative measure should be clear and precise and its application foreseeable for those subject to it, as required by the case-law of the Court of Justice and the European Court of Human Rights. Member State law regulating the processing of personal data within the scope of this Directive should specify at least the objectives, the personal data to be processed, the purposes of the processing and procedures for preserving the integrity and confidentiality of personal data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.

Article 11 of the Directive (Automated individual decision-making) states that Member States shall provide for a decision based solely on automated processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller. Decisions referred to in paragraph 1 of this Article shall not be based on special categories of personal data referred to in Article 10, unless suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place. Profiling that results in discrimination against natural persons on the basis of special categories of personal data referred to in Article 10 shall be prohibited, in accordance with Union law.

Recommendation 15.

The objectives, the personal data to be processed, the purposes of the processing and procedures for preserving the integrity and confidentiality of personal data and procedures for its destruction should be added to the Law to provide sufficient guarantees against the risk of abuse and arbitrariness. Provisions with regard to the right to obtain human intervention in case of automated decision-making should be added.

Interaction with State Authorities, Local Self-Government Bodies, Enterprises etc.

It is proposed to enhance this provision to adequately fulfil its purpose. It is particularly important for Probation to have strong connection and recognition by different authorities, local administrations and other bodies.

Addressing crime should not be regarded as the exclusive responsibility of the criminal justice system. The Ministries of Health and Education, local municipalities and other bodies can make an important contribution to both the prevention of crime and the rehabilitation and reintegration of offenders.

As discussed in relation to **Art.13** (and *Recommendation 17*), the development of inmate training and employment opportunities in penitentiaries could be significantly enhanced by adopting the model of partnership with the private sector seen in a number of European countries.

Powers of penitentiary staff and interaction with inmates (Section IV Articles 44-48)

This section of the draft law concerns powers of the personnel and commanding officers. It can only be considered within the wider context of the Criminal Executive Code 2004-2021 and the Order for Internal Regulation for Penitentiaries 2018-2024 which provide the settings in which staff exercise their powers and responsibilities. It is of course necessary to provide a legal framework for relationships

between staff and convicts and the required checks and balances. (see Recommendation 1.)

Article 44 describes the powers of the personnel and commanding officers. However, the list of powers does not include preparation for release of the inmates which is required by the Criminal Executive Code (articles 13, 61, 98, etc.) This should be done whether it is a normal release at end of sentence or early conditional release during sentence. Giving the importance of the preparation of inmates to be released into society and be ready to live a law-abiding life, this function should be included in the powers and duties. The list of powers also might be completed with preparation for transfer to another institution.

Recommendation 16.

Preparation for Release and Assessment for Conditional Release should be added to this part of the law.

Article 48 sets up the general rules of the use of physical coercion and firearms. In addition to reporting mechanisms described, whenever firearms or other means of lethal weapon are deployed, a report should be prepared by the Inspectorate regarding 'lessons learned' to help improve security and reduce future violent incidents.

Recommendation 17.

All or any incidents where firearms or other means of lethal weapon are deployed should be investigated by the Inspectorate and a 'lessons learned' report prepared.

Conditions of service for staff (Section V Art 49-61)

These Articles relate exclusively to conditions of service for staff. As recommended in the introduction above (Recommendation 1.), these issues might be better located in a separate law or Order aimed at improving recruitment, retention, working conditions, benefits and career opportunities.

Cooperation with communities (Sections VI Art 62-64)

These Articles describe arrangements for financing and support.

Art. 62.3 relates to the financial support that local authorities may provide to Penitentiary Bodies. Art 62.4 states that local authorities shall provide probation bodies with local offices, transport and other supplies free of charge. Experience in other countries (e.g. Georgia) has shown that it is possible to locate Probation offices in public buildings that also provide other services to citizens. This is cost-effective and improves integration of offenders with local services and their communities. (n.b. some safeguards are needed e.g domestic violence cases).

Recommendation 18.

The law should encourage dialogue between senior Probation personnel and local authorities to explore how Probation facilities can be integrated into local plans and other community facilities.

Article 4 anticipates the transfer of responsibility of medical facilities for both prison inmates and staff to the Ministry of Health executive body. This is a welcome development and reflects European trends. A key question is to set a target date or implementation plan for this process. (See Recommendation 6.)

Articles 5-14 describe the transition for staff moving from military ranks to civil service positions and the protection of certain rights. If recommendation 1. to separate the Draft Law into two parts is accepted, these Articles would concern the staffing and HR law.

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The great majority of the interviewed persons who were, or had recently been, in police custody indicated that the police had treated them correctly. The Committee takes note of this positive finding, illustrating the results of efforts deployed by the Ukrainian authorities in recent years to improve the treatment of persons detained by the police. That said, the CPT's delegation did receive allegations of physical ill-treatment (shortly after apprehension, in the police vehicle or at the police establishment, prior to questioning) and excessive use of force upon apprehension as well as of psychological pressure and threats.

Regarding the fundamental legal safeguards against ill-treatment (notification of custody, access to a lawyer and to a doctor), the CPT's findings suggested that the situation had generally improved as compared to its previous periodic visit to Ukraine in 2017. In particular, it is positive that persons in police custody were almost systematically questioned in the presence of (usually *ex officio*) lawyers. The Committee also notes with interest the ongoing progress in introducing a nation-wide comprehensive electronic custody record (ARMOR) and the development of the institutions of Human Rights Inspectors (working in temporary holding facilities) and of the State Bureau of Investigation (tasked *inter alia* with the carrying out of criminal investigations into possible cases of ill-treatment by law enforcement officials).

As regards prison establishments, whilst welcoming the continued efforts made by the Ukrainian authorities over the past 25 years to reduce the country's prison population, the Committee notes that the proportion of remand prisoners remained high and that many remand prisoners continued to be held in overcrowded conditions for prolonged periods of time.

The delegation received no allegations of recent ill-treatment by staff in any of the prisons visited. However, the visit revealed that the long-standing phenomenon of informal prisoner hierarchy was still prevalent throughout the Ukrainian prison system. In this context, the situation of persons considered to be "humiliated", that is, those who find themselves at the bottom of this hierarchy, remains a matter of serious concern to the CPT. These prisoners continued to be rejected by the mainstream prison population and were required by the hierarchy's "code of conduct" to comply with a range of restrictions (for example, to avoid any physical contact with other prisoners, not to use communal facilities, etc.). Moreover, such prisoners were frequently compelled to perform "dirty" work (such as cleaning toilets and collecting rubbish) for which they were not paid.

In some of the prisons visited, the general policy was to separate this category of prisoners from the general inmate population for protection reasons, grouping them together in dedicated cells. In some other establishments, however, no such policy was in place; as a result, the "low caste" prisoners were often exposed to a risk of violence, intimidation and exploitation by their cellmates. The CPT calls upon the Ukrainian authorities to develop and implement a comprehensive strategy for combating inter-prisoner violence and intimidation and tackling the phenomenon of informal prisoner hierarchy with all its negative consequences. Steps should also be taken to significantly increase staffing levels in the prisons visited, with a view to reinforcing the presence of custodial staff in the detention areas.

Most of the prisons visited by the delegation were located in old buildings which had not undergone any major refurbishment for years, if not decades. As a result, the bulk of the prisoner accommodation in these establishments was in a poor state of repair (damp-ridden and crumbling walls, damaged floors, rusty sanitary installations, bug-infested bedding, limited access to natural light and ventilation, etc.). The situation was particularly precarious at Odesa Pre-Trial Detention Facility (SIZO) where the conditions of detention of the great majority of prisoners could, in the CPT's view, easily be considered as inhuman and degrading.

The Committee also notes with concern that the situation in respect of out-of-cell activities for remand prisoners had not improved since its previous visits. As in the past, with the exception of a small number of working prisoners, adult remand prisoners (including women) held in the prisons visited were effectively confined to their cells for up to 23 hours a day, with hardly any out-of-cell activities available to them, apart from daily outdoor exercise. The regime applied to life-sentenced prisoners was similarly poor; moreover, they were still not allowed to associate with prisoners from other cells.

As concerns the provision of healthcare to prisoners, recommendations are made, inter alia to increase the complement of general practitioners and the nursing staff resources in the establishments visited. The Ukrainian authorities are also called upon to improve the existing procedures for the recording of injuries observed on prisoners and to ensure that medical confidentiality is fully respected.

REFERENCES

1. European and International Standards and Rules for Penitentiary Systems

- 1.1 Recommendation CM/Rec (2021) 6 regarding the assessment, management and reintegration of persons accused or convicted of a sexual offence
- 1.2 Recommendation CM(2017) 3 on the European Rules on community sanctions and measures United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules 2015)
- 1.3 Recommendation CM (2014) 3 concerning dangerous offender
- 1.4 Recommendation CM (2012) 5 on the European Code of Ethics for Prison Staff
- 1.5 Recommendation CM (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse
- 1.6 Recommendation CM (2006)2 on European Prison Rules
- 1.7 Recommendation CM (2003) 23 on the management by prison administrations of life sentence and other long-term prisoners.
- 1.8 Recommendation CM (2003) 22 on conditional release (parole)
- 1.9 Recommendation CM (99) 22 concerning Prison Overcrowding and Prison Population Inflation
- 1.10 Recommendation CM (98) 7 concerning the ethical and organisational aspects of health care in prison
- 1.11 Recommendation CM (93) 6 concerning prison and criminological aspects of the control of transmissible diseases including aids and related health problems in prison United Nations Rules for Juveniles deprived of their liberty (45/113 1990)
- 1.12 Recommendation CM (89) 12 on education in prison
- 1.13 Recommendation CM (82) 16 on prison leave
- 1.14 Recommendation CM (79) 14 concerning the application of the European Convention on the supervision of conditionally sentenced or conditionally released offenders

2. Other References

- 2.1 Handbook for Prison Standards in Georgia, EU Project/ Special Penitentiary Service (unpublished)
- 2.2 (based on international standards , Georgian law and ECtHR judgements) 2019 Topics : The handbook includes the following topics: Effective security; Protection of vulnerable prisoners; Search; Isolation; Transfer to another penitentiary establishment; Somatic health care; Mental health care; Protection of prisoners prone to suicide; Child health care; Dealing with substance abuse; Screening for infectious diseases; Force feeding; Right to respect for private life; Freedom of thought, conscience and religion; freedom of expression; Right to education; Non-discrimination; Effective investigation; Rehabilitation and reintegration
- 2.3 Prison Rules of England & Wales 1999 N.728
- 2.4 Prison Rules of England & Wales 2017 N.576



