

## **FEEDBACK**

on the European Commission's proposal for a directive amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

# **Enhancing the rights of victims of crimes in prison**

EUROPEAN PRISON LITIGATION NETWORK

FORUM PENAL – ASSOCIATION OF CRIMINAL LAWYERS

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This submission was prepared in partnership with:

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1. Guaranteeing victims of crime<sup>1</sup> in detention effective access to justice, appropriate protection measures and adequate compensation is essential to preserving the dignity of detainees and fully implementing the principles of the rule of law across the European Union (EU). At a more practical level, harmonising upwards victim's rights in detention can only strengthen mutual trust between Member States and therefore contribute to the effectiveness of judicial cooperation between Member States (see below, para. 18-20).
2. The need to take account of the specific situation of prisoners victims of crime was already highlighted in the EU strategy on victims' rights (2020-2025), published eight years after the 2012 victims' rights directive (VRD) entered into force. The strategy not only acknowledged the scale of the phenomenon (with one prisoner out of four worldwide reporting being victimised by violence each year) but also stressed that their captive and stigmatised condition hinder their access to justice and to protection.<sup>2</sup>
3. The amendments to the VRD proposed by the European Commission in July 2023<sup>3</sup> contain a number of elements designed to address the shortcomings identified in the current text.<sup>4</sup> Among other things, prisoners' vulnerable position as a result of their limited mobility and dependency from the offender (prison staff or other prisoner) is explicitly acknowledged (proposed Recital 6). This characteristic is also integrated in the new methodology informing individual assessment, with a reference to the "the relationship to and the characteristics of the offender" (proposed Article 22(2)(d)). Finally, the specific protocols that national authorities shall establish to provide an appropriate, coordinated response to situations of victimisation must ensure that detained persons "receive the information about their rights; [...] can rely on facilitated crime reporting; [...] have access to support and protection in accordance with their individual needs" (proposed Article 26a(1)(b)).<sup>5</sup>
4. This feedback focuses on proposing a series of changes to the proposed directive to further strengthen the protection of victims of crime in detention (see below section I). It also puts forward a number of medium-term proposals, requiring in-depth work within the Victim's Rights Platform and other relevant EU bodies, to address the problem of fundamental rights violations in prison (II). Recommendations are compiled in a final section (III).

## I. Comments on the proposed amended Victims' Rights Directive

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### A. Consider inserting a fundamental rights provision covering existing international standards

5. The proposed directive lacks a binding fundamental rights provision. Recital (66) of the 2012 VRD provides that it "respects fundamental rights and observes the principles recognised" in the EU Charter of Fundamental Rights (CFR). However, this provision lacks specificity in its implications in terms of obligations imposed upon EU Member States (EUMS), including in the event of crimes committed in detention.
6. In particular, the proposal takes limited account of relevant case law and international standards specifying the obligations incumbent on the states in case of torture and ill-treatment in detention. These include the

<sup>1</sup> The notion of "crime" refers here broadly to "criminal offence", as in Article 2(1)(a)(i) of the 2012 victims' rights directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>

<sup>2</sup> European Commission, *EU Strategy on victims' rights (2020-2025)*, COM(2020) 258 final, 24 June 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0258#footnoteref78>. The figure of 25% prisoners reporting violence worldwide is drawn from WHO, *Prison and Health*, 2014: <https://www.who.int/europe/publications/i/item/9789289050593>

<sup>3</sup> European Commission, *Proposal for a directive amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, COM(2023) 424 final, 12 July 2023: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0424#footnoteref4>

<sup>4</sup> For a detailed assessment of the 2012 VRD, see Commission Staff Working Document, *Evaluation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012*, SWD(2022) 179 final, 28 June 2022: [https://commission.europa.eu/system/files/2022-06/swd\\_2022\\_179\\_evaluation\\_rep\\_en.pdf](https://commission.europa.eu/system/files/2022-06/swd_2022_179_evaluation_rep_en.pdf)

<sup>5</sup> Several of these innovations reflect the recommendations of the reference report published by Fair Trials, covering both criminal detention and immigration detention: Fair Trials, *Rights Behind Bars. Access to justice for victims of violent crime suffered in pre-trial or immigration detention*, 2019: <https://www.fairtrials.org/articles/publications/rights-behind-bars/>

United Nations (UN) *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol), which provides guidelines for the investigation of torture and ill-treatment, including on the role and obligations of health professionals in the process.<sup>6</sup> At CoE level, the European Court of Human Rights (ECtHR) and the Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have defined a series of obligations incumbent on State authorities in case of torture and ill-treatment occurring under their jurisdiction, e.g. the obligation to open an investigation on their own initiative and conduct it thoroughly and promptly; the requirement that the investigative body is independent from the officials subject to the investigation and has full power to conduct the said investigation; the reversal of the burden of proof; the requirement that victims are involved in the procedure; the obligation to report publicly on the results of investigations.<sup>7</sup> All of these elements are essential to ensure that victims of violence, including those in custody, have effective access to justice and should therefore be reflected in the directive in order to ensure a common baseline for transposition at national level.

## **B. Consider emphasising the importance of access to legal aid for prisoners victims of violence**

7. Research has shown that prisoners' access to a lawyer is crucial to ensure that prisoners' rights are effectively respected. The low level of literacy, let alone legal literacy, of the prison population compared to the general population, combined with the specificities of prison life (including fear of reprisals, difficulties in getting complaints out of prison and the persistence, in some countries, of a prison subculture that devalues reporting offences)<sup>8</sup> and the difficulties in availing oneself of the assistance of a lawyer while imprisoned, results in the current situation where crimes committed in detention are underreported.<sup>9</sup>
8. Extending prisoners' rights to legal aid could help reverse this trend. While Article 13 of the 2012 VRD guarantees the right to legal aid for eligible victims "where they have the status of parties to criminal proceedings", the intervention of a lawyer can be beneficial as soon as the offence has taken place and prior to the initiation of criminal proceedings. The presence of a lawyer helps to break the situation of secrecy and complete dependence of the detainee on the prison administration, in a context that is highly conducive to retaliation. In addition to that, violent incidents in prison, including ill-treatment by staff or by fellow prisoners often trigger disciplinary proceedings. In that context, the assistance by a lawyer would also contribute to detect and report appropriately such offences.<sup>10</sup> As argued by Fair Trials in their reference report, in view of the important proportion of foreigner in prisons compared to the general population, such legal aid should cover "legal advice and representation, as well as translation and interpretation costs".<sup>11</sup>

## **C. Consider specifying the protocols for national coordination and cooperation to guarantee harmonised implementation**

9. Proposed Article 26a sets an obligation for EUMS to establish "specific protocols on the organisation of services and actions under [the] Directive". These protocols are meant to ensure coordinated action between all relevant services in order to provide appropriate response to situations of victimisation and thereby reinforce victims' rights. This article also includes a specific paragraph on "victims who are in detention including jails", specifying that they should have access to information on their rights, rely on facilitated crime reporting, and benefit from measures of support and protection adapted to their needs (proposed Article 26a(1)(b)).

<sup>6</sup> United Nations, Istanbul Protocol: *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2002: <https://www.ohchr.org/en/publications/policy-and-methodological-publications/istanbul-protocol-manual-effective-0>; see also see also CPT, *Documenting and reporting medical evidence of ill-treatment* (Extract from the 23rd General Report of the CPT), CPT/Inf(2013)29-part, 2013: <https://rm.coe.int/16806ccc4d>

<sup>7</sup> Fair Trials, *op. cit.*, pp. 31-32; E. Svanidze, *Effective investigation into ill-treatment. Guidelines on European standards*, Council of Europe, 2014: <https://rm.coe.int/16806f11a3>; specifically on the requirement of public scrutiny, see ECtHR, *Al Nashiri v. Romania*, no. 33234/12, 2018, para. 641 and the cases cited therein: <https://hudoc.echr.coe.int/eng?i=001-183685>

<sup>8</sup> On the persistence of prison subcultures and informal prison hierarchies, including in the EU, see below para. 19.

<sup>9</sup> Fair Trials, *op. cit.*, p. 35; European Prison Litigation Network, *op. cit.*, pp. 45 et seq.

<sup>10</sup> In the context of discipline and segregation, the CPT always stresses that the right to legal assistance is one of the required safeguards – e.g. *Report on the periodic visit to Finland*, CPT/Inf (2021) 07, 2021: <https://rm.coe.int/1680a25b54>, para. 47, fn. 13; *Report on the periodic visit to Moldova*, CPT/Inf (2023) 27, 2023: <https://rm.coe.int/1680ac59d8>, para. 101; *Report on the periodic visit to Lithuania*, CPT/Inf (2018) 02, 2018: <https://rm.coe.int/168095212f>, para. 82; *Report on the visit to Ukraine*, CPT/Inf (2020) 40, 2020, para. 65: <https://rm.coe.int/1680a0b93c>. See also, in respect of access to a lawyer for prisoners more generally, CPT, *Report on the periodic visit to the Netherlands*, CPT/Inf (2023) 12, 2023: <https://rm.coe.int/1680abb4b5>, para. 173

<sup>11</sup> Fair Trials, *op. cit.*, p. 38

10. These protocols are a welcome innovation to the extent that they intend to address prisoners' specific situation. However, as a result of its general wording, the proposed article leaves EUMS with an important margin of manoeuvre, and risks therefore to reinforce national disparities – against the initial aim of harmonisation.<sup>12</sup> A series of changes could be introduced in order to guarantee that these protocols do contribute to reinforcing the rights of prisoners victims of crime.
11. Firstly, the article should explicitly mention civil society organisations, healthcare professionals and Bar associations among the stakeholders to be consulted (along with “law enforcement, prosecution authorities, judges, detention authorities, restorative justice services and victim support services” (proposed Article 26a(1))) both in the initial drafting phase and in the revision phase (proposed Article 26a(2)).<sup>13</sup> “Victim support services” can indeed be of various nature (public or non-governmental) and may lack expertise on or experience of the prison environment,<sup>14</sup> while civil society organisations play a crucial role in protecting prisoners from ill-treatment and can therefore make use of their expertise to ensure that the protocol drafted are up to the task.<sup>15</sup> As for healthcare professionals working in prisons, their specific experience on medicine in prison settings and their crucial role in documenting torture and ill-treatment makes them a central actor in the protocols to be established (see above). Similarly, practising lawyers represented by their Bars have a wealth of experience and knowledge of the prison environment, their role in the protection of victims in prison being essential (see above para. 7-8) and it is crucial that their involvement starts at this stage already.
12. Secondly, Article 26a(1)(b)(i) on the provision of information should be specified to mitigate the risk that it will result in the provision of very summary, and eventually useless in practice, information. In view of the specific vulnerability of the incarcerated population, provision should be made for legal advisers to provide access to rights in prison, as a minimum under the conditions of ordinary law, as provided for in certain national systems.<sup>16</sup> Furthermore, in view of the digitalisation of the law, detainees should have access to online legal resources. This would be coherent with the stress put on digitalisation throughout the directive and would contribute to harmonising upwards prisoners' access to digital services in the EU.
13. Thirdly, improved crime reporting in prison could be increased by targeted modifications to Article 26a(1)(b)(ii). First, it should be specified that prisoners must be able to “rely on facilitated crime reporting through judicial proceedings”. This would guarantee a judicial response, i.e. by independent and impartial bodies, to practices that are too often dealt with internally (through disciplinary proceedings) or non-judicial bodies.<sup>17</sup> Second, facilitated access to free of charge medical and forensic examinations for prisoners victims of crime should be mentioned in this article as the prompt and thorough collection of medical evidence is key to ensure crime reporting, and constitutes an obligation under the procedural aspect of Article 3 of the ECHR.<sup>18</sup> This would also be consistent with the inclusion of healthcare professionals among the relevant actors to be consulted in the protocol's drafting process, as proposed above (para. 11).
14. Fourthly, Article 26a(1)(b)(iii) guaranteeing prisoners' access to “support and protection” should be complemented with relevant references to applicable international standards. As pointed out by Fair Trials in their reference report, prisoners reporting crime face difficulties in accessing adequate protection from retaliations and secondary victimisation. Not only are the available options limited, but often infringe on the victim's fundamental rights: prisoners victims of crime might be placed in solitary confinement, might lose access to certain part of the detention or could be transferred to another facility, which may result in the

<sup>12</sup> The proposal's Explanatory Memorandum identifies the “lack of clarity and precision with which certain rights are formulated” and the “large margin of manoeuvre for Member States to transpose them” as a cause of the problems identified in the VRD evaluation report. See COM(2023) 424 final cited above.

<sup>13</sup> Recommendation CM/Rec(2018)11 of the CoE Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe: [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=09000016808fd8b9](https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9)

<sup>14</sup> See Fair Trials, *op. cit.*, pp. 46-49 and FRA, *Victims of crime in the EU: the extent and nature of support for victims*, 2015, pp. 57-76: [https://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support\\_en\\_0.pdf](https://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf)

<sup>15</sup> European Prison Litigation Network, *White paper on access to justice for pre-trial detainees. Bringing Justice into Prison: For a common European Approach*, 2019, pp. 59-62: <http://www.prisonlitigation.org/wp-content/uploads/2021/04/WHITE-PAPER-final-ENG.pdf>

<sup>16</sup> European Prison Litigation Network, *op. cit.*

<sup>17</sup> Fair Trials, *op. cit.*, p. 36

<sup>18</sup> Fair Trials, *op. cit.*, p. 34; Observatoire International des Prisons – Section française, *Omerta, Opacité, Impunité. Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, pp. 58 et seq. : <https://oip.org/wp-content/uploads/2019/05/oip-rapport-violences.pdf>

person being separated from their relatives.<sup>19</sup> Consequently, the proposed article should specify that the adoption of protection measures must not infringe the fundamental rights of the victim and that their imposition must incorporate the corresponding procedural obligations (i.e. that they must, as a matter of principle, be subject to the adversarial process and be open to appeal).

#### D. Consider broadening the scale and use of the data collected

15. Confronted with the lack of comprehensive and comparable data on victims of crimes, the Commission proposes to “establish a system for the collection, production and dissemination of statistics” including data on “the number and type of reported crimes and the number, the age, sex of the victims and the type of the offence” (proposed Article 28(1)).
16. The methodology to be developed by the EUMS with the support of the Commission (proposed Article 28(4)) should enable to establish statistics on crime reporting in detention, including on the judicial response and fill a knowledge gap. On the one hand, the comparison between the number of crimes reported to judicial bodies and the number of complaints received from prisoners by civil society organisations and non-judicial bodies (such as National Preventive Mechanisms) would enable to quantify the scale of underreporting of crimes committed in detention to judicial authorities. On the other, data on the type of judicial response to crimes committed in detention would enable to quantify and compare the phenomenon of impunity for perpetrators of crimes committed in detention.<sup>20</sup>
17. These two indicators, which reveal the health of a justice system and respect for the rule of law in a given country, could be analysed in a comparative perspective in the Justice Scoreboard to assess the progress made in protecting detainees’ rights. The Justice Scoreboard could also be used to map safeguards in place in EUMS for prisoners victims of crimes, on the model of the analysis of specific arrangements for victims of violence against women and domestic violence introduced for the first time in the 2023 issue.<sup>21</sup>

## II. Additional measures to uphold prisoners’ rights across the EU

### A. Acknowledge prisons as a priority policy area

18. Improving the rights of detainees across the EU is of crucial importance for the good functioning of the European area of freedom, security and justice. Detention conditions *lato sensu* have indeed proven to have a significant impact on cooperation in judicial matters: according to the European Commission, between 2016 and 2019 EUMS has refused or delayed execution of European Arrest Warrants “on grounds related to a real risk of breach of fundamental rights in close to 300 cases, including on the basis of inadequate material conditions of detention”.<sup>22</sup> In 2020 and 2021, 194 additional cases were registered.<sup>23</sup>
19. Two factors are likely to increase the centrality of prison issues for cooperation in judicial matters. On the one hand, the developing case law of the CJEU (including on issues other than material detention conditions, such as prisoners’ health, prisoners’ social reintegration or the best interest of a prisoners’ child)<sup>24</sup> is likely to increase EUMS’s fundamental rights obligations in the context of cooperation in criminal matters.

<sup>19</sup> Fair Trials, *op. cit.*, p. 43 ; see also, CPT, Report on the visit to in Lithuania, CPT/Inf (2023) 01, 2023, paras. 46, 48 and 84: [https://rm.coe.int/1680aa51af\\_and\\_mutatis\\_mutandis\\_ECtHR\\_X\\_v\\_Turkey\\_no\\_24626/09:https://hudoc.echr.coe.int/?i=001-113389\\_\(this\\_case\\_concerns\\_a\\_prisoner\\_who\\_has\\_been\\_placed\\_in\\_solitary\\_confinement\\_since\\_as\\_a\\_result\\_of\\_his\\_sexual\\_orientation\\_the\\_prison\\_administration\\_considered\\_there\\_was\\_a\\_risk\\_that\\_he\\_might\\_be\\_assaulted\)](https://rm.coe.int/1680aa51af_and_mutatis_mutandis_ECtHR_X_v_Turkey_no_24626/09:https://hudoc.echr.coe.int/?i=001-113389_(this_case_concerns_a_prisoner_who_has_been_placed_in_solitary_confinement_since_as_a_result_of_his_sexual_orientation_the_prison_administration_considered_there_was_a_risk_that_he_might_be_assaulted)).

<sup>20</sup> Fair Trials, *op. cit.*, p. 36; Observatoire International des Prisons – Section Française, *op. cit.*

<sup>21</sup> European Commission, 2023 EU Justice Scoreboard, pp. 24 et seq. : [https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023\\_0.pdf](https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf)

<sup>22</sup> European Commission, *Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions*, 8 December 2022, Recital (11): [https://commission.europa.eu/document/b59ddb88-b9c3-420c-98d5-622807f8729b\\_en](https://commission.europa.eu/document/b59ddb88-b9c3-420c-98d5-622807f8729b_en)

<sup>23</sup> See European Commission, *Statistics on the practical operation of the European arrest warrant – 2021*, SWD (2023) 262 final, 2023, pp. 21-22: [https://commission.europa.eu/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant\\_en](https://commission.europa.eu/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en) ; European Commission, *Statistics on the practical operation of the European arrest warrant – 2020*, SWD (2022) 417 final, 2022, pp. 21-22: [https://commission.europa.eu/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant\\_en](https://commission.europa.eu/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en)

<sup>24</sup> See respectively the judgments E.D.L., C-699/21, 18 April 2023: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=272581&pageIndex=0&doclang=en&mode=reg&dir=&occ=first&part=1&cid=1766897> ; O.G., C-700/21, 6 June 2023: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=274368&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1766985> and the Advocate General Opinion in GN, C-261/22, 13 July 2023:



On the other, the accession process of Moldova and Ukraine, and discussions on the candidate status of Georgia, which puts stronger emphasis on the crucial topic of violence as a result of so-called prison subculture, which is a complex phenomenon often fuelled by the prison administration itself, leading to the existence of castes in detention. Although it is not absent from EU prisons<sup>25</sup>, this phenomenon remains an unrepresentative feature of the European prison situation. The accession to the EU of Moldova, Ukraine and Georgia, three countries where prison subculture is deeply rooted, would make it a first-priority problem in view of the risk for prisoners' rights – and therefore for cooperation in criminal matters.<sup>26</sup>

20. Resolute EU intervention is therefore needed to constrain EUMS to bring their prison systems in line with international standards, in order to preserve mutual trust and facilitate cooperation in criminal matters.

## **B. Increase EU knowledge of EUMS prison systems**

21. The collection of comprehensive data on EUMS compliance with international detention conditions standards appears as a prerequisite. The data collected could usefully complement the database on criminal detention developed by the EU Fundamental Rights Agency<sup>27</sup> by providing regularly updated overviews of prison systems across the EU, making it possible to assess the progress made in terms of detention.
22. Such analyses could be included in the Justice Scoreboard, as relevant indicators of EUMS' respect for their international obligations in terms of treatment of prisoners, and therefore as indicators of respect for the rule of law. This regular collection of data would also be useful in the context of EAW procedures, making it possible to assess whether the detention conditions offered in the requesting EUMS comply with prisoners' fundamental rights.

## **C. Consider examining detention conditions in light of EU anti-discrimination law**

23. Prisoners can fall victims of discrimination on a variety of grounds and in a variety of situations.<sup>28</sup> Although the EU non-discrimination directives have a narrower scope than the ECHR in terms of grounds for discrimination and situations covered,<sup>29</sup> they offer resources for combating discriminations in prisons. In particular, the prohibition of discrimination in the area of employment covers a wide range of grounds and could therefore be usefully implemented in prison context where such discriminations have been documented. Similarly, the notion of “services” used in directives 2000/43/EC (grounds of race or ethnicity) and 2004/113/EC (grounds of sex and gender) could be interpreted so as to include part of the services delivered in prison – education, postal services.<sup>30</sup>
24. Reflection on the impact of the application of EU anti-discrimination legislation in prison would help to ensure access to justice for victims of discriminations in detention. This is all the more important because,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=275413&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1767018>

<sup>25</sup> Prison subculture is present in post-soviet republic such as Lithuania and Latvia as documented by recent CPT report: CPT, *Report on the visit to Lithuania*, CPT/Inf (2023) 01, 2023: <https://rm.coe.int/1680aa51af> and CPT, *Report on the visit to Latvia*, CPT/Inf (2023) 16, 2023: <https://rm.coe.int/1680abe944>

<sup>26</sup> The obligation of States parties to the ECHR in respect of violence resulting from prison subculture has been analysed in a recent judgment: ECtHR, *S.P. v. Russia*, nos. 36463/11 and 10 others, 3 May 2023. As regards the situation in Moldova, Ukraine and Georgia, see: CPT, *Report on the ad hoc visit to Moldova*, CPT/Inf (2023) 27, 2023: <https://rm.coe.int/1680ac59d8>; CPT, *Report on the visit to Ukraine*, CPT/Inf (2017) 15, 2017: <https://rm.coe.int/pdf/1680727930>; CPT, *Report on the ad hoc visit to Georgia*, CPT/Inf (2022) 11, 2022: <https://rm.coe.int/1680a6eabd>

<sup>27</sup> See <https://fra.europa.eu/en/databases/criminal-detention/>

<sup>28</sup> See for instance ECtHR, *Ecis v. Lativa*, no. 12879/09, 2019 (blanket ban on prison leave imposed on a certain category of male prisoners, not applying to female prisoners): <https://hudoc.echr.coe.int/?i=002-12298>; ECtHR, *Vool and Toomik v. Estonia*, no. 7613/18, 2022 (statutory ban on long-term family visits imposed on remand prisoners, while such visits are authorized for convicted prisoners): <https://hudoc.echr.coe.int/?i=001-216464>; ECtHR, *Martzakis and Others v. Greece*, no. 20378/13, 2015 (HIV-positive prisoners held in poor physical and sanitary conditions and without adequate treatment in prison psychiatric wing): <https://hudoc.echr.coe.int/?i=001-155825>; CPT, 10th General Report, CPT/Inf (2000) 13, 2000, pp. 13-16 (on unequal access to activities for women deprived of liberty): <https://rm.coe.int/1680696a74>; CPT, *Report on the visit to Bulgaria*, CPT/Inf (2008) 11, 2006, para. 105 (on foreigners' unequal access to open prison regime, home leave, parole, access to work, education, vocational training, visits): <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806940a0>

<sup>29</sup> Each directive covers a limited number of grounds, and a limited number of situations, and the principles of non-discrimination applies only in relation with implementation of EU law. Directive 2000/43/EC prohibits discriminations based on race or ethnicity in access to employment, welfare systems, social security, as well as goods and services. Directive 2000/78/EC prohibits discrimination in the area of employment only but based on a diversity of grounds (sexual orientation, religion or belief, age, disability). Directive 2004/113/EC and Directive 2006/54/EC prohibit discrimination based on sex in accessing goods and services and employment and social security respectively.

<sup>30</sup> On the latter (equal access to postal services), see a recent case documented by the French NGO Observatoire International des Prisons – Section française on a transgender prisoner to whom the prison postal service refuses to deliver mails addressed to her new identity: <https://oip.org/communiqu/une-personne-transgenre-discriminee-par-ladministration-penitentiaire-a-la-prison-de-muret/>

while the VRD guarantees an equal access to justice for victims of crime, it does not necessarily apply to victims of discrimination, since the anti-discrimination directives do not require EUMS to address situations of discrimination through criminal law.

#### **D. Reinforce prisoners' procedural rights**

25. According to a recent study report commissioned by the European Parliament's LIBE Committee, improving rapidly and effectively detention conditions across the EU requires legislative action: an EU-wide binding text could indeed help enforce existing international standards that remain unevenly observed at national level.<sup>31</sup>
26. In order to bring added value to the existing legal framework, such EU legislative instrument should not reproduce but "seek a complementarity with existing standards".<sup>32</sup> In EPLN's view, this could be achieved through EU action setting minimum standards for prisoners' procedural rights – chiefly prisoners' access to legal information, access to a lawyer and access to legal aid. Indeed, while the ECHR has defined in detail States' obligations with regard to the remedies to be made available to prisoners wishing to complain of their detention conditions, its case law remains limited with regard to the procedural rights of prisoners, as it has mostly aimed to "adapt the characteristics of the appeal bodies" to the specific situation of prisoners instead of imposing legal assistance standards that would have allowed "detainees to bring their cases before ordinary courts".<sup>33</sup> These procedural standards would also benefit to pre-trial detainees, in respect of both domestic and cross-border proceedings.<sup>34</sup>

### **III. Recommendations**

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In view of the above, EPLN and Forum Penal recommend:

#### **(a) As desirable amendments to the proposed VRD:**

1. to insert a binding fundamental provision reflecting international standards, including procedural safeguards in the areas of protection against torture and ill-treatment;
2. to guarantee access to legal aid for prisoners before them being party to a criminal procedure, and to ensure that legal aid covers legal advice and representation, as well as translation and interpretation costs;
3. to specify the content of the protocols for national coordination and cooperation so that:
  - a. civil society organisations, healthcare professionals and Bar associations are mentioned among the stakeholders to be consulted for the elaboration and revision of the protocols;
  - b. it is mentioned that prisoners should be able to receive comprehensive information about their rights including by digital means;
  - c. it is mentioned that prisoners must be able to rely on facilitated crime reporting "through judicial proceedings" and, to this end, should have facilitated access to free of charge medical and forensic examinations
  - d. it is mentioned that measures of "support and protection" should comply with international standards and not infringe on prisoners' fundamental rights;
4. to enable the establishment of statistics on crime reporting in detention, including on the judicial response.

#### **(b) As medium-term measures:**

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<sup>31</sup> J. Burchett and A. Weyembergh, *Prisons and detention conditions in the EU. Study requested by the LIBE Committee*, 2023, pp. 103-104: [https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2023\)741374](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)741374)

<sup>32</sup> *Idem*.

<sup>33</sup> European Prison Litigation Network, *op. cit.*, p. 9

<sup>34</sup> See European Criminal Bar Association, *ECBA Response to Commission Non-paper on Detention Conditions and Procedural Rights in Pre-Trial Detention*, 2021: [https://ecba.org/extdocserv/publ/20211006\\_ECBA\\_Commission\\_Non-paper\\_Detention\\_Conditions.pdf](https://ecba.org/extdocserv/publ/20211006_ECBA_Commission_Non-paper_Detention_Conditions.pdf)



5. to acknowledge that prison issues are a priority area for cooperation in criminal matters;
6. to regularly collect comprehensive data on EUMS compliance with international detention conditions standards;
7. to acknowledge the application of EU anti-discrimination law in detention;
8. to reinforce prisoners' procedural rights by means of a directive.



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