

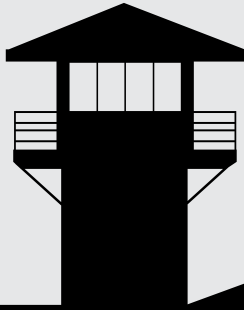


Towards the Effective Protection of LGBTI Persons Deprived of Liberty:

A Monitoring Guide



association pour la prévention de la torture
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The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva, working globally to prevent torture and other ill-treatment.

The APT was founded in 1977 by the Swiss banker and lawyer Jean-Jacques Gautier. Since then the APT has become a leading organisation in its field. Its expertise and advice is sought by international organisations, governments, human rights institutions and other actors. The APT has played a key role in establishing international and regional standards and mechanisms to prevent torture, among them the Optional Protocol to the UN Convention against Torture.

APT's vision: Societies free of torture that protect the dignity of persons deprived of liberty

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Foreword

While the immediate concern of a monitor visiting a place of deprivation of liberty is the observation of situations and conditions, leading to analysis and conclusions, it is my experience that every visit is usually followed by certain moments of introspection. After my visits, I have often been struck at how, from every human interaction, from every instance or pattern of abuse and from every tale of respect – or disrespect – that is reported to me I can see reflected societal mores, preconceptions and prejudice.

This is particularly true when one strives to observe and understand the lived experience of bisexual, gay, lesbian, trans and other gender diverse persons deprived of liberty. One sees it all. Upon entering a place of deprivation of liberty, I have had meetings in which authorities were visibly uncomfortable at the sole use of the word lesbian and others in which I was informed that gay men are a construct of other parts of the world and not existing in that context. While the legal argument that condoms are criminal paraphernalia is only made in the 71 countries that still criminalise same sex relations, in the rest of the world the stigma associated to the mere existence of LGBTBI persons remains deeply entrenched in the collective awareness.

Up to this day, I have never had an experience where policies in places of detention catered for bisexual persons or revealed an understanding of intersexuality. While great progress has been made in relation to the needs of trans persons, they remain the most mistreated of all persons deprived of liberty. In my recent report to the Human Rights Council I observed that “[n]egation is adopting the position that violence and discrimination based on sexual orientation or gender identity do not exist in a particular context or that,

in a given social context, there are no lesbian, gay, bisexual, trans or gender non-conforming persons” and, indeed, this fiction is the source of much of the violence and discrimination that I have observed in places of deprivation of liberty.

The reader of this manual, possibly about to engage in a visit that hopefully will impact persons' lives and contribute to social change, may experience apprehension deriving from an awareness of just how little one single person can know about the enormous range of problems and needs connected to sexual orientation and gender identity in places of deprivation of liberty, a concern that I know only too well. This guide - prepared by the Association for the Prevention of Torture with great attention to the current state of international human rights law, best practices in the field of torture prevention, and the wealth of experience of the extraordinary group of experts that provided its substance – will provide an understanding of the factors of risk and the acts, patterns and extreme manifestations of torture and ill treatment against LGBTBI persons, and is an invaluable blueprint for any conceptual understanding of these.

While adhering to technical rigour that has proven so effective in the preventive approach, the guide makes evident different facets present in persons, objects and spaces and interactions. Its great merit – in the tradition of all the indispensable materials prepared by the APT over the four decades of its existence – is that, in doing so, it will enrich every visit to a place of detention and every human interaction that occurs in its frame. Equally important is the fact that the guide motivates the reader to understand, in practice, how such traits interact with race, ethnicity, religion or belief, health, status, age, class and caste, as well as migration or economic status, to drive the dynamic processes that, in space and time, create the lived experience of persons deprived of liberty.

Victor Madrigal – Borloz

UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity

Key acronyms and abbreviations

APT	Association for the Prevention of Torture
CAT	(United Nations) Committee against Torture
CEDAW	(United Nations) Committee on the Elimination of Discrimination against Women
CESC	(United Nations) Committee on Economic, Social and Cultural Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	(United Nations) Committee on the Rights of the Child
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
LGBTI	Lesbian, Gay, Bisexual, Trans(gender) and Intersex
LPM	Local Preventive Mechanism
MSM	Men who have sex with men
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism

- OHCHR** Office of the United Nations High Commissioner for Human Rights
- OPCAT** Optional Protocol to the Convention against Torture
- SOGI** Sexual orientation and/or gender identity
- SOGIESC** Sexual orientation, gender identity and expression and/or sexual characteristics
- SPT** (United Nations) Subcommittee for the Prevention of Torture
- STI** Sexually transmitted infection
- UN** United Nations
- UNHCR** Office of the United Nations High Commissioner for Refugees
- WGAD** (United Nations) Working Group on Arbitrary Detention
- WHO** World Health Organisation
- WSW** Women who have sex with women
- YP** Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity
- YP + 10** Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles

Introduction to the Guide

Objectives

In 2015 the Association for the Prevention of Torture (APT) convened an international symposium dedicated to addressing the vulnerabilities of lesbian, gay, bisexual, and transgender (LGBT) persons in detention, which gathered detention monitors, as well as non-governmental organizations (NGOs) and experts on LGBTI issues. The participants came to the conclusion that there was “a glaring lack of standards or guidelines at the international level on the management and care of LGBT persons in detention, notably with respect to safeguards against discrimination and abuse”. Participants further agreed that this made their monitoring task particularly difficult and concluded that “[i]n the absence of such standards, a first step would be to develop guidelines designed to help monitoring bodies refine their detention visit practices and better prepare their recommendations to the authorities”. The United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) also acknowledged that “there is no clear guidance on appropriate and non-discriminatory measures required to effectively protect them from violence in detention settings without placing them in *de facto* isolation or restricting their participation in activities and access to services”. The primary objective of this guide is therefore to contribute to filling this gap.

Over the past two decades, the APT has developed a variety of to-

¹ See Jean-Jacques Gautier NPM Symposium, *Addressing vulnerabilities of LGBT persons in detention*, 2016, p. 31.

² *Living free and equal. What States are doing to tackle violence and discrimination against LGBT and I people*, New York and Geneva, Office of the High Commissioner for Human Rights, 2016, p. 41.

ols and guidance with the aim of strengthening the capacities of detention monitoring bodies, such as practical guides on detention monitoring and on monitoring police custody, and a joint practical manual on monitoring immigration detention³. Building up on this expertise, the present guide seeks to enhance and strengthen the capacities of detention monitoring bodies to identify and address risk factors contributing to torture and other ill-treatment of LGBTI persons deprived of liberty. It also aims to raise awareness about the specific risks of abuse and discrimination faced by LGBTI persons in detention contexts. This publication is therefore not meant to replace existing guidance on monitoring but rather to complement them.

The specific objectives of the guide are:

- To provide background information regarding systemic patterns and historical forms of discrimination specifically targeting LGBTI individuals that are conducive to torture and other ill-treatment;
- To provide practical guidance regarding specific aspects of the monitoring methodology and to foster a mindset sensitive to issues related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC);
- To improve the understanding of risk situations faced by LGBTI persons deprived of liberty with the aim of enhancing their protection and adequately meeting their needs;
- To provide guidance on the situation of LGBTI persons in specific places of deprivation of liberty, namely prisons, police stations, and immigration detention facilities;
- To bring visibility to the issue and to contribute to ending stigma and stopping cycles of discrimination and violence.

³ See inter alia APT, *Monitoring places of detention: a practical guide*, 2004; APT, *Monitoring police custody: A practical guide*, 2013; APT/UNHCR/IDC, *Monitoring immigration detention: Practical manual*, 2014. More specific tools on LGBTI persons in detention setting includes the APT/PRI *LGBTI persons deprived of their liberty: a framework for preventive monitoring*, 2015 [2013] and the APT database on human rights in prison: www.apr.ch/detention-focus.

Target audience

This guide is intended for any institution or organisation that carries out visits and inspections to places of deprivation of liberty. It has been primarily designed for members of National Preventive Mechanisms (NPMs) operating under the Optional Protocol to the Convention against Torture (OPCAT) with mandates to prevent torture and other forms of ill-treatment across all places of deprivation of liberty in their jurisdictions. It is also aimed at other institutions with a visiting mandate, including international and regional bodies, National Human Rights Institutions (NHRIs), UN Human Rights Council Special Procedures, civil society organisations, lay visitor schemes, and parliamentary bodies. NGOs specifically working on LGBTI issues are also a target audience. Internal inspection mechanisms may also benefit from the guide.

Finally, the information in the guide might also be useful to:

- Authorities in charge of places of detention;
- Staff working in places of detention, including healthcare and social welfare personnel;
- Policy-makers;
- Training centers for law enforcement and prison staff;
- Lawyers, judges, and prosecutors;
- Persons deprived of their liberty and their relatives;
- Immigration officers and staff of the UN Office of the High Commissioner for Refugees (UNHCR) (particularly the section on monitoring immigration detention);
- External service providers, chaplains, and other persons working in places of deprivation of liberty.

Structure of the guide


The guide is made up of an introduction and five main chapters. Chapter I provides a general analysis of the reasons why LGBTI persons deprived of liberty are specifically exposed to torture and ill-treatment across the world. It briefly elaborates on how international human rights law applies to LGBTI persons and reflects on the

scarcity of specific protection standards. The chapter also discusses the criminalisation and pathologisation of LGBTI identities, which exacerbate the risks of all forms of ill-treatment. Intersectional forms of discrimination are also highlighted in this chapter.




Chapter II discusses key considerations regarding the monitoring methodology. It includes sections concerning monitoring bodies' strategic planning and visit programming, data gathering, and the development and revision of tools, as well as practical advice regarding team composition, interviews with detainees, triangulation of information, and reporting.

Chapters III, IV, and V are each dedicated to specific types of places of deprivation of liberty. Chapter III, which deals with prisons, includes sections on violence prevention, allocation and regimes, body searches, the right to visits, discriminatory sanctions, access to healthcare, and training of prison personnel. Chapter III addresses a number of topics that are also relevant for the subsequent chapters. Chapter IV focuses on police custody and addresses discriminatory profiling and violence during arrest, detention by the police, police interviewing, the role of law enforcement during public demonstrations, and reporting crimes (including hate crimes) to the police. Chapter V pertains to immigration detention and examines access to asylum and non-refoulement, vulnerability screenings upon arrival, and deprivation of liberty on grounds related to migration. It must be stressed that violations of the rights of LGBTI persons also occur in other detention settings, and that the methodology detailed in this guide can be applied to the broader range of places of deprivation of liberty, on which data and documentation may typically be more difficult to obtain.

Each chapter includes quotations from the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, known as the “Yogyakarta Principles” and adopted in 2006, and from the additional principles adopted in 2017 to complement these (“Yogyakarta Principles plus 10”). References are made to both sets of principles throughout the guide.

Good practices will appear in boxes () throughout the text. Some of the good practices identified refer to policies and regulations. While the mere adoption of such policies and regulations indicates

significant advances, it is nevertheless important to recall that their adoption does not necessarily amount to adequate implementation in practice, and that monitoring bodies have an important role to play in examining and addressing gaps between policies and realities on the ground.

Other boxes reference relevant case law () and detail practices that either heighten the risks of mistreatment or amount to ill-treatment or even torture (). At the end of each section, a “monitoring checklist” () summarizes - in the form of questions - key issues that monitors should inquire into during their visits.

In order to ensure that the guide remains practical and user-friendly, sources are provided only when explicit reference is made to a country situation or specific case law. A list of further readings is provided at the end of the publication.

Key concepts and definitions⁴

Bisexual	A person who is physically, romantically and/ or emotionally attracted to people of two (or more) sexes or genders.
Biphobia	Describes an irrational fear, hatred or aversion towards bisexual people.
Cisgender	Describes persons whose gender identity is aligned with the sex assigned to them at birth.
Cisnormativity	Refers to the assumption that all persons are cisgender, i.e. have a gender identity which is aligned with the sex they were assigned at birth.

⁴ Definitions are drawn mainly from the Yogyakarta Principles, UNHCR Guidelines on international protection N°9, and APT materials, unless otherwise specified. Specific vocabulary, including associations and perceptions related to usage, are largely dependent on local contexts. As such, what may be considered an appropriate term in a given country or region, may not also be the case in others.

Deprivation of liberty	Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority (OPCAT, Art. 4.2).
Gay	Mostly used to describe a man whose physical, romantic and/or emotional attraction is to other men, although it may also be used to describe both gay men and women (lesbians).
Gender identity	Refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.
Gender expression	Describes how an individual publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language, and voice.
Heteronormativity	Presumes that heterosexuality is the normal or preferred sexual orientation and that sexual and marital relations are only appropriate between a man and a woman.
Homophobia	Describes an irrational fear of, hatred or aversion towards lesbian, gay or bisexual people.
Intersex	Refers to a condition in which an individual is born with atypical sex characteristics, including genetic, hormonal and anatomical differences. Intersex is not about gender identity. Just like non-intersex people, there are inter-

sex men and women, intersex people who are both, and those with other identities. Intersex is a lived experience of the body. Many forms of intersex exist, mostly genetic in origin⁵.

Lesbian Used to describe a woman whose physical, romantic and/or emotional attraction is to other women.

Sex characteristics Refers to each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

Sexual orientation Refers to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

Transgender (sometimes shortened to “trans”) Describes persons whose gender identity and/or gender expression differs from the sex they were assigned at birth. Transgender refers to gender identity (not sexual orientation) and a transgender individual may be heterosexual, gay, lesbian, or bisexual.

Transphobia Describes an irrational fear, hatred or aversion towards transgender people.

⁵ Definition drawn from Morgan Carpenter, in *Intersex: Intersectionality, Epistemic and Structural Violence, Presentation to the Mental Health Services conferences in Perth, Australia, in August 2014, September 2015.*

Chapter I

The specific exposure of LGBTI persons deprived of liberty to torture and other ill-treatment

LGBTI persons⁶ have historically been subjected to discrimination and abuse, as well as institutional violence, across all regions of the world. Discriminatory patterns are magnified in detention contexts, and when LGBTI persons are deprived of their liberty, they are particularly exposed to the risk of being ill-treated or even tortured. For these reasons, LGBTI persons are in situations of heightened vulnerability in all detention settings. Although data are scarce⁷ (and mostly coming from the Global North), it is well-established that LGBT people tend to be disproportionately incarcerated, including in jurisdictions where same-sex relations and expression of diverse gender identities are not in fact criminalised. The overrepresentation of LGBT persons in criminal justice systems is multifactorial and can be explained by the prevalence of social norms reflecting rigidly ascribed gender and heteronormative ideals, which in turn result in family rejection, social stigma, homelessness, hostility in foster care, reliance on non-traditional means of earning income, and discriminatory profiling and targeting by law enforcement. LGBT persons may also be overrepresented and particularly exposed to abuse in immigration detention facilities, often due to having had to flee their countries of origin because of persecution stemming from their sexual orientation or gender identity.

Where data is available, it reveals that LGBTI persons deprived of

⁶ The acronym “LGBTI” is used throughout the guide, unless the issues described specifically refer to situations affecting one group in particular. This is the reason why the readers will sometimes find shorter versions of the acronym, such as “LGB”, “GBT”, “LGBT”, “trans women” or “trans men” used at times in this guide. The intention in such cases is not to exclude any particular group, but rather to strive for as much precision and relevance as possible in describing realities and issues.

⁷ Data on LGBTI persons deprived of liberty are generally scarce or even nonexistent in many contexts, although the situation is evolving in some parts of the world. As a result, the examples provided in this guide are sometimes not regionally balanced.

their liberty are more likely to have been sexually victimised, reported mental health problems, experienced solitary confinement, and been subjected to sanctions. While deprived of liberty – and in prisons in particular – LGBTI persons report the highest rate of sexual victimisation, including rape, as compared to other groups such as younger detainees, victims of previous sexual abuse, persons with disabilities, or first-time offenders. Data on intersex persons in detention settings are generally – if at all available – scarce, which explains why this guide features less information about intersex as compared to lesbians, gays, or trans persons. Information regarding violence targeting bisexual persons also tends to be less documented.⁸

Monitoring bodies, thanks to their access to first-hand information, their independence, and the trust they often obtain from detainees, can play a crucial role in shedding light on the situation of LGBTI persons deprived of liberty and in finding ways to improve it.

1. “LGBTI”: a heterogeneous group, but a common pattern of abuse

LGBTI persons do not form a homogenous group. “LGBTI” is an acronym commonly used for “Lesbian, Gay, Bisexual, Transgender and Intersex” persons. Sometimes the acronym is modified to account for nuances and diversities, such as “Q” for “queer” or “questioning”. It may therefore seem arbitrary or inappropriate to refer to “LGBTI” persons as a group, and some LGBTI persons do not identify with the acronym, rejecting its labels and associated narratives. For instance, some men who have sex with men or women who have sex with women do not identify as “gay” or “lesbian”. In the public health discourse in particular, other terminologies are sometimes preferred, such as “MSM” (men having sex with men) or “WSW” (women having sex with women). There is no consensus regarding what it means to “be” L, G, B, T, or I, and no person’s identity can be reduced to one single characteristic. Moreover, these terms and concepts are evolving rapidly, and it must be acknowledged that often no definitive consensus is reached on certain concepts. It is therefore im-

⁸ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/38/43, 11 May 2018, para. 46, p. 11

portant for monitoring bodies to understand that the designation “LGBTI” can have different meanings to different people – relating for instance to identification and identities, attractions, practices, or a combination of various meanings – and that what ultimately matters is how an individual self-identifies. Additionally, certain individuals who are not LGBTI but may be perceived as such are exposed to the same risks of discrimination and abuse.

Notwithstanding the significant differences encompassed by the acronym “LGBTI” (mixing concepts of sexual orientation, gender identity and expression, as well as sex characteristics), LGBTI persons tend to be exposed to the same array of risks when deprived of their liberty and are “disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations.”⁹ The Yogyakarta Principles—although not explicitly using the acronym LGBTI—also group together various identities and experiences, while acknowledging “the often distinct violations affecting persons on grounds of ‘gender expression’ and ‘sex characteristics’¹⁰”.

Monitoring bodies should also take into consideration how sexual orientation, gender identity or expression, and sex characteristics intersect with other characteristics and vulnerability factors, such as age, the existence of a disability, race, ethnic origin, religious background, or economic status. In some contexts, for instance, there is evidence that LGBTI people from ethnic minorities experience higher levels of policing and are overrepresented in penal establishments. They may also be discriminated against during court proceedings and face additional challenges in accessing a lawyer and obtaining pre-trial release. Monitoring bodies should therefore have a dynamic and evolving understanding of the concept of vulnerability in order to adequately comprehend situations of multiple vulnerabilities and decipher how specific characteristics intersect with one another.

⁹ *Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly, A/56/156, 3 July 2001, para.19.*

¹⁰ *Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles*, as adopted on 10 November 2017, Geneva. The revision of the Principles in 2017 led to the inclusion of the concepts of “gender expression” and “sex characteristics” in their title.

2. International legal standards

Despite the Universal Declaration of Human Rights' unequivocal pronouncement that “[a]ll human beings are born free and equal in dignity and rights,” States have historically failed to protect LGBTI persons from violence and discrimination — and particularly so in the context of deprivation of liberty. This failure does not mean that the creation of new rights is required in order to ensure the protection of LGBTI persons, but rather that already existing, well established obligations in international human rights law must be adequately implemented.

Non-discrimination is a core principle of international human rights law, but its restrictive interpretation has often led to the exclusion of LGBTI persons. While key human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) do not explicitly refer to sexual orientation and gender identity as prohibited grounds for discrimination¹¹, jurisprudence and authoritative interpretations by treaty bodies have now established that the express prohibition of discrimination on the grounds of “other status” —which is consistently enumerated among the non-exhaustive prohibited grounds for discrimination in human rights treaties—must be read to include discrimination based on sexual orientation¹² and gender identity¹³. Sexual orientation and gender identity are integral to everyone’s dignity and humanity and therefore cannot be a basis for discrimination.

In response to the failure to apply international human rights law to adequately protect LGBTI persons, and to the fragmented response from the international community to the need to protect them from

¹¹ Article 26 of the ICCPR states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹² In 1994, States’ obligation to protect individuals from discrimination on the basis of their sexual orientation was spelled out for the first time by a treaty body. See UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). See also CCPR, General Comment N° 35 (2014), para. 3.

¹³ See *inter alia*, CESC General Comment N° 2, para 32; CRC General Comment N° 13 (2011), para. 60 and 72(g), CAT General Comment N° 2, para. 21, CEDAW, General Recommendation N° 28, para. 18.

violence and discrimination, in the year 2006 a group of leading human rights experts from diverse regions and backgrounds issued a set of international human rights principles relating to sexual orientation and gender identity, known as the “Yogyakarta Principles”. The Yogyakarta Principles provide authoritative interpretation on how international human rights law applies to issues of sexual orientation and gender identity. They were revised in 2017 to account for developments in international human rights law and emerging understandings of human rights violations affecting persons of diverse sexual orientations and gender identities, as well as on grounds of gender expression and sex characteristics. This resulting set of complementary Additional Principles and State Obligations is known as the “Yogyakarta Principles Plus 10”.

Because many of the Principles are relevant for LGBTI persons deprived of their liberty and because their formulation is unequivocally premised upon and encapsulates State obligations stemming from international human rights law—such as the right to freedom from arbitrary deprivation of liberty (Principle 7), the right to treatment with humanity while in detention (Principle 9), and the right to freedom from torture and cruel, inhuman or degrading treatment of punishment (Principle 10)—they serve as central points of reference and are quoted throughout this guide. As the Yogyakarta Principles do not strictly comprise a new set of standards, but rather assemble and offer clarifications on already-existing legal obligations, it may be judicious for monitoring bodies in some instances - and in particular when making recommendations to authorities - to reference the original sources of law, instead of or in addition to the Yogyakarta Principles.

The UN Human Rights Council adopted a resolution on “Human rights, sexual orientation and gender identity” for the first time in 2011 and subsequently in 2014¹⁴, expressing “grave concerns at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”, and requesting the OHCHR to produce studies “documen-

¹⁴ Resolution adopted by the *Human Rights Council, Human rights, sexual orientation and gender identity*, A/HRC/RES/17/19, 14 July 2011, and Resolution adopted by the Human Rights Council, *Human rights, sexual orientation and gender identity*, A/HRC/RES/27/32, 2 October 2014.

ting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity". The ensuing reports urged States to, among other things, train law enforcement personnel and judges in gender-sensitive approaches, ensure that police and prison officers are trained to protect the safety of LGBT detainees, and hold to account State officials involved or complicit in incidents of violence¹⁵. In 2016, another Human Rights Council resolution¹⁶ established the mandate of an "Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity", whose mission is to assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, and to identify, raise awareness about, and address the root causes of violence and discrimination.

In recent years there have also been important developments at the regional level. In the Council of Europe region, the Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity includes specific provisions about the duty of law enforcement officials and protective measures in prisons¹⁷. The Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity of the African Commission on Human and Peoples' Rights condemns, among other practices, arbitrary imprisonment and other forms of persecution of persons on these bases¹⁸.

Regarding standards specifically governing detention, there is no international instrument that addresses the needs of LGBTI detai-

¹⁵ Reports of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 17 November 2011 and A/HRC/29/23, 4 May 2015.

¹⁶ Resolution adopted by the Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/RES/32/2, 15 July 2016.

¹⁷ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

¹⁸ Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity of the African Commission on Human and Peoples' Rights, adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014.

needs in particular (as is the case for other groups in situations of vulnerability in detention, such as female offenders or juveniles¹⁹). However, the revised UN Standard Minimum Rules for the Treatment of Prisoners (known as the “Nelson Mandela Rules”), while not expressly referring to LGBTI detainees, contain a new rule emphasising the principle of non-discrimination and its practical implications, by stating that the “prison authorities shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory” (Rule 2). This new rule is essential in the context of this guide, as it establishes that ensuring substantive equality and meeting detainees’ special needs may require additional measures for specific groups of detainees who are in situations of vulnerability, including LGBTI persons.

3. Criminalisation²⁰ and its causal link with torture and other ill-treatment

Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles

Principle 33: The Right to Freedom from Criminalisation and Sanction

“Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

States shall:

- A** Ensure that legal provisions, including in customary, religious and

¹⁹ See in particular the *UN Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the “Bangkok Rules”), the *UN Standards Minimum Rules for the Administration of Juvenile Justice* (the “Beijing Rules”), or the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (the “Havana Rules”).

²⁰ Because intersex conditions are not as such criminalized, it is particularly important to dissociate intersex people from the LGBT acronym in discussions around de-criminalisation, in order to avoid conflation and possible backlash against this population.

indigenous laws, whether explicit provisions, or the application of general punitive provisions such as acts against nature, morality, public decency, vagrancy, sodomy and propaganda laws, do not criminalise sexual orientation, gender identity and expression, or establish any form of sanction relating to them;

- B** Repeal other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging;
- C** Pending repeal, cease to apply discriminatory laws criminalising or applying general punitive sanctions on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- D** Expunge any convictions and erase any criminal records for past offences associated with laws arbitrarily criminalising persons on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- E** Ensure training for the judiciary, law enforcement officers and healthcare providers in relation to their human rights obligations regarding sexual orientation, gender identity, gender expression and sex characteristics;
- F** Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics;
- G** Ensure effective access to legal support systems, justice and remedies for those who are affected by criminalisation and penalisation on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- H** Decriminalise body modification procedures and treatments that are carried out with prior, free and informed consent of the person.”

According to the latest data available²¹, 72 States still criminalise

²¹ ILGA, *State-Sponsored Homophobia, a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, 12th Edition, May 2017, p. 8.

same-sex sexual relations, out of which 45 States apply the law to both women and men. Legislation varies from one jurisdiction to another, criminalising for instance all sex outside of marriage, certain types of sexual activity, or any forms of intimacy or sexual activity between persons of the same sex. Oftentimes such laws use vague wording, referring for instance to “public scandal”, crimes against “nature” or “morality”, “debauchery”, and “bestiality”. Laws criminalising same-sex activities are often also used to target trans persons, while other laws specifically target diverse gender identities and expressions, for instance by prohibiting “indecent” and “immoral” dress, criminalising “cheating by personation” or “imitating the opposite sex,” or sometimes laws targeting “beggary”. In many regions, such provisions are remnants of colonial-era laws. Penalties associated with such laws can include corporal punishment such as canning or public flogging. In several countries, conviction on such grounds can lead to capital punishment.

Specific discriminatory and harmful practices such as forced anal examinations are also enshrined in law in some places, and must likewise be repealed for being in violation of the prohibition of torture and other ill-treatment. Laws not explicitly targeting LGBT persons, such as “anti-prostitution” laws, may be disproportionately used against them — as notably in the case of trans sex workers. In some contexts, publicly sharing information about sexual orientation or gender identity is banned and labelled as “propaganda”, leading to persecution.

A clear causal link has been established between the criminalisation of LGBT persons and increased exposure to violence, including by law enforcement, prison staff, and healthcare personnel. Both the Special Rapporteur on Torture and the Independent Expert on sexual orientation and gender identity have therefore urged States to repeal such laws²². The UN Subcommittee on Prevention of Torture (SPT) has clearly stated that “the repeal of laws criminalizing same-sex sexual relations between consenting adults and other laws

²² *Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 69, p. 19; Protection against violence and discrimination based on sexual orientation and gender identity, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/72/172, 19 July 2017, Chapter V, p. 11; A/HRC/38/43, para. 90, p. 19.*

used to penalize individuals on the grounds of sexual orientation or gender identity is a mandatory requirement for the prevention of torture against lesbian, gay, bisexual, transgender and intersex persons.²³ Laws criminalising diverse gender identities and expressions should also be repealed.

Furthermore, the UN Working Group on Arbitrary Detention (WGAD), Human Rights Committee, and Independent Expert on protection against violence and discrimination based on sexual orientation and gender identify have found that the detention of individuals under laws criminalizing consensual same-sex sexual activity in private constitutes a form of arbitrary detention²⁴. Even in countries where such laws are not enforced, they can be used to blackmail and intimidate LGBT people and to serve “social cleansing” purposes such as discouraging LGBT persons to meet in certain areas. Such laws also hinder public health policies and HIV/AIDS prevention efforts in particular in some contexts.

Human rights defenders working to combat violence and discrimination on the basis of sexual orientation and gender identity face aggravated forms of violence and discrimination, in particular in countries that criminalise same-sex relations and diverse gender identities or expressions, as they can face harassment, prosecution and imprisonment only because of their work and activism. Human rights defenders who are LGBT themselves are doubly exposed, as they are not only targeted because of their work, but also because of who they are.

Monitoring bodies, in particular NPMs with mandates to “submit proposals and observations concerning existing or draft legislation” (OPCAT, Art. 19 [c]), can contribute to efforts to repeal such laws, not least by recalling States’ non-derogable international human rights obligations with respect to the protection of human dignity and the prevention of torture, in support of decriminalisation. NPMs,

²³ *Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/54/2, 26 March 2015, para. 70.

²⁴ WGAD Opinion 7/2002 (Egypt) UN Doc. E/CN.4/2003/8/Add.1 (2002), pp. 68-73, Opinion 22/2006 (Cameroon), UN Doc. A/HRC/4/40/Add.1 (2007), pp. 91-94; CCPR General Comment N°35, CCPR/C/GC/35 (2014), para. 3 and 7, *Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/38/43 para. 20(b), p. 5.

NHRIs, or Ombuds institutions — given their ability to act as bridges between civil society, public authorities, political establishments, and regional and international institutions — can serve as catalysts for legal change processes leading to decriminalisation. Monitoring bodies may additionally contribute to the adoption of laws and policies that eliminate discrimination.

Although de-criminalisation is a necessary precondition to ensuring the protection of LGBT people from torture and other ill-treatment, it must be stressed that discrimination and violence against LGBT persons deprived of their liberty also take place in contexts where homosexuality and diverse gender identities and expressions are not criminalised.

4. Forced “conversion therapies”

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (YP + 10)

Principle 10: The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment “Sates shall: [...]”

- I** Prohibit any practice, and repeal any laws and policies, allowing intrusive and irreversible treatments on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including forced genital-normalising surgery, involuntary sterilisation, unethical experimentation, medical display, “reparative” or “conversion” therapies, when enforced or administered without the free, prior, and informed consent of the person concerned.”

In some countries²⁵, LGBT persons may be forced to undergo so-called “conversion therapies”, often as a result of intense coercion and family pressure or threats. “Conversion therapies” are grounded in the belief that being LGBT is “abnormal,” and consist of psychiatric, psychological, or other medical “treatment” with the intent to change individuals’ sexual orientation or gender identity.

Several UN entities, including the World Health Organisation (WHO),

²⁵Including China, Iran, Ecuador, Malaysia, and the United States.

issued a joint statement in 2015 urging States to protect LGBTI people from violence, including by ending “unethical and harmful so-called ‘therapies’ to change sexual orientation.”²⁶ In March 2016, the World Psychiatric Association (WPA) stated that “so-called treatments of homosexuality can create a setting in which prejudice and discrimination flourish, and they can be potentially harmful. The provision of any intervention purporting to “treat” something that is not a disorder is wholly unethical.”²⁷ The UNHCR considers that “efforts to change an individual’s sexual orientation or gender identity by force or coercion, may constitute torture or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of the person.”²⁸ The UN Special Rapporteurs on Torture and on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as well as the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity²⁹, have also strongly condemned the practice of forced “conversion therapies”.

Despite the global consensus that such therapies are ineffective, unethical, and harmful, some countries continue to permit or tolerate them. “Conversion therapies” often entail coercion and lack of informed consent, arbitrary deprivation of liberty, verbal harassment, intimidation, forced medication and electroshock, which can amount to torture and other forms of ill-treatment. The use of “corrective rapes” aimed at changing the person’s sexual orientation has also been reported.

“Conversion therapies” can be practiced in public hospitals, private clinics, drug-rehabilitation centers, traditional healing centers, reli-

²⁶ *United Nations Joint Statement, United Nations entities call on States to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children*, September 2015. The Pan American Health Organisation also issued a statement identifying purported therapies aimed at changing sexual orientation as ethically unacceptable and lacking medical justification. See “*Cures for an illness that does not exist*, 2012.

²⁷ World Psychiatric Association, *WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction, and Behaviours*, March 2016.

²⁸ UNHCR, “Guidelines on International Protection No. 9”, para. 21.

²⁹ See in particular Special Rapporteur on Torture, A/HRC/22/53 (2013), para. 76 and 88 and A/HRC/31/57, para 48 and 72 (i), Special Rapporteur on the Right to Health, A/HRC/14/20/2010, para. 23 and A/HRC/35/21 (2017), para. 48–49, and Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/38/43, para. 47, p. 11.

gious centers, as well as clandestine clinics. These places should be on the radar of monitoring bodies, and when “conversion therapies” are reported monitoring bodies ought to contribute to bringing their use to an end. “Conversion therapies” are also practiced by clergy members or spiritual advisers in the context of religious practice³⁰. In prison, the practice of conditioning early release upon “conversion therapies” has also been reported.

Other “treatments” or “therapies” administered to LGBTI people may also infringe the prohibition of torture and other ill-treatment. For instance, there is a growing awareness and consensus around the fact that so-called “gender-normalizing” surgery on intersex children is both medically unnecessary and harmful, with the UN Special Rapporteur on Torture, among others, having called on States to outlaw such surgeries³¹. Such practices are not addressed specifically in this guide, given its primary focus on monitoring places of deprivation of liberty. However, it should be noted that torture prevention bodies, in particular NPMs, can contribute to the eradication of such practices thanks to their power, enshrined in the OPCAT, to submit proposals and observations concerning legislation (Art. 19.c).

³⁰ Mallory Christy, Brown Tayler N. T., Conron J. Kerith, *Conversion Therapy and LGBT Youth*, Williams Institute, January 2018.

³¹ See in particular *Special Rapporteur on Torture, A/HRC/22/53*, para. 88, 2013.

Chapter II

Monitoring methodology – Key considerations

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 9. The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall: [...]

- 1 Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics.”

In a report on the applicability of the prohibition of torture to the unique experiences of women, girls, and LGBTI persons, the UN Special Rapporteur on Torture called for the application of a “gendered and intersectional lens” to adequately account for the harmful “impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes³²”. Monitoring bodies ought to apply such a lens to their work. They may need to seek out and acquire the specific knowledge needed to facilitate a better understanding of the risks faced by LGBTI persons in detention settings and of ways to address their specific needs in a sensitive manner. This may involve a need to reconsi-

³² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Human Rights Council, A/HRC/31/57, 5 January 2016, para. 5, p. 3.

der their existing policies, practices, and tools, as well as to devise new ones.

It is important to stress that all monitoring bodies with some experience in visiting places of detention have come across situations involving discrimination on the basis of sexual orientation or gender identity, although they may not have been adequately equipped to detect, understand, and address these situations. Equally important is the fact that monitoring the situation of LGBTI persons deprived of liberty entails risks of harm towards a population that is already particularly exposed to abuse and experiences a greater incidence of human rights violations. The “do no harm” principle should therefore be a primary consideration informing the work of monitoring bodies on this issue. The need to ensure that the risk of reprisals is mitigated ought to be a foremost concern in this respect.

This chapter does not aim to detail a comprehensive monitoring methodology³³, but rather to highlight the specific and practical considerations that monitoring bodies must bear in mind when examining the treatment of LGBTI persons deprived of liberty.

1. Planning and programme of visits

Monitoring bodies usually develop short and long-term strategies and adopt programmes of visits for specific timeframes. The programme of visits is a pivotal planning tool, in particular for institutions with a broad monitoring mandate. Whether trimestral, bi-annual, or annual, it establishes an operational basis common to all monitors and reflects the monitoring body’s main priorities for the period under consideration. According to the SPT, NPMs (the following also being of relevance for other monitoring bodies), “should ensure that [they] have criteria for selecting the places to be visited and for deciding on thematic visits that ensure that all places of detention are visited regularly, taking into account the type and size of institutions, their security level and the nature of known

³³ For detailed information on the monitoring methodology, see inter alia APT, *Monitoring places of detention: a practical guide*, 2004, APT, *Monitoring police custody: A practical guide*, 2013, APT/ UNHCR/IDC, *Monitoring immigration detention: Practical manual*, 2014.

human rights problems³⁴.”

Selection priorities and criteria can be linked to types of places (e.g. prisons, psychiatric institutions), particular issues (e.g. the use of solitary confinement, access to healthcare) or categories of detainees (e.g. pre-trial, persons with disabilities). Monitoring bodies may decide that the assessment of the situation of LGBTI persons deprived of liberty will be a priority, either as a stand-alone objective or alongside other situations of vulnerability and forms of discrimination. Such decisions may be based on prior observations, information received (including letters from detainees and their relatives or friends), changes at the legal or policy level, or simply a recognition that the risks facing LGBTI persons deprived of their liberty require specific attention and dedicated consideration. In these cases, monitoring bodies will need to consider whether to assess the treatment of LGBTI persons in specific types of facilities (e.g. prisons, immigration detention centers) or to examine the issue across various detention settings.

During the planning stages, monitoring bodies will need to determine what expertise, capacities, and resources will be required to achieve their objectives. They should also ensure that sufficient time is allocated for visiting each contemplated facility, in recognition of the fact that this is a prerequisite for gaining an in-depth understanding of extant power structures, relationships, and discriminatory patterns. It is also essential that monitoring bodies take into consideration situations of risk that may be amplified by intersectional factors, and pay special attention to how sexual orientation and gender identity intersects with ethnicity, gender, age, or the existence of a disability.

Planning decisions will depend on context-specific factors. In some countries, for instance, closed institutions have special units or wings for gay, bisexual, and/or trans women detainees who are partially or entirely segregated from the rest of the general population (it should be noted that even when this practice is not officially ack-

³⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Analytical assessment tool for national preventive mechanisms*, CAT/OP/1/rev.1, 25 January 2016, para. 22, p. 7.

nnowledged by the authorities, gay, bisexual or trans detainees may be *de facto* segregated in separated cells). In such cases, monitoring bodies may seek to conduct targeted visits to these units, whilst remaining cognizant of the fact that their existence within a prison does not preclude the possibility that other LGBTI detainees are held in other parts of the establishment.

In other contexts, correctional establishments have separate wings for so-called “vulnerable detainees”, which might hold LGBTI detainees alongside other categories of detainees, such as sex offenders, former law enforcement officials, detainees with a disability, or others being separated for alleged protective purposes. In such case, monitoring bodies looking into discrimination on the basis of sexual orientation and gender identity may consider targeting these units during their visits. In all cases, due consideration should be given to ensuring that no harm is done to detainees, in particular by preventing any forms of retaliation or reprisals as a consequence of the visit.

If a monitoring body lacks expertise on the issue, its members should reach out to external experts among civil society organisations, in particular those representing LGBTI persons and working on LGBTI matters, with a view to enhancing its understanding of and capacity for addressing the unique challenges faced by LGBTI persons deprived of liberty. This will help ensure that biases and misconceptions are avoided from the early moments of strategic planning and visit programming. Exchanges with LGBTI organisations are central to the consolidation of monitoring bodies’ understanding of the issues and to their ability to devise adequate strategies, whilst also helping to reinforce NGOs’ interest and knowledge in matters relating to the deprivation of liberty, thus proving to be mutually beneficial.

2. Mapping and data gathering

Mapping out existing legislation, policies, and case law impacting LGBTI persons *in general* – ranging from criminalisation of same-sex conducts to legal gender recognition and access to healthcare for trans persons – is an important precondition to initiating any work on the issue. More specifically, monitoring bodies should be

aware of any legislative or policy documents that either expressly discriminate against LGBTI persons *in detention* or, conversely, contribute to the enhancement and protection of their rights (such as official guidelines on searching trans detainees). It is also important to determine whether law enforcement agents are trained or sensitized about non-discrimination in general, or on the specific needs of LGBTI persons in particular.

In some cases, monitoring bodies may have collected anecdotal information about the situation of LGBTI detainees during prior visits or through allegations and letters received from detainees or family members. This information should be properly recorded so as to enable monitors to easily access it when preparing specific visits. It is important that monitoring bodies use secure systems to ensure the confidentiality and protection of data.

Reports from NGOs or other oversight bodies and news sources may help with the mapping of types or specific facilities where discrimination occurs, for example by revealing that a specific police station may hold a larger number of sex workers, including trans persons, or that gay asylum seekers have been assaulted in a specific administrative detention facility or reception center.

Data on issues pertaining to sexual orientation and gender identity in detention settings is generally known to be scarce. It is therefore important that monitoring bodies attempt to collect all available relevant information to devise a baseline of the situation, even if rudimentary. The SPT has urged NPMs, alongside State agencies, to “collect and publish data on the number and types of incidents of torture and ill-treatment against lesbian, gay, bisexual, transgender and intersex persons, and the result of the respective investigations, as well develop appropriate models of data collection, processing and analysis³⁵.” Due consideration should be given to the “do no harm” principle before any data is published.

The ways in which data on sexual orientation and gender identi-

³⁵ *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 22 March 2016, CAT/C/57/4, para. 75, pp. 15-16.

ty is collected may sometimes be problematic and fail to respect the right to privacy. Accordingly, NPMs and other monitoring bodies must establish standard practices with a view to ensuring that data is collected in a manner that is consistent with human rights and accounts for the principles of participation, self-identification, privacy, transparency, and accountability. Moreover, it is important that data is disaggregated to guarantee that the needs and situations of each group encompassed by the LGBTI acronym are clearly distinguished and understood.



Good practice
**Targeted visits by civil society organisations to examine
 the situation of LGBTI detainees**

In **Guatemala**, the “National Network on Sexual Diversity and HIV” (REDNADS) initiated a review of the needs of LGBTI persons deprived of their liberty. The Network’s members visited 7 prisons between December 2014 and January 2015, with the purpose of examining issues of visibility, conditions of detention, discrimination, ill-treatment, free development of one’s personality, intimate visits, sensitisations of prison officials, and institutional management. The review process included interviews with 54 LGBTI detainees, as well as with prison management, multidisciplinary teams among prison staff, and 15 key LGBTI stakeholders from the community.

Based on the findings, REDNADS subsequently issued a report with standards and guidelines for the treatment of LGBTI detainees jointly with the Department of Vulnerable Groups of the Penitentiary Administration. The process included several roundtables with LGBTI detainees, as well as with civil society organisations and penitentiary staff. A pilot training for the Penitentiary training school was also included in the process. The review’s report³⁶ identified priorities in four key areas:

- **Data protection:** the guidelines provide that LGBTI persons should be able to self-identify according to their chosen name and gender, and that staff members in charge of registers should be properly trained.
- **Security:** LGBTI persons may not be prevented from wearing

³⁶ Red Nacional de la Diversidad Sexual y VIH (REDNADS), *Primer Diagnóstico. Necesidades de la población LGBTI privada de libertad*, Guatemala, 2015.

clothing consistent with their self-identified gender, and confidential complaint mechanisms for sexual violence are to be strengthened.

- **Social rehabilitation:** an emphasis is placed on the need to combat corruption in the provision of access to vocational programmes, and a pilot project dedicated to social reintegration is contemplated in one penal establishment.
- **Training:** a review of the content of curricula for prison staff is foreseen.

In **Ireland**, the Irish Penal Reform Trust (IPRT) conducted a small-scale exploratory study on the rights, needs, and experiences of LGBT people in prison. The report³⁷—the first in-depth study on the experiences of LGBT prisoners in Ireland—includes first-hand testimonies by LGBT prisoners, and a review of the prison and policy context. The study included interviews with seven LGBT detainees or former detainees, ten stakeholders from the criminal justice system, and four representatives from the LGBT community. The authors were well aware of the ethical challenges of “outing” detainees while conducting the investigation and took measures to mitigate such risks. The measures included submitting the project for review to a research ethics committee and to the Irish Prison Service; making arrangements to safeguard the anonymity of participating detainees, including in respect of designated personnel within the prison service; providing each participant with information about the project during face-to-face meetings, where the parameters of confidentiality were explained; having interviewees sign a consent form; using pseudonyms for all persons in the report; and not disclosing the name of the prisons in which the interviews and focus group took place.

The IPRT’s main findings include evidence of homophobia and a prison culture of hyper-masculinity that is often maintained through violence, the invisibility of LGBT detainees’ needs, challenges in accessing gender reassignment therapies, and obstacles in obtaining means of prevention for sexually transmitted diseases and infections, in particular for women. Recommendations are tailored accordingly and addressed to the Irish Prison Service and other relevant bodies.

³⁷ Irish Prison Reform Trust, *Out on the Inside: The Rights, Experiences and Needs of LGBT People in Prison*, February 2016.

3. Monitoring tools and assessment criteria

Employing appropriate “lenses” to adequately account for the situation of LGBTI persons deprived of their liberty may entail adjustments to extant methodologies and a review of existing monitoring tools. Monitoring bodies using checklists and/or questionnaires ahead of or during visits might have to reconsider and revise such materials. While this is particularly relevant for tools designed for visits with specific objectives related to the situation of LGBTI persons, tools used during general visits should also reflect such considerations. If monitoring bodies use checklists, criteria, or other tools to assess the treatment and conditions of persons deprived of liberty, these should include specific questions or indicators related to sexual orientation and gender identity. It is advisable that monitoring bodies develop such materials with the support of experts from civil society organisations and/or academics working on LGBTI issues.

Ahead of their visits, some monitoring bodies may use voluntary and confidential surveys of a sample detainee population, which inform visit preparation and form part of the evidence-base for subsequent monitoring and reporting. While such surveys can help obtain quantitative data on a broad range of issues, they are not recommended for inquiring into the specific situation of LGBTI persons. Experience demonstrates that even if questionnaires are distributed individually to respondents and sealed in an envelope, only few LGBTI detainees are likely to disclose their sexual orientation, gender identity, or sex characteristics, particularly in contexts with deeply-rooted homophobia, transphobia, and discrimination against intersex persons.



Good practice
Criteria and indicators on LGBTI persons in tools used by monitors

Her Majesty’s Inspectorate of Prisons (HMIP), which is part of the NPM of the United Kingdom, uses criteria-called “Expectations³⁸”–

³⁸ Her Majesty’s Inspectorate of Prisons: <https://www.justiceinspectrates.gov.uk/hmiprison/our-expectations/>

against which inspectors monitor prisons and other establishments. HMIP has devised specific “Expectations” for different types of facilities falling under its remit (e.g. immigration detention facilities, armed forces service custody facilities, police custody facilities) or by specific prison populations (e.g. men, women, children and young people).

The “Expectations” used for assessing the conditions and treatment experienced by men in prisons include specific indicators to assess whether the specific needs of prisoners “of all sexual orientations” are met, by looking at evidence of staff training, promotion of acceptance of all sexual orientations, the existence of guidelines for prisoners about what behaviours are acceptable, and the availability of support groups or schemes within the prison or of referrals to external support networks. Similarly, the “Expectations” have a set of indicators for both trans and intersex detainees, which include evidence that the views of the prisoner are taken into consideration in placement decisions, of access to appropriate medical treatment and other specialist support for prisoners wishing to begin gender reassignment, and to specific items, as well as of the use of proper name and pronouns, access to counselling services, and staff training to better meet trans prisoners’ needs.

“Expectations” used for assessing the conditions and treatment of women in prison similarly include indicators to assess whether women “of all sexual orientations” are treated equitably and according to their individual needs. “Expectations” used for children and young people, as well as for detainees in immigration detention, also include indicators regarding sexual orientation and gender identity. HMIP’s “Expectations” are regularly reviewed and civil society organisations are encouraged to contribute to the reviews.

4. Composition of monitoring teams

Due consideration should be given to the composition of visiting teams tasked with monitoring the treatment of LGBTI persons deprived of liberty. Not all monitoring bodies will have the same leeway with regards to determining a team’s composition, depending primarily on the size of the institution, its budget, and the range of expertise available internally. The type and size of facility to be visited (e.g. prison, immigration detention facility, police station) also must be taken into account when determining the skills and

expertise required. In particular, the proper implementation of NPM mandate demands that members “have the required capabilities and professional knowledge” and “strive for a gender balance and the adequate representation of ethnic and minority groups in the country” (OPCAT, Art. 18 [2]).

Smaller NPMs may not be able to ensure the presence of both capabilities and professional knowledge, and adequate representation of all ethnic and minority groups in their teams. In such cases, and when specific skills and profiles additional to those represented by the team’s membership are required, it is advisable to reach out to outside experts, including for participation in visits (although some monitoring bodies may be prevented by law from bringing external experts on visit). Irrespectively of their size and capacities, it is essential that NPMs (and other monitoring bodies) strive to promote and actualize a reality of non-discrimination, including in their mere composition, which should aim to reflect the diversity of people encountered in places of deprivation of liberty.

The Special Rapporteur on Torture has noted that the “inclusion of women, lesbian, gay, bisexual and transgender persons and other minority representation on inspection bodies at all levels would help facilitate the reporting of gender-based violence and discrimination and identify cases of torture and ill-treatment³⁹”. Nevertheless, it cannot be expected that all monitoring bodies will include LGBTI team members, and all the more so individuals who are open about their sexual orientation or gender identity. It is also important to stress that every monitor—irrespective of his or her gender, sexual orientation, or gender identity—can and should apply a “gendered and intersectional lenses” during visits.

This being said, having an LGBTI focal point within a monitoring body will prove useful to ensuring the visibility of the topic and to internally mainstreaming issues related to sexual orientation and gender identity in places of deprivation of liberty. An LGBTI focal point can also ensure that materials used by the monitoring body pro-

³⁹ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57, 5 January 2016, para. 39.

perly account for the needs of LGBTI detainees, and liaise with civil society organisations, including with the purpose of strengthening the capacities of the team in this respect. The focal point should not be dependent on the presence of an LGBTI member in the team, but rather ought to be institutionalized in order to ensure sustainability.

Monitoring bodies should also be aware that in contexts with deeply rooted homophobia and transphobia, openly LGBTI monitors may be at risk of harassment and abuse during visits. If monitoring teams include LGBTI monitors (and particularly if they are open about their sexual orientation or gender identity), primary consideration should be given to their safety and to ensuring that they are treated on equal basis with their peers, notably in terms of accessing facilities and avoiding discriminatory subjection to searches.

When monitoring bodies are supported by boards or advisory councils, it is advisable that LGBTI expertise is adequately represented in the membership of these bodies.



Good practice (I)
Working team dedicated to LGBTI-related issues
within monitoring bodies

In **Argentina**, the Federal Ombudsman for Prisons (PPN – *Procuración Penitenciaria de la Nación*), which forms part of the NPM, established a working team on gender and sexual diversity. The creation of the working team enabled the PPN to bring visibility to the issue and to ensure that LGBTI detainees recognise it as a guardian of their fundamental rights.

The establishment of the working group was premised on the conviction that it is the duty of a monitoring body to devote special attention to those who are likely to be most adversely impacted by imprisonment. The working team conducts weekly visits to prisons with special units for women and GBT detainees. It examines in particular issues relating to the implementation of legal provisions in detention settings, including the right to legal recognition of self-identified gender for trans detainees. The team also places special emphasis on the right of access to healthcare.

The working team is responsible for ensuring that LGBTI issues are

mainstreamed and visible across the entire institution, and of raising awareness about these issues among external stakeholders. Since the creation of the working team, a chapter on gender issues (that features information on sexual orientation and gender identity) is included in every annual report of the institution.



Good practice (II)

Internal training on LGBTI issues for monitoring bodies

Monitoring bodies may be well-meaning when examining the specific situation of LGBTI detainees, but in the absence of proper training there is a risk that monitors will make assumptions based on stereotypes or overlook situations of discrimination. There is also a risk that private interviews with LGBTI detainees will be experienced as yet more oppressive experiences, if they are not adequately conducted by monitors.

In the **United Kingdom**, inspectors of HMIP (part of the national NPM) participated in 2012 in a workshop designed to raise awareness about the needs of and risks faced by LGBTI detainees. The participants discussed a series of scenarios in small groups, with the aim of identifying specific challenges faced by LGBTI prisoners, and how outcomes could be improved. The scenarios were based on findings from recent prison inspection reports, and on the personal experiences of a gay former detainee who helped the organisers devise the workshop.

5. Interviews with detainees

When considering selection strategies for interviewing detainees, monitoring bodies should first and foremost ensure that they do everything to prevent any harm, either during the interview, or as a consequence of it. Depending on their objectives and on the context in which visits are undertaken, monitoring bodies will need to determine whether or not they ought to proactively reach out and speak to LGBTI detainees. In establishments with special units or cells dedicated to GB or trans women detainees, the selection of detainees for interviews may be more straightforward than in detention settings where such separation does not exist. Directors of closed institutions or senior staff members may often be willing to

tell monitors who among detainees are considered to be LGBTI, but monitors should exert caution when enquiring about the presence of LGBTI detainees in the establishment, unless this question is raised alongside others pertaining to specific categories of detainees. Understanding power structures and informal hierarchies within places of deprivation of liberty is also very important to preventing reprisals following interviews.

One-to-one interviews with self-declared or perceived LGBTI detainees may draw unnecessary attention and/or may not be possible, and monitors should consider having interviews with a large number of randomly selected detainees and addressing the issue of discrimination and abuse stemming from sexual orientation and gender identity, among others.

Because of the specific challenges in identifying LGBTI detainees and risks of harm, interviews may not always be the main source of information, and other sources of information may be prioritised. Interviewing former detainees, relatives or associations is sometimes a safer way to tackle sensitive issues. It is also crucial that all data is treated confidentially and that this is clearly explained to detainees.

It is important to stress that one cannot assume a person is LGBT on the basis of their appearances and demeanours. “Effeminate” men or “masculine” women are not necessarily gays or lesbians and, conversely, heterosexual persons may not dress, behave, and present themselves according to heteronormative social expectations. Gender-based expectations and terminologies related to sexual orientation and gender identity can also greatly vary depending on culture and context. What is ultimately important for monitors is not to know detainees’ sexual orientation or gender identity, but rather to enquire into and identify any forms and patterns of discrimination based on sexual orientation, gender identity and expression, or sex characteristics that may be conducive to torture or other ill-treatment. Monitors should be aware that many LGBTI detainees have experienced discrimination and trauma and might perceive some questions, or their formulation, as offensive or intrusive. In any case, detainees should never be or feel pressured by monitors to disclose their sexual orientation or gender identity. Monitors should

always be clear about what they can or cannot offer in order to avoid raising false expectations, in particular with persons who have suffered trauma and who may be at risk of re-victimisation.

In all interviews with detainees, monitors should use appropriate language and send a clear message of non-discrimination, including with regards to sexual orientation and gender identity. This will help detainees feel safe in disclosing their sexual orientation or gender identity if they so wish. Ensuring the confidentiality of the setting and devoting sufficient time to the interview are essential to establishing a relationship of trust and to creating a safe space that will enable the detainee to open up about situations of discrimination or abuse. Monitors should favour open-ended questions and avoid asking direct questions about sexual orientation and gender identity. When addressing LGBTI issues, it is essential that they are cautious with the use of labels, in particular with detainees of different nationalities or ethnicities, who may not be familiar or at ease with some terminologies. Monitors conducting interviews with detainees should also exert caution in using pronouns and, when appropriate, ask the detainee what their pronouns are.



Terminology matters!

In order to ensure a common understanding of and approach to the use of terminology by the entire visiting team, monitoring bodies should develop a short internal document on the use of LGBTI-sensitive vocabulary during interviews,⁴⁰ providing examples of language that ought to be avoided and suggestions for preferred alternative wording. Such internal guidance should be developed jointly with experts working on LGBTI issues, ideally with a cross-section of racial, linguistic, and economic minorities, and should be tailored to the context in which the monitoring body operates.

If monitors are accompanied by interpreters, in particular when visiting immigration detention facilities, it is imperative to ensure that the lat-

⁴⁰ See for example UNHCR Resettlement Service Division of International Protection, *Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees* (April 2013), which includes examples of language to avoid and preferred language. The list can be adapted to ensure its relevance to each local context.

ter are carefully chosen and, specifically trained on appropriate terminology, and that they do not display discriminatory attitudes. Monitoring bodies should rely neither on interpreters working at immigration detention centers nor on fellow detainees from the same country of origin as the detainee being interviewed (see Chapter V).

6. Triangulation of information

All preventive visits to places of deprivation of liberty require that monitors triangulate the information they receive and avoid taking any information received or observations at face value. Triangulation should be at the core of the monitoring methodology and is the only way to ensure objectivity and impartiality in communicating with, and reporting to, authorities. Triangulation also demands that in cases where a monitoring team splits into groups during the course of a visit, it should reconvene periodically (and at least before the final dialogue with the establishment's director) to exchange and cross-check information.

When interviews with detainees constitute the primary source of information, monitoring bodies should also seek to obtain information from other sources, such as the institution's director, staff members (including healthcare personnel), as well as registers and other documents. Monitoring bodies may also seek to enquire about specific issues with other stakeholders, such as service-providers, chaplains, lawyers, relatives, and former detainees. Seeking information from detention facility staff may be especially significant in cases where detainees fear reprisals. In such cases, a good strategy may be for monitors to speak with additional staff members, and in particular frontline staff, who may be candid and open up about their practices and sometimes their prejudices (or, conversely, demonstrate their sensitivity towards and understanding of the issue). Asking simple questions, for instance regarding the training received on gender and diversity, their understanding of LGBTI issues, or what reception procedures are in place for detainees who identify as LGBTI, may be a means of obtaining helpful information without endangering detainees.

Initial discussions with an institution's director are typically useful for obtaining general information about the establishment's population. In prisons, for instance, these are often a good occasion to obtain figu-

res and data about sentenced and pre-trial detainees, the number of foreigners disaggregated by nationalities, the nature of detention and security regimes, and the presence of detainees in disciplinary quarters. When the establishment includes special wings for “vulnerable detainees”, the director may also be able to provide additional information about the profile of this population and the reasons behind their placement in such units, including for preventing violence on the basis of their sexual orientation or gender identity.

Given the sensitivity of the issues that may emerge in assessing the situation of LGBTI persons deprived of liberty, monitors should exert caution to ensure that their efforts to cross-check information avoid exposing detainees to risks of reprisals. In some cases, several similar testimonies from detainees will be sufficient for a specific pattern of abuse or discrimination to emerge.

Registers, both manual and electronic, are essential sources of information. Registers of particular importance include custody records, logbooks on incidents, the use of force, and complaints, personal detainee files, and medical files. If an establishment is equipped with CCTV, the footage also constitutes an important source of information and a useful means for cross-checking information. Triangulation is especially important if monitors suspect the existence of a pattern of discrimination or abuse on the basis of sexual orientation and gender identity. For example, if there is a suspicion that lesbian or gay detainees showing open displays of affection are arbitrarily sanctioned by being placed in solitary confinement, monitors should check disciplinary registers (and particularly for information about the reasons for sanctions, the recurrence of specific staff members’ names, etc.) and triangulate this information with that obtained during interviews with the concerned detainees, as well as fellow inmates, staff members and, if relevant, CCTV footage.

In the case of trans detainees, monitors should examine registers to determine whether the recorded information respects their self-identified gender⁴¹. They should check how this information is used and whe-

⁴¹ See United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 7: “No person shall be received in a prison without a valid commitment order. The following information shall be entered in the prisoner file management system upon admission of every prisoner: (a) Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender”.

ther it helps inform allocation and placement decisions in either male or female facilities.

7. Reporting

Visits to places of detention are never ends in themselves, but rather central components of a monitoring body's sustained endeavors and the processes by which it seeks to improve the overall treatment of and conditions experienced by persons deprived of liberty. Visits should therefore be followed by reports to the authorities, with recommendations on areas for improvement and required changes. This section does not aim to present a comprehensive overview of all aspects of reporting and recommendations, but rather to elaborate on key points relevant to reporting on the situations of LGBTI persons deprived of liberty.

Visit reports are one of the most important tools at the disposal of monitoring bodies aiming to enhance the protection of persons deprived of their liberty. Some monitoring bodies first share their draft reports confidentially with the authorities, with the final reports being made public only thereafter, alongside the authorities' replies. Visit reports are intrinsically linked to the ways in which monitoring bodies conduct visits, as they are meant to reflect, elaborate upon, draw conclusions from, and issue recommendations from the main findings of visits. The issue of LGBTI detainees may or may not appear in a visit report, depending on what is observed during the visit. In some cases, the issue of sexual orientation and gender identity may be addressed in the broader context of discrimination. In other cases, when monitoring bodies conduct targeted visits to specific premises where LGBTI detainees are held, or come across situations of a systemic nature, dedicated reports and/or specific recommendations on this topic should be produced.

In addition to visit reports, monitoring bodies may also write **thematic reports** and (at least in the case of NPMs) be obliged to publish an **annual report**. Issuing thematic reports enables monitoring bodies to employ a cross-cutting approach to specific topics, such as the situation of LGBTI detainees, and moreover to address sectors as a whole (e.g. the penitentiary or health immigration systems), rather than individual establishments. Both thematic and annual reports can be powerful tools that bring visibility to the deprivation of liber-

ty in general, and to more specific topics in particular. If supported by a communications strategy, they can attract more media coverage and attention, and contribute to setting the terms of public and policy debates on important issues.

It is essential for monitoring bodies to apply the “do no harm” principle not only to the conduct of visits, but also to the way they draft reports, and particularly by ensuring that the names of the persons concerned do not appear in published documentations. They should also strive to guarantee that persons referenced in a report will not be easily identified, even though this might be difficult if only a few individuals are mentioned by the findings. In some contexts, bringing attention to specific groups may also be a way to enhance their protection. In all cases, monitors should always seek the consent of detainees before publishing information that may lead to their identification. Monitoring bodies should also have clear rules and procedures regarding data management and data protection, as well as secure filing systems.

Particularly when raising issues related to the situation of LGBTI persons deprived of liberty, which in some contexts may be met with some resistance from authorities, monitoring bodies should make the best use of international standards, reports from international and regional monitoring bodies, recommendations from UN special procedures, as well as treaty bodies’ concluding observations and communications, in order to reinforce their arguments and recommendations.



Good practice
**NPM visits and thematic reports focusing on the
 situation of LGBTI detainees**

Following a visit to the prison of Gorizia, in Northeast Italy, the **Italian NPM** (*Garante nazionale dei diritti delle persone detenute o private della libertà personale*) published a visit report⁴² highlighting the specific situation of gay and trans detainees. The visit was prompted “by specific

⁴² Il Garante Nazionale dei diritti delle persone detenute o private della libertà personale, *Rapporto sulla visita alla Casa circondariale di Gorizia*, 17 maggio 2016.

circumstances” following the opening of a special unit for gay detainees in September 2015. The unit was equipped to host up to 17 detainees coming from various prisons of the region. In its report, the NPM was critical of the unit for various reasons. First, and while recognising that the authorities had consulted with NGOs working on LGBTI issues ahead of opening the unit, the NPM expressed concern about the risk of further isolation and stigmatisation of gay detainees, who were in danger of being held in a “world apart”. The NPM was also very critical of the fact that one detainee had remained in a situation of *de facto* solitary confinement for two and a half months. In its report, the NPM recommended the undertaking of a review of the policy that led to the establishment of such a unit, with the aim of providing equal treatment and conditions for all detainees, and suggested the establishment of a working group to identify ways forward. As a result, the Ministry of Justice decided to close the unit and to allocate gay detainees to other prisons in the region. The report helped bring visibility to the issue, and was echoed in NGO statements and the media.

In 2010, the **French NPM** (*Contrôleur général des lieux de privation de liberté*) published an opinion on the care and management of trans prisoners⁴³. In what can be considered a short thematic report, the NPM addressed the issue on the basis of various testimonies gathered from detainees through letters and of on-site visits. The opinion includes the following recommendations regarding the care of trans detainees: enable them to benefit from access to a clearly identifiable specialist health-care team throughout the care pathway; ensure the provision of adequate information and support; ensure respect for their physical integrity without resorting to solitary confinement; and guarantee their rights to intimacy and privacy. The opinion has gained attention from the media and set the terms for relevant discussion on this issue.

In 2016, the **Local Preventive Mechanism (LPM) of Rio de Janeiro** (part of the National System to Prevent and Combat Torture in **Brazil**) issued a thematic report⁴⁴ on “Women and girls deprived of liberty in Rio de Janeiro,” which includes a separate chapter on “transsexual and *travesti*” detainees. The report was primarily based on a visit to the penal es-

⁴³ *Opinion of 30th June 2010 concerning the care and management of transsexual prisoners*, Opinions and Recommendations of the French ‘Contrôleur général des lieux de privation de liberté’, 2008 - 2014, CGLPL and APT, 2014, pp. 47-52.

⁴⁴ Mecanismo Estadual de Prevenção e Combate à Tortura do Rio de Janeiro, *Mulheres, Meninas e Privação de Liberdade no Rio de Janeiro*, ALERJ, Rio de Janeiro 2016.

establishment of *Evaristo de Moraes*, which hosts most of the trans and *travesti* detainees in the State of Rio de Janeiro (including 79 *travesties* at the time of the visit), as well as other detainees in situations of vulnerability. During its visit, the LPM used a methodology that combined focus groups and other interviews. At the outset of the interviews, the LPM staff asked detainees which pronouns and names were appropriate to use. The visit revealed that trans and *travesti* detainees were subjected to mocking, insults, and harassment by prison guards; faced barriers in initiating or continuing hormone therapies; were forced to wear men's uniforms and obliged to renounce their visitation rights for fear of being humiliated by guards. An insufficiency of contraceptives and the lack of complaint mechanisms were also noted. Most trans women and *travesties* said that they would prefer to remain in the male prison as opposed to being transferred to a facility for female offenders. The LPM stressed in its report that trans and *travesti* detainees' consent should be sought prior to any transfer decision.

Chapter III

**Monitoring the situation of LGBTI
persons in prisons**

Prisons tend to be generally characterized by strong heteronormative values, a strict hierarchy of power relations, and a culture of correction. In such environments, LGBTI detainees are at risk of a broad range of discrimination and abuse. In homophobic and transphobic societies stigma, discrimination, and violence are further magnified in closed settings. As noted by the Special Rapporteur on Torture, “within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as children, the elderly, persons with disabilities and diseases, gay, lesbian, bisexual and trans-gender persons, suffer double or triple discrimination⁴⁵”.

Where data is available, LGBTI detainees are reported to be among the groups most exposed to violence, in particular sexual violence, before other vulnerability factors such as young age, first time in detention, and sex-related offense. Prevailing taboos and discomfort regarding LGBTI issues in prisons contribute to the invisibility of the LGBTI detainees, aggravating the risks they face and the reality that their needs are often neither identified nor met.

1. Prevention of violence from staff and fellow inmates

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity and Additional

⁴⁵ Report of the Special Rapporteur on Torture to the UN Human Rights Council, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, 5 February 2010, A/HRC/13/39/Add.5, para.231.

***Principles and State Obligations on the Application of
International Human Rights Law in Relation to Sexual Orientation,
Gender Identity, Gender Expression and Sex Characteristics to
Complement the Yogyakarta Principles***

**Principle 9. The Right to Treatment with
Humanity while in Detention**

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall: [...]

- D** Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population.”

**Principle 33. The Right to Freedom from
Criminalisation and Sanction**

“Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

States shall: [...]

- F** Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics.”

The specific and exacerbated exposure of LGBTI detainees to violence stems from stigmatisation and discriminatory attitudes that are magnified in closed environments. Violence against LGBTI detainees can take many forms and may include bullying, harassment, verbal or psychological violence, exploitation, as well as physical and sexual violence, including rape. LGBTI detainees are among the persons most exposed to sexual and gender-based violence, which can include, in addition to rape and threat of rape, improper tou-

ching of certain body parts, forced prostitution, being forced to undress in front of others, improper behaviour during body searches, voyeurism in cells or showers, and obscene comments or sexualised gestures. The effects of non-consensual sex include a wide range of physical and psychological harms, including sexually transmitted infections (STIs) such as HIV and hepatitis, depression, anxiety, self-harm, and post-traumatic stress disorders.

Verbal violence is the least visible form of violence, but it is often the gateway to bullying and physical violence, especially when unchallenged by staff. Homophobic or transphobic name-calling and mocking, the deliberate improper use of pronouns with trans detainees, as well as forced disclosure of sexual orientation and gender identity by staff or other detainees, have harmful and long-lasting impact on detainees. When prison staff and management do not challenge such behaviours, they participate in creating a homophobic and transphobic climate wherein not only insults, but also physical violence, may go unpunished.

Discrimination against LGBTI detainees might also be justified by reference to religious teachings or cultural norms that are not questioned by prison staff. Prison staff may not react to allegations of rape by fellow inmates that are made by gay detainees, as a result of conflating their sexual orientation with consent to sexual activities. The stigmatisation of LGBTI detainees in some prisons is so great that they are treated as complete outcasts. In some cases, they are obliged to wear special uniforms or other distinctive signs, and coerced to perform the least rewarding tasks, including cleaning services. There are also reports of gay detainees being tattooed against their will to “mark” them as homosexuals.

Lesbians are particularly exposed to violence by staff, and even more so when they are under the supervision of male guards. Female detainees viewed as “masculine” in appearance by guards can be subjected to harassment, physical abuse, and “forced feminization”. Specific abuses include so-called “corrective rapes” and being placed in cells with men for refusing sexual advances by prison staff. They can also be coerced into sex with prison staff, sometimes in return for favours such as cigarettes or alcohol.

Trans detainees, in particular trans women, face unique exposure to violence from both staff and fellow inmates, which can include

intentional beatings of the breasts to burst implants, being forced to enact sexual encounters scenes in front of fellow inmates (sometimes sponsored by guards who charge for the “viewing”), and gang rapes. As a first step to ensure protection of and respect towards trans detainees, authorities should ensure that they are registered and addressed by their chosen names (sometimes called “social” names), corresponding to their self-identified gender, and allocated accordingly (see below, “Allocation and detention regime”).

The taboos around sexuality prevailing in most prisons, coupled with cultures of hyper-masculinity, contribute to the lack of differentiation between consensual and non-consensual sex. Sexual victimisation of detainees therefore tends to remain invisible, while the rate of underreporting is understood to be very high. The Special Rapporteur on Torture has noted that “fear of reprisals and a lack of trust in the complaints mechanisms frequently prevent [LGBTI] persons in custody from reporting abuses”.⁴⁶ Allegations of homophobic and transphobic bullying and violence should be efficiently investigated, in order for detainees to have confidence in the reporting process. In many contexts, detainees do not report acts of violence for lack of trust in the complaints mechanisms and the justice system as a whole, as well as for fear of reprisals. This underreporting not only makes violence against LGBTI detainees less visible, but can also turn against detainees, who may not have evidence such as medical certificates or testimony if they decide to lodge a complaint later on. It may also reinforce State authorities’ conceptions that LGBTI detainees do not face particular problems in detention and that specific measures for their protection are therefore not required.

Even when acts of violence against an LGBTI detainee are sanctioned by authorities, their gender dimensions may not be adequately accounted for, thus diminishing their gravity. Monitoring bodies should check whether authorities have put in place a comprehensive anti-bullying strategy to reduce and eliminate incidences of inter-prisoner violence and intimidation, including those directed against LGBTI detainees. Such a strategy should include systematic recording of all such incidents and adequate investigations into all

⁴⁶ *Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 35, p. 10.*

allegations of targeted violence against LGBTI prisoners. Investigations should properly account for the sexual orientation and gender identity dimensions of all complaints.

Transfers between detention facilities and to courts or hospitals are moments of high risk, especially if various detainees are grouped together in the same vehicle. Trans women in particular are exposed to various forms of violence (verbal, physical, and sexual) from fellow inmates during transfers. Adequate protective measures should be undertaken during transfer, but should neither prevent LGBTI detainees from being brought to a court or hospital, nor delay transfers to another facility.



Good practice

The Prison Rape Elimination Act (PREA) and PREA Standards (USA)

The Prison Rape Elimination Act (PREA) was passed in 2003 with unanimous support by the **United States** Congress. Its purpose is to “provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.”

The Act led to the creation of the National Prison Rape Elimination Commission, which was charged with developing draft standards for the elimination of prison rape. The “PREA Prisons and Jails Standards⁴⁷” (published in 2012) include provisions that direct government agencies to pay particular attention to the need to protect LGBTI persons. Among other things, the standards stipulate that the assessment of detainees “during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates” consider “whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming”. The standards also provide that protective custody must be limited in time and not entail the imposition of a harsher prison re-

⁴⁷ Prisons and Jail Standards, United States Department of Justice Final Rule, *National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA)*, 28 C.F.R. Part 115 Docket No. OAG-131 RIN 1105-AB34, May 17, 2012. Available at : https://www.prearesourcecenter.org/sites/default/files/content/prisonsandjailsfinalstandards_0.pdf

gime, and contemplate disciplinary sanctions both for staff (including termination) and for fellow inmates who violate agency sexual abuse or sexual harassment policies.

The PREA standards also consider intersectional forms of discrimination, notably with respect to incident reviews, noting that prison authorities “shall consider whether the incident or allegation was motivated by race; ethnicity; gender identity; lesbian, gay, bisexual, transgender, or intersex identification, status, or perceived status; or gang affiliation; or was motivated or otherwise caused by other group dynamics at the facility.”



Worrying trend **Self-government and related risks for LGBT detainees**

Preventing violence against all detainees is a key duty of all prison authorities, which must be abided independently of the nature of any particular prison, or of the profile and characteristics of the detainees. However, in many prison across the world, State authorities informally delegate powers, including those of management and governance, to detainees themselves, while keeping control over the external perimeter of the prison. This phenomenon is referred to as “self-government” (or “shared-government”, whereby authorities retain some forms of control) and is often, but not always, linked to organised crime and gangs.

Good prison management does not preclude some forms of detainees’ involvement in decision-making, “under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment”, as prescribed for in the Nelson Mandela Rules (40.2). Nevertheless, the same rules make clear that “no prisoner shall be employed, in the service of the prison, in any disciplinary capacity” (40.1). In practice, however in many “self-governed” facilities informal leaders have *de facto* powers to impose disciplinary measures over fellow inmates.

Evidence shows that minority groups and disenfranchised categories of detainees are particularly exposed to abuses related to self-government. Male prison subculture is often characterised by “*macho*” values and strict informal hierarchies relying on stigmatizing labels; in such cases, detainees who are perceived as not adhering to their expected sexual orientation or gender identity and roles are usually relegated to the bottom of the hierarchy, alongside sex offenders and child moles-

ters. Abuses and punishments faced by such detainees include verbal, physical, and sexual violence, as well as additional isolation and being forced to be in charge of prison maintenance or other unrewarding and humiliating tasks. They can be forced to eat from different dishes to avoid any forms of physical contact with other inmates. LGBTI detainees can also be prohibited from accessing the courtyard, sport activities, and religious services, or be forced to remain in their quarters, other than for maintenance and cleaning purposes. Sexual violence is typically used as a means to assert power and authority over the most vulnerable detainees, and to establish status in the prison hierarchy.

In prisons with male and female wings, lesbians can face a risk of abuse if they refuse to submit to the control of and measures imposed by male detainees who have leadership functions within the prisons.

Monitoring checklist

- ✓ Are there national policies and/or specific regulations in place to prevent violence and discrimination based on sexual orientation, gender identity and sex characteristics?
- ✓ Is there any indication that LGBTI detainees are victims of targeted forms of violence? (from staff or from fellow inmates?) Do incident registers reveal any patterns of violence or discrimination?
- ✓ Is there any indication that LGBTI detainees are forced to carry out humiliating and degrading tasks within the prison?
- ✓ Do prison staff adequately react to manifestations of homophobic and transphobic violence from fellow inmates?
- ✓ Are staff, and in particular healthcare staff, sensitized to identifying violence based on sexual orientation and gender identity?
- ✓ How are allegations of violence based on sexual orientation and gender identity handled by the authorities? Is the sexual orientation and gender identity dimension of incidents accounted for?

- ✓ Do detainees use and trust complaint mechanisms, particularly when incidents relate to their sexual orientation or gender identity?
- ✓ Once incidents have been recorded, what mechanism is in place for handling the victim, including medical and psychological care? In case of sexual violence, what measures are taken?
- ✓ Are allegations of sexual abuse or sexual harassment thoroughly investigated? If so, what are the outcomes of such investigations?
- ✓ Is data available regarding the specific exposure to violence and discrimination by LGBTI detainees?

2. Allocation and detention regime

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 9: The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall:

- A** Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse; [...]
- B** Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
- C** Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender

identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population; [...]

- D** Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and “protective” solitary confinement;
- E** Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed.”

The practices according to which LGBTI detainees are allocated to prisons and/or specific units or quarters within prisons are extremely diverse, ranging from failures to take into account a detainee’s sexual orientation and gender identity during placement decisions, to the creation of special prisons for gays and/or trans detainees. Between these two extremes, national practices include placing LGBTI detainees in wings for vulnerable persons or at-risk detainees (including sex offenders), creating special wings for gays, bisexual men, and/or trans women detainees (characterized by varying degrees of interaction with other prison units), and resorting to solitary confinement for purportedly protective measures. The degree of consent and consultation sought from LGBTI detainees in the decision-making process greatly varies by country (and even by facility). Depending on the context, allocation decisions may be taken by prison or judicial authorities.

The identification of LGBTI detainees is also subject to significant variations in national practices, being based for instance on self-declaration and self-identification; multidisciplinary assessments conducted upon arrival; or unilateral decisions by the prison ma-

nagement or judicial authorities. For trans detainees, allocation decisions are often made on the basis of the sex assigned at birth, rather than on self-identification. When LGBTI detainees are separated from the rest of the prison population, there is a risk that their access to activities, vocational training, or work will be restricted or even denied.

Special wings for LGBTI detainees

LGBTI detainees may be separated from the rest of the prison population and allocated to special wings because the authorities cannot guarantee the protection of their physical integrity in general prison population. LGBTI detainees may also be segregated from the general prison population and allocated to a facility's worst quarters, such as those characterized by poor and filthy material conditions, or that are lacking ventilation or electricity or are overcrowded, as a form of punishment. Even when special wings are created with entirely protective intentions, their use leads to risks of further stigmatisation and discrimination, and of arbitrariness in the placement decision-making process. Such wings can accommodate anywhere from a handful of detainees to several hundred, in the largest prisons. Sometimes the name of the wing may itself be derogatory. Practice shows that lesbians and trans men are usually not segregated from the rest of the population in special quarters, although they are disproportionately exposed to discriminatory sanctions and punishments (see below, "Discriminatory sanctions").

When segregated from the rest of the prison population, LGBTI detainees can be subject to stricter detention regimes, for instance being denied access to services, programmes, and facilities offered to other inmates. This can be the result of infrastructure (i.e. due to the wing's location in a remote part of the prison or to its physical shortcomings), or due to prison personnel's alleged inability to guarantee the protection of the LGBTI detainees. In practical terms, it means that they may not be able to attend vocational training, participate in workshops, attend continuing education or sports classes, or even access the courtyard. They may also be excluded from therapeutic groups activities and drug rehabilitation programmes. Their detention conditions may even be tantamount to high security

regimes. Such discrimination jeopardizes the detainees' chances of reinsertion and leads to deprivation of meaningful human contacts and greater isolation.

Another issue of concern revolves around the admission process to LGBTI wings, and specifically to the question of who is placed in such units, and on the basis of which criteria. In some countries, special wings house trans women detainees only, while in others they house gay and bisexual men and trans persons together. In other cases, self-declared bisexual detainees are specifically excluded from such wings. Initial screenings are often conducted in such a way that they amount to discriminatory "admissions tests" that rely on appearances and stereotypes. There is also evidence that minorities, including ethnic minorities, may be excluded from special wings because of discriminatory biases during admission. Such screenings can be humiliating and detainees may therefore prefer not to disclose their sexual orientation or gender identity, while staff may label a detainee who has not self-identified as such as LGBTI. If special wings exist, initial admission screenings should be done by multidisciplinary teams, based on objective and professional criteria, and with a view to avoiding further discrimination and stigmatisation. It is also important for monitoring bodies to assess whether interviews upon admission are conducted in private, with clear explanations – in a language understood by the detainees – about the implications of disclosing such information.

In homophobic and transphobic contexts, LGBTI detainees – particularly gays and trans persons – can be segregated in the worst quarters of the prison (sometimes in warehouses, with little or no natural light at all) on the basis of their perceived sexual orientation and gender identity. They may be treated as outcasts, according to informal rules that forbid other inmates from speaking or coming into physical contact (i.e. taking items from their hands or shaking hands) with them, or even greeting or sharing the same space with them. Often housed together with sex offenders, LGBTI detainees may even be forced to bear a distinctive sign or wear a special uniform. Sometimes authorities may deny the existence of separate accommodation for "vulnerable" detainees, but monitoring bodies should be aware that they can nevertheless exist, even unofficially.

There is no “one-size-fits-all” answer to the question of the appropriateness of segregating LGBTI detainees from the rest of the prison population. Even though segregation can sometimes be a matter of life and death, it is not a long-term solution that tackles the issue of prison violence stemming from homophobia and transphobia at its roots. Importantly, monitoring bodies should assess the extent to which LGBTI detainees are involved in the placement decision-making process, as it cannot be assumed that LGBTI detainees always prefer to be segregated from their fellow inmates. Decisions on placement should not be irrevocable and LGBTI detainees should be given the possibility to appeal placement decisions.

LGBTI detainees placed in solitary confinement

Prison authorities may resort to isolating LGBTI detainees in single cells for their alleged protection, sometimes for weeks, months, or even years. This can be the result of unilateral decisions by the prison management, and even of informed discussions between prison authorities and the concerned inmates. In either scenario, LGBTI detainees may end up in a de facto regime of solitary confinement, defined in the revised Nelson Mandela Rules as the “confinement of prisoners for 22 hours or more a day without meaningful human contact” (Rule 44). Even if isolating a vulnerable detainee can be justified as an emergency and short-term measure, while a more adequate solution is identified or while awaiting the detainee’s transfer to another facility, it should not be used as a long-term solution. Solitary confinement may in itself constitute an infringement on the prohibition of torture and other ill-treatment and *prolonged* solitary confinement (for a time period in excess of 15 consecutive days) must be prohibited (Rule 43.1), in light of scientific and medical evidence that its harmful psychological effects can become irreversible after 15 days. The Special Rapporteur on Torture has made clear that States should ensure that “protective measures do not involve the imposition of more restrictive conditions on lesbian, gay, bisexual, transgender and intersex persons than on other detainees.”⁴⁸

⁴⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 24 February 2016, para. 70.



Case law European Court of Human Rights, *X. v. Turkey* (2012)

The European Court of Human Rights set a significant precedent in a ruling against Turkey, concerning a Turkish citizen who spent nearly 10 months in solitary confinement. The measure was ordered by the prison authorities after the applicant complained about homophobic intimidation and harassment by fellow detainees with whom he shared a collective cell. In addition to being isolated in a small and dirty seven square meter cell, the applicant was denied access to fresh air and exercise, and his social contacts were limited to his meetings with his lawyer.

For the first time, the Court found that a complaint related to discrimination based on sexual orientation yielded a violation of article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention of Human Rights, in conjunction with article 14 (prohibition of discrimination). With this ruling, the Court sanctioned the principle that solitary confinement on the basis of sexual orientation is discriminatory, even if it is intended to be a protective measure.

Allocation of trans detainees in either male or female facilities

Because prisons are governed by the principle of separation on account of sex and therefore conceived of as binary environments, trans persons generally have no option but to be allocated to either male or female facilities. Placement is commonly done on the basis of detainees' genitalia and does not take into consideration their self-identified gender, or the fact that trans identities can fluctuate. Even in countries with liberal gender recognition laws, significant gaps exist between law and practice. As a result, in many prisons trans detainees continue to be detained in male or female facilities on the basis of the sex assigned at birth, where they are extremely vulnerable to abuse. For example, trans women in some cases are coerced into giving sexual favors in return for the protection of the prison staff. There are reported instances of trans women being purposefully placed in cells with known sex offenders. Furthermore, detainees who start transitioning while in detention often face not only hostility from prison authorities, but also additional hindrances stemming from their deprivation of liberty, notably in accessing appropriate healthcare services and support. Consultations with de-

tainees regarding the most suitable allocation should not only take place upon admission, but throughout the period of detention.

In the view of the CPT, “transgender persons should either be accommodated in the prison section corresponding to their gender identity or, if exceptionally necessary for security or other reasons, in a separate section which will best ensure their safety. If accommodated in a separate section, they should be offered activities and association time with the other prisoners of the gender with which they self-identify⁴⁹.” The Nelson Mandela Rules specify that prison file management should “enable the determination of the prisoners’ unique identity, respecting his or her self-perceived gender” (Rule 7.a). This provision should be understood as intending to facilitate the placement of transgender detainees in facilities – whether male or female – of their choice. Even in facilities where allocation is dependent upon self-identified gender, it is essential that placement decisions have the consent of the detainees concerned, as some may prefer to be housed in facilities for their birth-assigned sex for reasons such as safety, work opportunities, or proximity with relatives.

Trans detainees may refrain from requesting formal legal gender recognition for fear of being transferred to another section of the prison or another facility. This is particularly the case of trans men, who may fear to be automatically transferred to a male prison. The Special Rapporteur on Torture recommends not only to “take individual’s gender identity and choice into account prior to placement”, but also to “provide opportunities to appeal placement decisions.⁵⁰” Similarly, the Special Rapporteur on extrajudicial, summary or arbitrary executions has urged States to ensure that “judicial and prison authorities, when deciding allocation of transgender person to either a male or female prison, do so in consultation with the prisoner concerned and on a case-by-case basis” and noted that “safety considerations and the wishes of the individual must be paramount.⁵¹”

⁴⁹ CPT’s visits to Spain, CPT/Inf (2017) 34, para. 95.

⁵⁰ *Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council*, A/HRC/31/57, 24 February 2016, para. 70

⁵¹ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killing*, A/HRC/35/23, June 2017, para 110 (e).

Trans men may face additional hurdles imposed by authorities when they ask to be transferred to male sections of a prison, notably on alleged security grounds, as the authorities may deem that their safety cannot be ensured in a male facility. Sometimes labeled as lesbians, trans men are often invisible in the prison system⁵², and their specific needs are therefore often not met.

When the authorities cannot guarantee the protection of LGBTI detainees, and in particular of trans persons, alternatives that will avoid further isolating and marginalising the individuals concerned should be sought, either at the moment of sentencing, when deciding on placement, or in the course of inspecting prison conditions. The Inter-American Commission on Human Rights (IACHR) notably calls for a “differentiated approach” with respect to persons belonging to groups at special risk, including LGBTI persons, which entails “considering the particular vulnerabilities and factors that may increase the risk of acts of violence and discrimination in pretrial detention contexts” and “reducing subjection to pretrial detention by making priority use of alternative measures⁵³”.



Good practice (I)

Leniency based on vulnerability and alternatives to detention

In **Israel**, a trans man sentenced to 15 months in prison for robbery appealed the decision on the grounds that he would have had to serve the entire duration of his sentence in solitary confinement, in accordance with Israel Prison Service regulations. The Supreme Court found that additional leniency was appropriate given the circumstances and reduced the sentence to ten months, stating that the harsh prison conditions in solitary confinement constituted a mitigating factor⁵⁴.

In **Argentina**, a trans woman who was detained in a male prison

⁵² Trans men and other trans-masculine persons tend to be generally speaking less visible in reports and data than lesbians, gays or trans women. See *Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/38/43, 11 May 2018, para. 42, p. 10.

⁵³ Inter-American Commission on Human Rights. Rapporteurship on the Rights of Persons Deprived of Liberty. *Report on measures aimed at reducing the use of pretrial detention in the Americas*, OEA/Ser.L/V/II, July 2017, 136.

⁵⁴ <http://www.timesofisrael.com/supreme-court-rules-leniency-for-transgender-prisoner/>

obtained the right to be placed under house arrest after being subjected to insults, threats, and beatings by prison guards. She also suffered severe burns while in prison and did not receive proper medical treatment. Furthermore, the prison authorities had failed to provide her with the adequate medical care required by her HIV-positive status. The judicial decision granting house arrest recognized her unique vulnerability as a trans person in prison. Additionally, the judge exhorted the penitentiary services to develop programmes and take action and measures to ensure that detention avoids further marginalisation of individuals on the basis of their gender identity. The judgement makes direct reference to Yogyakarta Principles 9 and 10⁵⁵.



Good practice (II)

Prison policies for the allocation of LGBT detainees

In the **UK**, Prison Service Instruction 17/2016⁵⁶ (*The Care and Management of Transgender Offenders*) came into force in January 2017. According to this instruction issued by the National Offenders Management Service, which replaced an outdated policy from 2011, arrangements must be in place to determine the legal sex of all offenders during the initial assessment. During this initial point of contact, trans detainees must be asked their views on which part of the prison estate best reflects the gender with which they identify. Where a trans detainee wishes to be allocated in part of the prison estate that is not in accordance with their legal sex, the decision is made via a local “Transgender Case Board”, on a case-by-case basis. This new policy deliberately uses the term “transgender” rather than “transsexual” and acknowledges that some offenders may have a more fluid or neutral approach to their gender identity.

In **Colombia**, the General Regulation on Correctional Establishments⁵⁷ explicitly prohibits the creation of special units aimed at segregating

⁵⁵ See: Inter-American Commission on Human Rights, *Hearing on the situation of LGBT persons deprived of their liberty in Latin America*, 23 October 2015: http://www.aicr.org/en/news_on_prevention/inter-american-commission-discusses-situation-of-lgbt-people-in-detention/#.WMu5TRYHs0, as well as *Procuración penitenciaria de la Nación*, *La situación de los derechos humanos en las cárceles federales de la Argentina, informe anual 2014*: http://www.ppn.gov.ar/sites/default/files/INFORME%20ANUAL%20PPN%202014_0.pdf

⁵⁶ UK National Offender Management Service (NOMS), *The Care and Management of Transgender Offenders*, 1 January 2017.

⁵⁷ Resolución 006349 Por la cual se expide el Reglamento General de los Establecimientos de Reclusión del Orden Nacional-ERON a cargo del INPEC, 19 Dic. 2016.

or excluding persons on the basis of their sexual orientation or gender identity. At the same, the regulation stipulates that in order to protect their life and integrity, LGBTI persons are to be consulted by the prison administration about the possibility of having access to safe and dedicated areas solely intended for their protection (Art. 36, para. 4).

In **Argentina**, trans women formerly were not able to access semi-open regimes when approaching the end of their prison term (as part of a progression in regimes towards successful release), on the alleged grounds that their security could not be guaranteed. Following a recommendation by the Federal Ombudsman of Prisons issued in 2013⁵⁸, one of the houses of the colony of Ezeiza (a semi-open prison) was reallocated for the purpose of accommodating trans women and *travesties* only, whereby ensuring their access to a progressive semi-open regime on an equal basis with other detainees. Trans women and *travesties* can therefore benefit from temporary leave and adequately prepare their release.



Worrying trend **Special prisons for bisexual, gay, and/or trans detainees**

A couple of countries publicly announced plans to build (or reallocate) entire facilities for gay and/or trans detainees only. **Turkey**, whose government was forced to pay serious attention to the treatment of gay and trans detainees following a ruling by the European Court of Human Rights in 2012⁵⁹, plans to build what has been labelled as “pink prison” in the city of Izmir⁶⁰, for the alleged protection of gay and trans detainees. Serious concerns were raised by civil society organisations and academics, which had not been consulted at all in the process. At the time of writing, the prison had not been built.

Even if the goal of building dedicated facilities for LGBTI detainees is allegedly to ensure their protection from harassment and violence from fellow inmates, the use of such facilities is likely to lead to further exclusion, isolation, and alienation. Specifically designed facilities do not guarantee that detainees will be protected from violence, particularly abuse by staff members. Furthermore, the stigma attached to persons

⁵⁸ Procuración Penitenciaria, *Recomendación N° 790*, EP 68, 15 de marzo de 2013.

⁵⁹ European Court of Human Rights, *X. v. Turkey* (2012).

⁶⁰ See in particular, *The rumours of opening an LGBTI prison in march and our requests from the Ministry of Justice*, TCPS Press Release 23, 21 March 2018.

detaiined in such prisons may also negatively impact their relationship with their relatives, including by *de facto* disclosing their sexual orientation or gender identity. As for special gay or trans women wings within prisons, there is a risk that the screenings of detainees who may be “eligible” for placement in such wings will amount to a humiliating admission “test” relying on harmful stereotypes.

In addition to ethical concerns, practical considerations should also caution against devising such projects, in particular when it comes to assuring and enabling detainees’ regular contacts with the outside world. If all gay and trans women detainees in an entire country or region are gathered in one location, it will be impossible to guarantee their proximity to relatives, regular contacts with their lawyers, and transfers to Courts where judicial hearings may be held.

Monitoring checklist

If LGBTI detainees are allocated with the rest of the prison population:

- ✓ Is there any indication that LGBTI detainees suffer discrimination based on their sexual orientation, gender identity, gender expression or sex characteristics? (from staff and/or fellow inmates)
- ✓ Is there any indication that LGBTI detainees do not participate in activities or renounce access to exercise and fresh air for fear of being harassed or assaulted by fellow inmates?
- ✓ Are some LGBTI detainees placed in solitary confinement for their alleged protection? If so, for how long, in what conditions, and is their consent sought? Are decisions reviewed regularly?
- ✓ What measures are in place to identify and address violence stemming from homophobia or transphobia? (from staff and/or fellow inmates) ghout their detention?

If LGBTI detainees are allocated in special wings:

- ✓ What are the policies and criteria for placement?

- ✓ Is the consent of detainees sought prior to placement and throu Can detainees appeal decisions of allocation?
- ✓ What are the conditions in the dedicated wings? Is the regime stricter than in other sectors of the prison?
- ✓ Is accesstoservices,programmes,education,vocationaltraining,visitation, or therapies restricted in any way as a consequence of segregation?
- ✓ Are LGBTI detainees held together with other at-risk categories of detainees, and does such joint allocation have any negative impact?
- ✓ Does the separation contribute to increasing the stigmatisation of LGBTI detainees?
- ✓ Does the separation effectively protect LGBTI detainees from violence?

Allocation of trans detainees:

- ✓ What are the policies and criteria for allocation? (based on sex assigned at birth, legal documentation, self-identification, etc.)
- ✓ Is the consent of trans detainees sought prior to their allocation?
- ✓ Can trans detainees appeal a decision (including if they wish to remain in a facility for detainees of their sex assigned at birth)?
- ✓ What are the dynamics between trans detainees and their fellow inmates?
- ✓ Is it possible for trans detainees to access legal recognition of their gender identity while in prison?

3. Body searches

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 9: The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall: [...]

- H** Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as [...] body or other searches [...].”

Body searches are moments when abuses are likely to occur, and in particular for LGBTI detainees. As body searches might imply nudity and physical contact, they magnify the risks of humiliation, discrimination, and abuse. As noted by the Special Rapporteur on Torture, “humiliating and invasive body searches may constitute torture or ill-treatment, particularly for transgender detainees⁶¹”. For this reason, body searches should always be conducted in accordance with the principles of legality, necessity, and proportionality; they should be intelligence-led and always conducted with the sole purpose of ensuring order and security. Intrusive searches – such as body cavity searches – should be performed only as a matter of last resort, and exclusively by healthcare personnel who are not the treating physicians.

Alternatives to body searches – such as metal detectors or millimeter wave scanners – should always be sought. When searches are unavoidable, they should always be performed in two steps (first above, then below the waist), to avoid full nudity. In practice, LGBTI

⁶¹ Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 36.

detainees are more likely to be abused and discriminated against during body searches. They are at a risk of suffering verbal abuse, name-calling, mocking, and physical abuse while being searched. Searches should always be intelligence-led, rather than based on profiling or conducted on a punitive basis. The Nelson Mandela Rules require that searches “shall not be used to harass, intimidate or unnecessarily intrude upon a prisoner’s privacy” (Rule 51).

International standards establish that searches should be conducted by staff of the same gender as the detainee⁶². While this provision is protective for most detainees, the situation of intersex and trans persons is especially sensitive in this regard, particularly if their gender has not been recognized by the prison authorities, or if they are transitioning and/or gender-fluid. There is as such a risk that trans detainees are not recognised in accordance with their gender identity: in such cases, trans women may be searched by a male member of staff, even though they identify as female. The same risk applies for trans men. There is also evidence that body searches can be used to humiliate trans detainees, for example by exposing them in the nude in front of other staff and inmates for the purpose of viewing their body. To mitigate and prevent such risks, trans detainees should be given the possibility, on a case-by-case basis, to choose the gender of the prison staff conducting the search. Whenever possible, authorities should first resort to alternative means, such as metal detectors. Furthermore, searches should never be conducted for the purpose of assigning gender or sex on the basis of anatomical features. Prison staff should be trained on how to conduct searches, both in terms of practical modalities and non-discrimination, with a special focus on searches conducted on trans and gender diverse detainees.

LGBTI persons – in particular trans people – visiting relatives in prison are also at risk of being discriminated against when searched by prison staff upon entry. Trans and non-binary people may end up not visiting relatives and friends in prison because they will be asked to wear men’s clothing and/or searched by male officers upon entry.

⁶² See notably the *United Nations and Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the ‘Bangkok Rules’, Rule 19) and the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXI).



Good practice: Policies on searching trans detainees

Some states have adopted policies on searches with the aim of protecting the dignity of trans detainees and preventing abuse. In **Argentina**, procedural guidelines regarding searches of trans detainees were approved by the Federal Penitentiary Services in 2016. The decision to develop such guidelines followed a *habeas corpus* petition presented by the Public Defender's Office (*Defensoría General de la Nación*), in which degrading searches on trans women were denounced. The guidelines, which were developed with the support of the Federal Ombudsman for Prison (which forms part of the National Preventive Mechanism), outline how both medical visual assessments (aiming to evaluate the detainee's state of health and detect injuries) and searches should be conducted. Regarding searches, the guidelines stipulate that alternative means should first be sought and, when strip searches cannot be avoided for well-grounded reasons, prison staff should check clothing and belongings only, letting the medical staff conduct the body search itself. They also stipulate that prison staff cannot have physical, verbal, or visual contact with the person being examined by the health care staff. The guidelines also foresee adequate training for staff, and dissemination of this information among trans detainees⁶³.

In **Colombia**, the General Regulation on Correctional Establishments stipulates⁶⁴ that trans detainees should be asked on a case-by-case basis whether they prefer to be searched by a male or a female guard (Art. 28). It also includes specific provisions for trans visitors, whereby body searches are to be conducted on the basis of the visitors' self-declared gender, independently of the information provided on their identification document. In case of any doubt, the visitor has to be asked if he or she prefers to be searched by a male or a female officer (Art. 68, para. 5).



Case law

Intersex detainee subjected to inhumane and degrading body searches

In 2010, the High Court of **Kenya** found in *Richard Muasya v. the Hon.*

⁶³ Servicio Penitenciario Federal, *Guía de procedimiento de "visu médico" y de "control y registro" de personas trans en el ámbito del servicio central de alcaldías*, March 2016.

⁶⁴ Resolución 006349 *Por la cual se expide el Reglamento General de los Establecimientos de Reclusión del Orden Nacional-ERON a cargo del INPEC*, 19 dic. 2016.

*Attorney General*⁶⁵ that an intersex detainee was subjected to inhuman and degrading treatment, and awarded the plaintiff with financial reparations. The detainee, who had been sentenced to death for the capital offence of “robbery with violence,” was held in a male facility. In the prison, he shared cells with fellow inmates and was at times placed in isolation because of the mockery and abuse he was suffering. The detainee filed a complaint arguing that instead of being placed in a male prison, he should have been held in a separate location where he could receive support from specially trained staff. The Court found that although his situation was unique, creating a prison solely for him would have been impracticable. However, the Court found that the detainee had been subjected to inhuman and degrading treatment, because he was purposefully exposed in the nude by prison guards and subsequently mocked by fellow detainees, and was subjected to humiliating and invasive body searches that were “motivated by an element of sadism and mischievous curiosity, to expose the petitioner’s unusual condition”. The court found that the exposure of the detainees’ genitalia in the presence of others was “cruel and brought ridicule and contempt,” and awarded the detainee with financial reparations.

Monitoring checklist

- ✓ Is there any indication that LGBTI detainees are disproportionately targeted for body searches or that searches are conducted for purposes other than to ensure order and security in the facility?
- ✓ Is there any indication that LGBTI detainees are discriminated against or abused, either verbally or physically, during body searches?
- ✓ Is there any indication that searches are used for the purpose of assigning gender or sex based on anatomical characteristics?
- ✓ Is there a policy governing searches of trans and/or intersex detainees? If so, is the policy non-discriminatory in its purpose

⁶⁵ *Richard Muasya v. the Hon. Attorney General*, High Court of Kenya, Petition NO.705 OF 2007: <https://www.icj.org/sogicasebook/richard-muasya-v-the-hon-attorney-general-high-court-of-kenya-2-december-2010/>

and effects? Does it mandate that detainees' consent is to be sought prior to searches?

- ✓ Can trans and/or intersex detainees choose the gender of the staff conducting the body search?
- ✓ How are searches of trans and/or intersex detainees conducted in practice?
- ✓ Are LGBTI visitors, and in particular trans persons, discriminated or harassed when being searched upon entry to the prison?
- ✓ Are prison staff trained on how to conduct searches in a non-discriminatory manner, in particular as regards trans and intersex detainees?

4. The right to visits (including intimate visits)

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 9: The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall: [...]

- E** Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner.”

Contact with the outside world, and in particular with relatives and close friends, is a fundamental right that can only be limited under certain conditions. It is a crucial component of a detainee’s resocialisation and preparation for reintegration into society upon release. The right to family visits should not be curtailed on discriminatory grounds and the terms “family” and “spouse/partner” should

therefore be interpreted broadly in order not to exclude same-sex parents and partners. Detainees receiving visits from same-sex and/or trans partners may be discriminated against or even sanctioned when displaying affection in visiting rooms. Conditions attendant to visits by detainees' same-sex and/or trans partners must be the same as those afforded to other detainees, and the same rules and regulations ought to govern these.

In cases of children with same-sex parents, the best interests of the child should always prevail, and they should not be prevented from seeing either parent because of discriminatory visiting policies and/or discriminatory attitudes by the officers in charge. Trans detainees are sometimes denied the right to receive visits, especially if their visitors are also trans. As a result, trans visitors may not seek to exercise their right to visit friends and relatives in prison, as they know that they will suffer discrimination upon entry.

Various prison systems have established “conjugal” or “intimate” visits, whereby detainees can spend anywhere from a couple of hours to a few days with their partners and/or families in purpose-built apartments or cottages. The SPT has made clear that intimate visits should not depend on marital status and that the State “should ensure that all persons deprived of their liberty are able to receive regular visits, including conjugal visits, regardless of whether the partnership is formally recognized by the State; such visits should not be restricted on grounds of sex, nationality, sexual orientation or for any other discriminatory reason⁶⁶”. However, LGBTI detainees often suffer discrimination in accessing such visits, although they have been reported as one of the most important and commonly expressed needs. Some State policies simply ban intimate visits for same-sex partners, whether or not they are in a civil union, on the alleged grounds that they would affect the internal order and discipline of the establishment, or due to security concerns. In other contexts, in the absence of clear regulations, the decision to allow such visits may be left to the discretion of the prison director, often resulting in arbitrariness.

⁶⁶ See *Report of the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, CAT/OP/ARG/1, 27 November 2013, para. 70.

When intimate visits are allowed, access to condoms or other prophylactics and basic information on sexual and reproductive health should be provided to detainees. However, measures to prevent STIs have been mostly sought for heterosexual visits, with evidence indicating that when conjugal visits are allowed for same-sex partners, lesbians and trans men in particular are not provided with appropriate information and protection.

In prisons where corruption prevails and where detainees have to pay to access intimate visits, discrimination on the basis of sexual orientation and gender identity is likely to be exacerbated and LGBTI detainees are simply denied such visits.



Good practice

Prison regulations expressly allowing intimate visits for LGBTI detainees

In **Costa Rica**, the Supreme Court ruled in favour of a prisoner who lodged a complaint about the discriminatory nature of penitentiary rules providing that intimate visits could only take place between heterosexual partners. Following this 2011 ruling, the regulation was changed to ensure that same-sex partners are also given the possibility of accessing conjugal visits⁶⁷.

In **Colombia**, the General Regulation on Correctional Establishments establishes⁶⁸ that no prison establishment can deny the right to intimate visits on the basis of the sexual orientation or the gender identity of the person deprived of liberty (Art. 71, para. 1).

In **Brazil**, the Joint Resolution of the Presidency of the Republic and the National Council against Discrimination (April 2014) makes explicit reference to the Yogyakarta Principles and guarantees the right to intimate visits for LGBTI detainees (Art. 6)⁶⁹.

⁶⁷ *Acción de inconstitucionalidad contra el artículo 66 del Reglamento Técnico Penitenciario*, Decreto Ejecutivo Número 33876-J, Exp: 08-002849- 0007-CO, Res. No. 2011013800.

⁶⁸ *Resolución 006349 Por la cual se expide el Reglamento General de los Establecimientos de Reclusión del Orden Nacional-ERON a cargo del INPEC*, 19 dic. 2016.

⁶⁹ *Resolução conjunta N°1, Presidencia da Republica Conselho Nacional de combate a discriminação*, abril 2014.

Monitoring checklist

- ✓ What is the facility's policy on visits? Are there any discriminatory provisions on the basis of sexual orientation or gender identity?
- ✓ Does the practice reflect the policy/legislation?
- ✓ Is there any indication that LGBTI detainees refuse to exercise their rights to visits? If so, what are the reasons for such refusals?
- ✓ If intimate/conjugal visits are granted to detainees, is there any indication that same-sex and/or trans partners are discriminated against in terms of access?
- ✓ Is there any indication that informal hierarchies among detainees prevent LGBTI persons deprived of their liberty from accessing intimate/conjugal visits?
- ✓ Where LGBTI detainees are entitled to intimate/conjugal visits, do they receive information about STIs and other infectious diseases, as well as condoms or other prophylactics? Does the provision of such information/contraception take into account the specific needs of lesbians and trans men?

5. Arbitrary sanctions for manifesting different sexual orientations or expressing one's gender identity

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 9: The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall: [...]

- H** Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gen-

der expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and “protective” solitary confinement.”

LGBTI detainees are exposed to the risk of being subject to arbitrary and discriminatory disciplinary measures because of their sexual orientation or gender identity or expression. In particular, open displays of affection – such as hand holding, kissing, or embracing – can be considered to constitute violations of internal rules on good order and discipline, including severe breaches of internal regulations. Some prison officials may consider that such displays amount to a “breach of moral standards”, “indecent language, act or gesture”, or even “exhibitionism”, particularly during family visits and/or in the presence of children. In some contexts, the mere expression of sexual orientation or gender identity, including physical appearance and behaviors, can be sanctioned on the same grounds. Internal prison rules sometimes include discriminatory provisions, such as forced haircuts for trans women, or the prohibition of certain clothing and accessories for both trans women and trans men, which are often justified by prison authorities on grounds of hygiene, good order, or security. However, allowing trans detainees to wear their own clothes, and allowing gender-oriented items (including garments, accessories, and make-up) is essential to ensuring that they are able to live in the gender with which they identify. Access to such items should not be dependent on medical certification.

Lesbians and trans men are reported to be particularly exposed to discriminatory disciplinary sanctions. Common measures include the physical separation of detainees considered to be in a relationship, either by transferring them to different units or establishments, or by placing them in solitary confinement, including in punishment cells, sometimes for long periods of time. LGBTI detainees are therefore at risk of being placed in prolonged solitary confinement. The SPT considers that placing a detainee in a punishment cell for the mere display of affection towards a person of the same gender constitutes inhuman and degrading treatment⁷⁰. Other

⁷⁰ SPT, *Visita al Perú del 10 al 20 de septiembre de 2013: observaciones y recomendaciones dirigidas al Perú*, para. 82.

frequent punishments for trans detainees include the confiscation of garments and accessories.

Trans detainees undergoing hormone therapy may be at risk of having their medications withheld as a disciplinary sanction. Restraints and force also tend to be used more frequently on trans men than on cis-gender women due to harmful stereotypes and assumptions.

The existence of such discriminatory disciplinary measures not only violates LGBTI detainees' rights to privacy and to gender expression and has a detrimental impact on their well-being, but it is also conducive to an environment wherein staff members are less likely to challenge homophobic and transphobic language, behavior, and attitudes. Informal sanctions, which do not appear in official internal regulations or policies, are more likely to be applied for LGBTI detainees. They might be difficult to be identified by monitoring bodies, as measures taken against LGBTI detainees may be improperly justified by the authorities on a pretense of management, good order or security. Furthermore, monitors are not likely to find evidence of such informal sanctions in any official records.

In prisons characterized by self-government or shared-government, LGBTI detainees are exposed to high risks of being informally punished by fellow detainees, with or without the acquiescence of the prison authorities, for not behaving in accordance with their expected sexual orientation or gender identity.



Good practice
Policies and regulations banning discriminatory sanctions
stemming from homophobia or transphobia

In **Colombia**, the General Regulation on Correctional Establishments⁷¹ states that no sanction, whether enshrined in law or in disciplinary rules, can be interpreted in a discriminatory way. It also makes clear that, in the case of LGBTI persons deprived of liberty, displays of affections, physical appearance, or any other bodily manifestation of sexual orientation or gender expression or identity must not be considered as

⁷¹Resolución 006349 Por la cual se expide el Reglamento General de los Establecimientos de Reclusión del Orden Nacional-ERON a cargo del INPEC, 19 dic. 2016.

punishable conducts. The Regulation specifically prohibits transfers to other cells, units, or establishments on the basis of the sexual orientation or gender identity of LGBTI detainees and their partners. Finally, sanctions arising from the fact of a detainee's relationship with a person from the same cell are also prohibited (Art. 149).

Monitoring checklist

- ✓ Do internal rules or policies include discriminatory provisions against LGBTI detainees for open displays of affection (hand holding, kissing, etc.)? Are these rules and policies applied in practice?
- ✓ If so, what are the disciplinary measures foreseen? How are such measures recorded in the registers?
- ✓ Are sanctions that are not contemplated in rules or policies applied against LGBTI detainees?
- ✓ Are expressions of gender identity, including physical appearance and behaviors, sanctioned by internal rules?
- ✓ If so, what are the disciplinary measures foreseen? How are such measures recorded in the registers?
- ✓ Is there any indication that medical treatment, including hormone therapy, is withheld (including as a disciplinary sanction or as a form of punishment)?
- ✓ Are same-sex relationships prohibited by internal rules or policies? If so, what are the disciplinary measures foreseen? If not, is there evidence that detainees engaged in a relationship are discriminated against/sanctioned?
- ✓ Are same-sex partners allowed to/prohibited from sharing a cell?
- ✓ Is there indication that LGBTI detainees are informally sanctioned by fellow inmates on discriminatory grounds for not performing their expected gender?

6. Access to healthcare

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 17: The Right to the Highest Attainable Standard of Health

“Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.”

Principle 9 : The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity. States shall: [...]”

- B** Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;” [...]
- H** Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as [...] access to and continuation of gender affirming treatment and medical care [...].”

The WHO defines health as state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is a fundamental human right to which every person is entitled without distinction or discrimination of any kind. In prisons, detainees ought to benefit from at least the same level of healthcare that is

available in the community (the principle of equivalence of care). In practice, however, prison health services tend to be inferior or outrightly poor, with the healthcare needs of detainees being regarded as unnecessary luxuries.

Initial medical and psychological screenings upon admission are essential to identify and properly address the healthcare needs of all detainees, and in particular those with special medical needs. The Nelson Mandela Rules' requirement that the information entered in prisoner file management systems shall enable the determination of a detainee's "unique identity, respecting his or her self-perceived gender" (Rule 7(a)) should be understood as ensuring that the special needs of trans detainees are taken into consideration from the outset of their detention.

LGBTI detainees, and in particular trans detainees, often have special medical needs, including due to a higher incidence of comorbidity and past trauma. Prison healthcare should provide mental health counselling, which is particularly important for LGBTI detainees who have experienced sexual violence and other forms of abuse and trauma. Evidence suggests that LGBTI detainees may have heightened needs for mental health support. It is important that initial screenings are conducted in full confidentiality, by qualified health care personnel.

Prevention of sexually transmitted diseases and infections

In most places, the rate of HIV/AIDS tends to be higher in prisons than in the outside population, especially where a significant percentage of detainees are incarcerated for drug-related offences. Women are reported to face higher risks of entering prison with an STI, including HIV/AIDS. Sexual intercourse among detainees is prohibited in many contexts (or tolerated if it is invisible), but this prohibition does not typically prevent sexual activity from occurring. The concealment of sexual activity furthermore makes it nearly impossible to differentiate consensual from coerced sexual activity. The prevailing taboos surrounding sexuality in prisons not only aggravates the invisibility of victims of sexual violence, but also contributes to the spread of STIs, including HIV/AIDS and hepatitis. Prison dynamics can be conducive to forms of sexual interactions that increase the risk of transmission, in particular when detainees

who practiced sex work outside of prison may be compelled to continue doing so within the prison environment.

Sexual health and the prevention of STIs should be an integral part of healthcare provision in prisons. Public health should take precedence over alleged security and/or moral concerns and authorities should ensure that detainees have access to information about safe sex and sexual health in a variety of languages, and that condoms or other prophylactics are available to detainees. In female prisons, similar protection should be made available, including dental dams and information specific to the needs of detainees. In contexts where same-sex relationships are criminalised, making condoms or other prophylactics available may be perceived as tantamount to promoting conducts deemed as offenses. Nevertheless, this does not preclude authorities' obligation to ensure that public health considerations prevail at all times.

In the absence of safe-sex materials, detainees may use improvised condom alternatives that can endanger their health. Condoms and other protective materials should be made available without exposing or "outing" detainees. When detainees are obliged to make a request to healthcare staff in order to obtain condoms or other prophylactics, they may in fact be dissuaded from doing so, as in prisons men who have sex with men frequently do not identify as gay. Confidential STI testing and counselling services should also be made available.

In some contexts, detainees deemed to be vulnerable are segregated from the rest of the prison population and housed together with HIV-positive inmates, purportedly as a means to control the spread of HIV. This practice only further stigmatise those populations.



Good practice
Access to information about sexually transmitted diseases and condoms in prison

In 2016, a decree on epidemics entered into force in **Switzerland**⁷², which

⁷² *Ordonnance sur la lutte contre les maladies transmissibles de l'homme* (Ordonnance sur les épidémies, OEp) du 29 avril 2015 (Etat le 1er janvier 2016), Art. 30.

includes specific provisions on establishments of deprivation of liberty. Adopting a public health perspective, the decree tasks prison authorities with ensuring that the following obligations, among others, are met:

- Screening detainees upon entry to detect HIV and other STIs (with an optional medical test)
- Providing detainees with information about STIs and HIV/AIDS, including their symptoms
- Making means for the prevention of STIs available, in particular via condoms and sterile injection materials

In **Thailand**, a pilot project initiated by Doctors Without Borders (MSF) in the prison of Min Buri in 2004 provided condoms to prisoners as part of health promotion activities, resulting in drastically reduced HIV/AIDS transmission rates among detainees. Although sex remained a controversial subject in the prison, authorities acknowledged that sexual intercourse was the main mode of transmission. In the framework of the project, MSF trained health leaders among detainees whose role was to disseminate information about disease prevention and safe sex practices, and to make sure that detainees had access to condoms, counselling, and treatment. A group of detainees living with HIV/AIDS met twice a month, with the health leader providing psychological support to men who have sex with men.

Specific healthcare needs of trans persons

Trans detainees have specific healthcare needs, which are often neglected by prison authorities. The initial entry screening is particularly important to help identify and determine the needs of trans persons. As stated by the SPT, “the absence of adequate policies and methods of identification, registration and detention has severe consequences: obtaining precise individual information as to gender identity is vital to determining proper treatment, including hormone and other treatment associated with gender transition. In the absence of mechanisms to obtain such information, grave

health consequences ensue”⁷³. In order to avoid discriminatory attitudes, assumptions based on stereotypes, and misconceptions about the needs of trans persons, prison staff, and in particular healthcare staff, should be appropriately trained on gender identity and sexual orientation. It is crucial that prison staff (and monitoring bodies) understand that trans detainees are not *per se* sick and that the specific healthcare they require does not constitute a form of special treatment or “unnecessary luxury”, but a human right that must be made available.

In cases where trans detainees began hormone therapies outside prison, it is essential that the treatment not be discontinued upon entry into prison or upon transfer to another facility. In addition to being given access to hormones, trans detainees should be under the supervision of appropriately trained medical staff, who have the ability to address potential medical side-effects of hormone therapy. Detainees who have undergone surgical modification of their bodies likewise should have access to adequate care. The interruption of such treatment often has devastating consequences, including rapid transformations of the person’s body. Detainees who are denied their treatment may resort to self-intervention, self-mutilation, or the use of hormones not adapted for human consumption, which can all have harmful and long-lasting consequences.

The principle of equivalence of care should also apply to hormone therapy and gender-reassignment treatment, including surgery. In other words, the support and treatment provided to detainees should mirror that which would be available to them if they were living in a non-institutional setting within the community. Detainees who wish to start transitioning while in detention should not be prevented from doing so. Nevertheless, many States employ a so-called “freeze-framing” approach, whereby trans persons are not permitted to initiate or continue pursuing treatment initiated prior to incarceration. Mental health professionals working with detainees may also be pressured by prison authorities to not recommend surgery, in order to avoid additional costs and burdens. If the ex-

⁷³ *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/57/4 22 March 2016, Para. 65.

expertise of health professionals working in a prison is insufficient to assess or treat trans detainees, consultations by professionals with the requisite specialized expertise from the community should be made available.

Additionally, prior to their incarceration some trans persons may have taken “street-based” hormones, which were not prescribed by a medical doctor. Once in detention, they may consequently be deprived of hormone therapy because they cannot provide medical evidence of having started such treatment.

After his visit to Argentina, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity called on the State to “ensure equitable and accessible distribution of medicines and related necessities, including anti-HIV drugs, and hormones, as part of comprehensive health care for all and in particular for transgender persons, while facilitating access by the Public Health Ministry to prisons directly to provide services as well as deliver medicines.”⁷⁴

Specialised care for trans persons should not be limited to gender affirming treatment and should include in particular psychological support and mental health counselling, as well as specific oncological care. LGBTI persons, and in particular trans persons, are particularly exposed to “minority stress” (stress faced by members of stigmatized minority groups), and experience much higher rates of mental health problems than the general population, including anxiety, depression, and eating disorders. The risk of suicidal ideation and self-harm is also reported to be up to 10 times higher than in the general population. Furthermore, mental illness continues to be stigmatized, as do minority gender identities and sexual orientations, and the fact of deprivation of liberty. LGBTI detainees who suffer from mental health problems thus find themselves in extremely vulnerable situations, and the provision of appropriate care and support must be prioritized by authorities.

⁷⁴ End of Mission Statement by the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Mr. Vítit Muntarbhorn, of his visit to Argentina, 10 March 2017.



Good practice

Access to comprehensive healthcare for trans and/or intersex detainees

Following its visit to Malta in 2015, the European Committee for the Prevention of Torture (CPT), made a series of specific recommendations⁷⁵ regarding the treatment of trans detainees. In its reply, the Maltese government informed the CPT that a new policy relating to transgender inmates was launched in August 2016. Under the new policy⁷⁶, the following provisions apply to all “trans, gender variant and intersex inmates”:

- “Right to access medical assessment and treatment related to their gender identity, gender expression and/or sex characteristics. Any hormone medication (such as hormone tablets, injections and topical gels) an inmate is already receiving on prescription prior to imprisonment should be identified, recorded within the inmate’s healthcare records and access continued in the same manner as any other prescribed medication would be continued within prison.”
- “Access to hormones, hair removal, speech therapy or surgery as part of a process of transition while in prison should be taken in consultation with doctors (specialised in the fields of gender reassignment, endocrinology and/or surgery) applying the same principles as would be applied in relation to people at liberty.”
- “The fact of a trans, gender variant and intersex person’s imprisonment, and the vulnerable situation in which that places them, means that every effort should be made by Correctional Services to ensure access to the required/requested medical treatment that assists the inmates in aligning their physical characteristics with their gender identity. Whenever an inmate requests such specialist assistance, the necessary arrangements to facilitate this should be undertaken promptly.”
- “Access to trans, gender variant and/or intersex healthcare services should be guaranteed to inmates regardless of their legal gender identity.”

⁷⁵ Report to the Maltese Government on the visit to Malta carried out by the CPT, from 3 to 10 September 2015, CPT/Inf (2016) 25.

⁷⁶ Malta Prison Policy, Correctional Services, Trans, Gender Variant and Intersex Inmates Policy, August 2016, 3.10 Access to Health Services.

Monitoring checklist

- ✓ How are initial medical and psychological screenings conducted upon arrival? Is confidentiality ensured?
- ✓ Are healthcare professionals sensitized/trained about the specific needs of LGBTI persons?
- ✓ What is the policy and practice regarding the prevention of sexually transmitted diseases and infections in the prison system?
- ✓ Are detainees informed about the nature and symptoms of sexually transmitted diseases and infections and how to prevent them?
- ✓ Are condoms and/or other prophylactics made available to detainees? If so, are they easily and discreetly accessible?
- ✓ Are confidential treatments accessible to all detainees with HIV/AIDS on a non-discriminatory basis?
- ✓ Do trans detainees have the possibility to initiate hormone therapy and/or gender-affirming treatment while in detention?
- ✓ Can detainees who started hormone therapies outside prison – even without medical prescription – continue treatment while in detention?
- ✓ Are gender-affirming surgeries available for detainees (and are such surgeries available in the community)?
- ✓ What are the conditions for accessing gender-affirming treatments? Is legal gender recognition a pre-condition?
- ✓ Is there any indication that the prison administration is adopting a “freeze-framing” approach to gender-affirming therapies?
- ✓ What mental health care is available in detention? Are the specific needs of LGBTI detainees identified and addressed by mental health professionals?

7. Training of prison staff

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 9. The Right to Treatment with Humanity while in Detention

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall: [...]

- Ⓒ Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity. ”

Principle 10. The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

“Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.

States shall: [...]

- Ⓒ Undertake programmes of training and awareness-raising for police, prison personnel and all other officials in the public and private sector who are in a position to perpetrate or to prevent such acts.”

Well-trained prison personnel contribute to reducing the risks of torture and other ill-treatment against persons deprived of liberty. Prison staff should not only be equipped with the requisite theoretical knowledge, but also with the practical skills and non-discriminatory attitudes that will enable them to perform their duties with respect for, and in compliance with, the human rights and dignity of detainees. Training should not be limited to initial capacity-building, but should be provided regularly and continuously

for prison staff. In order to prevent discriminatory attitudes and practices and to tackle existing prejudice, training should include specific content on sexual orientation and gender identity and expression.

The Special Rapporteur on Torture has called on States to “undertake specific training and capacity-building programmes designed to sensitize law enforcement authorities and detention facility staff to the specific circumstances and unique needs of female and lesbian, gay, bisexual and transgender prisoners and standards such as the Bangkok Rules⁷⁷.” Such training modules should draw inspiration from the Yogyakarta Principles and should be devised with the support of NGOs with specialized expertise on these issues. The involvement of LGBTI organisations in the delivery of trainings is usually very beneficial. Sensitisation and training ultimately lead to a clearer understanding of, and an improved ability to handle, particular situations. Staff should furthermore be trained on specific and practical issues, including but not limited to non-discriminatory approaches to body searches, classification, and placement, and the identification of specific forms of violence and victimisation, especially from fellow inmates.

However, in many instances no reference is made to LGBTI detainees in either initial or basic trainings, or in specialized modules and continuing education for prison staff. The direct consequence of such omissions is to continue fostering the invisibility of the specific needs of LGBTI detainees, and the perpetuation of prevailing taboos and stereotypes. This shortcoming additionally means that when prison staff face specific situations involving LGBTI detainees, they are unlikely to know how, or to be able to, adequately respond because of a lack of knowledge, and may be likely to display discriminatory attitudes and behave in discriminatory ways without being sanctioned by their superiors.

Training should not be limited to security staff and should include other specialists, including healthcare staff. It is particularly im-

⁷⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 24 February 2016, para. 70.

portant that the latter understand the specific healthcare needs of LGBTI detainees, and specifically of trans and intersex persons. External service providers should also be expected to have a basic understanding of human rights and regarding sexual orientation, gender identity and expression, and sex characteristics.

Monitoring bodies can play an important role in assessing existing curricula (and, if relevant, the way in which training sessions are conducted) and in recommending, whenever appropriate, the inclusion of specific modules on sexual orientation, gender identity and expression, and sex characteristics, while ensuring that organisations specialised in LGBTI rights are also involved in these efforts.



Good practice
Component on sexual orientation and gender identity
as part of regular training for prison staff

In **Brazil**, a joint resolution issued in 2014 by the National Council against Discrimination and the Presidency of the Republic urges prison authorities to ensure “on-going training to professionals of prison establishments on human rights and the principles of equality and non-discrimination, including with regards to sexual orientation and gender identity” (Art. 10).

In **Chile**, following acts of discrimination and mistreatment against a trans woman deprived of her liberty – including being forced to stand naked in front of other inmates, being searched by male officers, having her underwear purposely destroyed, and being mocked by the staff – the regional Court of Iquique ruled that the relevant training center would be required to train prison staff on issues related to “gender identity, sexual orientation and gender expression”. In its ruling, the Court noted that prison officials “did not treat [the trans woman] in conformity with her gender identity, by confusing her gender expression with the existence of male genitalia, as well as confusing the due respect for her gender identity with the absence of proceedings to rectify her birth certificate.”

Monitoring checklist

- ✓ Does the mandatory training curriculum/programme for prison staff include anti-discrimination courses/modules, including on human rights and sexual orientation, gender identity and expression, and sex characteristics?
- ✓ Does training include education about sexual health and the prevention of HIV and other STIs?
- ✓ Do prison staff have the possibility of accessing and/or are they required to attend regular and continuous education modules on human rights and sexual orientation, gender identity and expression, and sex characteristics?
- ✓ If such courses/modules exist, are LGBTI organisations involved in their design and/or delivery?
- ✓ If such courses/modules exist, which members of staff have access to them (mandatory for all, medium managers, etc.)?
- ✓ If such courses/modules exist, are they also targeting health-care professionals? Are specialised curricula available for healthcare professionals?
- ✓ If external service providers are interacting with detainees, are they trained/sensitised on human rights and sexual orientation, gender identity and gender expression, and sex characteristics?

Chapter IV

Monitoring the situation of LGBTI persons in police custody and their interactions with law enforcement⁷⁸

⁷⁸ For a comprehensive methodology of the monitoring of police custody, see: APT, *Monitoring police custody: A practical guide*, 2013.

Interactions with and arrests and detention by the police are moments when the risks of abuse and torture are heightened. While all persons in the hands of law enforcement officers may be said to be in a situation of vulnerability as a result of the power imbalance inherent therein, LGBT persons are particularly at risk of abuse, especially in contexts where same-sex relations and non-binary identities are criminalised.

LGBT persons are more likely than the general population to be apprehended by the police, to be subject to discriminatory profiling, and to experience hostile attitudes from police officers. Trans women in particular report experiencing high levels of police brutality. Once LGBTI persons are brought to the police stations for interrogation (or even before), specific threats may be used by police officers to extort confessions, and/or as a form of punishment or correction.

Law enforcement officials must not only abstain from holding any discriminatory attitudes towards LGBTI persons, but indeed have a positive obligation to protect them, including during public demonstrations. They should also be able to adequately respond to reports of hate crimes, although evidence indicates that LGBT persons tend to underreport such crimes because of mistrust in institutions and fear of reprisals.

1. Discriminatory profiling and violence during arrest or apprehension

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 7. The Right to Freedom from Arbitrary deprivation of liberty

“No one shall be subjected to arbitrary arrest or detention. Arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.

States shall:

- A** Take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice [...].”

LGBT individuals are at a greater risk of being arbitrarily arrested, harassed, extorted, and subjected to excessive use of force by police, than the general population. Risks are further magnified for trans people and for LGBTI sex workers, as well as LGBTI human rights defenders. Where same-sex relations and/or trans identities are criminalized, such abuses easily go unpunished. LGBT persons may be victims of discriminatory profiling, particularly in places known by police for being largely frequented by LGBT people, including social venues, specific streets, and public spaces. Discriminatory police profiling practices include the association of a particular social group with a specific criminal offense. For instance, in some countries trans women are arbitrarily arrested on alleged grounds of dealing drugs in large numbers (and sometimes contemptuously referred to as “narcotrans” or “narcotransvestite”).

LGBT persons are also exposed to harassment in the streets, including by being forced to stand naked, be stripped searched, or arbitrarily held in custody in the absence of formal charges. When detained, LGBT persons are further at risk of being deprived of water and food and exposed to violence from custody officers. Trans detainees

are additionally at risk of being held without due regard for their self-identified gender. In some countries, particularly where same-sex relations and/or trans identities are criminalized, the police may resort to entrapment via online dating platforms and social media as a means to target and arrest LGBT persons, and in particular gay men and trans women. In some contexts, police officers may be supported by local militias.

In some cases, the mere fact of carrying condoms or lubricants may be used by police and prosecutors as evidence to prosecute persons under anti-prostitution laws, particularly in countries where same-sex relationships, so-called “crossdressing”, or “transgenderism” are criminalized. Trans sex workers, who are especially targeted, consequently may avoid carrying condoms for fear of arrest, thus gravely jeopardizing their right to health and their ability to protect themselves and others from contracting HIV and other STIs. When sexual orientation or gender identity intersects with other characteristics, in particular ethnicity or migratory status, but also socio-economic situation, the risk of discriminatory police profiling is further magnified.

At borders, trans and intersex persons may be exposed to humiliating treatment by police officers who consider that the sex indicated in their passport does not correspond to their appearance. In such cases they are at risk of being brought to separate rooms and being required to undress for the purpose of having their genitalia examined, under the false premise of assigning their sex. They may eventually be arbitrarily refused permission to fly abroad or to enter a country, without having been charged with any offense.

Abuse, mistreatment, and even torture can take place in the streets, in police vehicles, and in police stations, where LGBT persons may be arbitrarily detained for hours, days, or even weeks (sometimes for alleged identity checks). Police officers may also arrest LGBT individuals in their private homes and search premises without presenting a warrant. The targeting of LGBT individuals by law enforcement officials often does not have any investigative purpose, but merely aims to punish and “correct” reprehended behavior. The risk is particularly high when homophobia and transphobia are deeply-rooted in police culture, and where stereotyping and discrimination

are socially accepted. Even when homosexuality and/or trans identities are not criminalized, police officers may abuse their discretionary powers and arbitrarily arrest LGBT persons on the basis of ambiguous decency, debauchery, or vagrancy laws.

Specific forms of discrimination, abuse, and mistreatment of LGBT persons by law enforcement officers include name-calling and other abusive language, beatings, forced anal or vaginal examinations, and sexual violence, including anal rape with a stick, as well as the threat of being raped. Cases of trans women being arbitrarily executed by law enforcement officials have also been reported. Other abusive practices include forcing arrestees to do sit-up exercises while naked and, for trans women, pulling off their garments or wigs or beatings in the breasts and cheekbones to burst implants and release toxins. There are also reports of arrests followed by forced medical testing for HIV and other STIs, targeting in particular sex workers and/or persons perceived to be LGBT. Lesbians are especially exposed to the risk of being forced to perform sex acts on police officers and to “corrective rapes”. As apprehension by the police does not always lead to formal arrest and detention, it is particularly challenging for monitoring bodies to have a proper understanding of law enforcement practices at this crucial moment. This is also why it is important for monitors to not only seek to obtain specific information about such practices at later points in time—once the person is in custody or has been released—but also to engage in regular exchanges with grassroots LGBTI organisations with direct knowledge of police practices during arrest and apprehension.



Good practice

Court ruling in Nepal leading to drastic decrease of police violence

In **Nepal**⁷⁹, people known as metis – or “third gender” – have historically been one of the groups most targeted, harassed, mistreated by law enforcement and other officials. Relegated to the

⁷⁹ See *An activist's guide to the Yogyakarta Principles*, August, 2010, pp. 89-91. Available at: www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf <accessed 7 October 2013>.

margins of society and often unable to obtain citizenship cards, they were systematically disenfranchised and unafforded the protection of the law.

Following a petition filed by the Nepalese NGO “Blue Diamond Society”, the Supreme Court ruled in 2007 that the government was obliged to recognize the gender identity of *metis* persons, provide them all necessary documentation pertaining to this recognition, and take all necessary measures, including by enacting specific anti-discrimination legislation, to protect all LGBTI people. Considered by activists as “the single most comprehensive judgement affirming protections for gender identity anywhere in the world”, the ruling led not only to the successful application for citizenship cards under the category of “third gender” for several *metis* people, but reportedly also led to a decrease of up to 98% in police violence against members of this group.

Monitoring checklist

- ✓ Is there any indication that LGBT persons are arbitrarily targeted by the police? What are the alleged grounds for apprehension or arrest?
- ✓ Are ambiguous legal grounds, such as those based on decency, debauchery, or vagrancy, used to arrest LGBT individuals?
- ✓ Is there any indication that police officers target specific establishments or public areas frequented by LGBT persons? If so, what are the alleged reasons? Is data available?
- ✓ Is there any indication that police officers use discriminatory and abusive language when apprehending LGBT persons? Conversely, do police officers display the skills and attitudes needed to ensure that LGBT are not discriminated against or harmed when apprehended?
- ✓ Do LGBT detainees have prompt access to lawyers following arrest?

- ✓ Can detainees promptly notify relatives or other third parties about the fact of detention following arrest? Are narrow interpretations of who constitutes “next of kin” that prevent LGBT detainees from notifying the person of their choice, used?

2. Police detention

Police stations are typically not intended or designed to hold detainees for periods longer than 24 to 48 hours, and are therefore not suitable for lengthy detention. Material conditions in most stations are basic, with the infrastructure limited to a bare minimum. Police detention quarters and cells should nevertheless have natural light and ventilation, and detainees should be provided with mattresses and blankets if they spend a night or more in a police cell. If there are no toilets in the cell, access should be otherwise provided without any delays. Toilet facilities should be in decent conditions and detainees ought to be provided with adequate means to wash themselves. Drinking water should be made available at all times and food, including at least one hot meal per day, should be offered at appropriate times. If police detention lasts for more than 24 hours, outside exercise should be offered on a daily basis.

The size and configuration of police stations vary significantly, and the detention area can range from single occupancy cells to large quarters comprised of many cells, either collective or individual. In collective cells, LGBTI persons face a risk of violence from fellow detainees, even when custody is limited to 24 hours. Trans women are particularly exposed to violence if they have to share a cell with men. As in prisons, trans women risk being held in collective cells on the basis of the sex assigned at birth, without consideration being given to their self-identified gender. If release from detention is not possible, single occupancy cells are therefore preferred for trans women. Police stations, including the detention areas, are sometimes equipped with CCTV. Monitoring bodies should be aware that areas not covered by CCTV might be precisely where abuse are more likely to occur.

Police stations are sometimes used to house detainees for much longer periods than the maximum duration contemplated by natio-

nal legislation and international standards (for pre-charge detention). Detainees can be held for weeks, months, or even years in police facilities, including while serving their sentences. If this is the case, nevertheless, material conditions should be equivalent to the minimum standards required for pre-trial detention. Persons requiring medical treatment, and in particular trans people, should not be prevented from accessing such treatment because of prolonged detention in police custody. There are reports of trans women being held for months in poor conditions in police stations, sometimes together with male detainees, and without the possibility of receiving visitors, especially if they are also trans individuals.

In countries where same-sex relations and/or trans identities are criminalized and LGBT persons are arrested on this account, the risk of harassment and abuse in custody is very high. Reports include accounts of police officers entering cells and forcing LGBT people to perform humiliating acts, and of beatings either by police officers or other detainees, at the request of the police. There is also evidence of food and water deprivation, and of allowing the media to photograph LGBT persons in custody against their will. Other reports detail instances of vigilante groups storming police stations and beating LGBT detainees in the presence of police officers.



Unlawful detention, torture, forced disappearances, and extrajudicial killings in unofficial places of detention

Starting at the end of February 2017, security forces in Chechnya, a federal subject of the Russian Federation, began abducting and unlawfully holding men perceived to be gay or bisexual in secret detention. These large-scale arrests have been identified as “cleansing” operations designed to eliminate homosexuality from the region. While violence on the basis of real or perceived sexual orientation or gender identity had occasionally been reported in the region in the past, the scale of the repression under way since 2017 is unprecedented. The apparent trigger was a request made by a Moscow-based gay rights group to hold marches in four cities in the North Caucasus region.

Many of the victims were targeted after being identified by cell phones or entrapped via online dating apps. Various sources report that they were held in an unofficial detention center in very poor material conditions. They have been subject to physical and verbal abuse, as well

as torture, including beatings, electric shocks, sleep deprivation, and threats to disclose their sexual orientation to their family. On some occasions, police forcibly disclosed their sexual orientation, putting their life in danger due to the risk of so-called “honour” killings. At least three men are reported to have been killed because of their perceived sexual orientation. Senior local and national authorities have also made homophobic public statements, which may constitute incitement to hatred and violence.

Monitoring checklist

- ✓ What is the size of cells and how many people are held in collective cells?
- ✓ Are detainees assessed to determine whether they pose a risk to other detainees? Are separate accommodations available to ensure safety?
- ✓ Are LGBTI persons held together with other detainees in collective cells? Is attention given to the risks that they may face when accommodated with other detainees?
- ✓ Is there any indication that LGBTI persons are more likely to spend the night in police stations?
- ✓ What happens if there are more people in custody than there is authorised space for?
- ✓ What is the practice/policy to prevent violence in collective cells, in particular on vulnerability grounds such as sexual orientation or gender identity?
- ✓ Is there a bell or buzzer in each cell that can be used to summon assistance from the duty officer?
- ✓ Are trans detainees permitted to keep garments and accessories?
- ✓ What are the conditions in which LGBTI persons are held in

- police cells? Is there evidence that they are detained without a formal charge?
- ✓ What is done when a detainee is considered to be at risk of self-harm, including suicide? What is the policy in place?
 - ✓ Do detainees have access to a doctor and/or medical treatment (in particular where detention is longer than 24-48 hours)?
 - ✓ Is the self-identified gender of trans persons duly taken into account by the police prior to placement in detention?
 - ✓ Are CCTV cameras in operation in police custody? Are some areas not covered by CCTV?

3. Interviewing and safeguards in police custody

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 7. The Right to Freedom from Arbitrary deprivation of liberty

“No one shall be subjected to arbitrary arrest or detention. Arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.

States shall: [...]

- B** Take all necessary legislative, administrative and other measures to ensure that all persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, and whether charged or not, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention.”

Police interviewing (or interrogation) presents high risks for LGBTI persons, particularly when arrests are based on discriminatory profiling. LGBTI individuals should be informed of the reasons for their arrest and the charges being brought against them from the very outset of detention. Basic safeguards, such as prompt access to a lawyer, the right to notify a third party, the right to be brought promptly before a judge, and the immediate provision of information on rights, are essential to mitigating the risks of abuse and ensuring that detention is not arbitrary.

During interviews, police officers may threaten to disclose the detainee's sexual orientation or gender identity to family members, friends, or colleagues in order to force a confession, or simply to punish them for their "deviant" behaviour (for instance, there are reported cases of trans women being brought to the police on false pretexts, and required to perform sexual acts or extorted in exchange for their release). The presence of a lawyer from the outset of detention, and during all questioning, is hence essential to prevent coercion and to guarantee that the detainee's rights – including the right to privacy – are respected throughout interviews. LGBTI persons in police custody should also have the right to see an independent medical doctor, who should not further victimise or stigmatise them.

The audiovisual recording of interviews, as well as written records of the names of all interviewers and persons present during interviews, and the exact place and times of (including rest periods between) interviews, are additional safeguards that have the potential to provide useful information for monitoring bodies seeking to assess how police questioning is conducted. The language logged in records may moreover provide an indication of police attitudes more broadly (e.g. writing "a woman dressed in men's clothes" to describe a trans man). Audiovisual recordings of interviews are especially important safeguards against torture and other ill-treatment, and monitors may use footage to cross-check information in case of allegations of mistreatment. Monitoring bodies should however be aware that inappropriate conduct, including beatings, often take place outside the view of cameras.

The risks for LGBT people are particularly high in countries where same-sex relations are criminalised, as detainees face the dual challenges and harms wrought by homophobic or transphobic police attitudes

and discriminatory laws. When trials for homosexuality are based on confessions, police investigators may resort to ill-treatment to obtain “proof”. In addition to using the threat of “outing” the detainee, police also resort to methods of torture or other ill-treatment that include beatings with truncheons, threats of murder or rape, being forced to sleep naked on the floor, and being filmed with mobile phones. In some countries, there is evidence that sexual violence is systematically used against LGBT detainees. LGBT detainees are also extremely vulnerable to police extortion, and not being able to pay bribes may lead to prosecution under laws criminalizing homosexuality.



Forced anal examinations Practices amounting to torture or ill-treatment

In States where homosexuality is criminalized, men suspected of same-sex conduct might be subject to non-consensual anal examinations intended to obtain physical “proof” of same-sex relationships upon arrest. Such examinations are typically performed by forensic medical experts and the “evidence” is then used in court. In 2016, Human Rights Watch⁸⁰ compiled evidence of the use of forced anal exams in at least eight countries (Cameroon, Egypt, Kenya, Lebanon, Tunisia, Turkmenistan, Uganda, and Zambia) and documented the lasting psychological trauma experienced by persons subjected to them.

The practice of subjecting individuals to forced anal examinations has been denounced by the Special Rapporteur on Torture, the SPT and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity as being “medically worthless” and amounting to torture or other ill-treatment. The World Medical Association (WMA) has adopted a resolution calling for the prohibition of this practice⁸¹, while the conference of Criminal Justice Sector Professionals, which includes police officers, prosecutors, judges, and correctional officers, has called for the adoption of an official position opposing forced anal examinations as unscientific and in violation of medical ethics and fundamental human rights⁸².

⁸⁰ Human Rights Watch, *Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions*, July 2016.

⁸¹ World Medical Association, *Resolution on prohibition of forced anal examinations to substantiate same-sex sexual activity*, adopted by the 68th General Assembly, Chicago, United States, October 2017.

⁸² Statement of the Conference of the Criminal Justice sector Professionals, *Forced Anal Exams Resolution*, Amsterdam, August 2016.

Monitoring checklist

- ✓ Is there any indication that LGBTI arrestees are discriminated against in accessing legal safeguards, such as the right to notify a relative, the right to a lawyer, the right to an independent medical examination, and the right to be informed of their rights?
- ✓ Is there any indication that specific threats, for instance of disclosing the detainee's sexual orientation or gender identity to family or colleagues, are used to obtain forced confessions?
- ✓ Is there any indication of police brutality targeting LGBT individuals?
- ✓ Are interviews of LGBT suspects used to intimidate and/or extort them?
- ✓ Are interviews video- or audio-recorded?
- ✓ Is there any indication that anal examinations are conducted in order to obtain physical "evidence" of same-sex intercourse?

4. The role of law enforcement during public demonstrations involving LGBTI persons

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 20. The right to freedom of peaceful assembly principle

"Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

States shall:

- A** Take all necessary legislative, administrative and other measures to ensure the rights to peacefully organise, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity;
- B** Ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities;
- C** Under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights;
- D** Provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide such protection;
- E** Ensure that information disclosure rules for voluntary associations and groups do not, in practice, have discriminatory effects for such associations and groups addressing issues of sexual orientation or gender identity, or for their members. ”

Law enforcement officers must not only refrain from discriminating against LGBTI people, but also have a positive obligation to adequately protect them from violence and discrimination by others. During public demonstrations (such as “gay prides”), officers must ensure that LGBTI persons can fully enjoy their rights to the freedom of peaceful assembly and association. However, evidence shows that officers sometimes fail to provide adequate protection when LGBTI people are targeted by counter-demonstrators. Law enforcement officials might even acquiesce, or be complicit in, such violence, particularly when such gatherings are not authorized by the authorities and/or when they are considered to be “against public morality.” In some contexts, cultural events or meetings aiming to raise awareness about HIV may be raided by

the police under the same pretense. The compelling positive obligation to provide protection implies that the officers ought to be aware of the risks arising from such public demonstrations, and to take appropriate measures to ensure the protection of those involved. In addition, the risk of violence should not be indiscriminately invoked as a way to prohibit peaceful demonstrations by a particular social group.

Police officers' failure to effectively protect LGBTI persons from violence and discrimination during peaceful demonstrations has a damaging impact not only on those directly involved in the marches, but also on the rights to freedom of peaceful assembly for all persons. As public demonstrations can entail risks for demonstrators, monitoring bodies – albeit a minority at the time of writing – may decide to be present during demonstrations for the purpose of monitoring police conduct.



Case Law
European Court of Human Rights, *Identoba*
and *Others v. Georgia* (2015)⁸³

In 2015, the European Court of Human Rights issued an important ruling about the police duty to protect LGBT individuals from targeted violence during peaceful demonstrations. The facts relate to a march organized in 2012 in Tbilisi, Georgia, to mark the International Day against Homophobia, which was violently disrupted by counter-demonstrators.

The Court held that there had been a violation of the prohibition of inhuman and degrading treatment (Article 3) in conjunction with the prohibition of discrimination (Article 14), with respect to 13 applicants (represented by the NGO organizing the march – Identoba) who had participated in the peaceful demonstration. The Court found that, due to being “surrounded by an angry mob of people who outnumbered them, uttered serious threats and randomly used physical violence, the applicants must have felt fear and insecurity severe enough to reach the threshold to fall within the remit of Article 3 in conjunction with Article 14 of the Convention.”

⁸³ See also *M.C. and C.A. v. Romania*, Application No. 12060/12, 2016.

Moreover, given that the authorities knew or “ought to have known of the risks surrounding that event”, they were “under an obligation to provide adequate protection”, which they failed to do.

Lastly, noting that “Georgian criminal law provided that discrimination on the grounds of sexual orientation and gender identity should be treated as an aggravating circumstance in the commission of an offence”, the Court found that it would have been “essential for the relevant domestic authorities to conduct [an] investigation[with]in that specific context,” which they had failed to do, thus “fail[ing] to conduct a proper investigation into the thirteen applicants’ allegations of ill-treatment.”

Monitoring checklist

- ✓ What is the role and attitude of police and other law enforcement officers during peaceful demonstrations and marches, such as “gay prides”? How does it compare with demonstrations organized by other social groups?
- ✓ Are police officers trained in providing protection to specific social groups during public demonstrations?
- ✓ What is the ratio between police officers and demonstrators? How does it compare with demonstrations by other social groups?
- ✓ How are law enforcement officers trained to handle escalations of violence and how does their behaviour measure up in practice?
- ✓ Is there any indication that officers are acquiescent or complicit in acts of violence targeting demonstrators?
- ✓ Conversely, do officers support and/or take part in marches such as “gay prides”?

5. Reporting crimes (including hate crimes) to the police

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 29. Accountability

“Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.

States shall: [...]

- B** Ensure that all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity of the victim, including such crimes described in these Principles, are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.”

LGBT persons face higher risks than the general population of being victims of crimes, including hate crimes, which are crimes motivated by hostility or prejudice on the basis of the person’s sexual orientation, gender identity, religion, ethnicity, disability or other grounds. At the same time, and often because of exposure to harassment and violence by the police, LGBT persons face additional barriers in reporting hate crimes, and obstacles to cooperation with investigators. They may, for instance, choose not to report complaints due to risks of reprisals or precedents indicating that the police will not take their complaints seriously, or that their experience is all too common to be reported. LGBT persons may also fear retaliations from the perpetrators. In the worst cases, where same-sex relations are criminalised, the police may turn against the persons reporting complaints and charge them for crimes such as sodomy or sex against the order of nature. LGBT persons may be abused or extorted by the police when trying to report a crime. Lesbian and bisexual women are reportedly even less likely than gay or bisexual men or trans victims to report incidents of hate-motivated violence to the police. Even in police forces with supposed tolerance for diversity, evidence points to the difficulties of eradicating homophobic attitu-

des within police sub-cultures, and to the risk of re-victimising LGBT persons who have suffered hate crime during police arrest, detention, and/or investigations.

It is crucial for the police to be able to unmask bias motivations behind hate crimes, by analysing and processing possible homophobic or transphobic motives behind the incidents under consideration. However, when national hate crime laws do not include sexual orientation or gender identity as discriminatory bias, it is likely that case will not be processed as a hate crime, thus contributing to a lack of trust, underreporting, and invisibility. Police failures to effectively respond to reports of hate crimes may lead to the escalation of such crimes, and can have a harmful impact on the wider LGBTI “community” and on society as a whole, and significantly damage police relationships with whole segments of the population. Assessing how LGBT persons are handled when they report crimes - including hate crimes - to the police will often fall outside the mandate of monitoring bodies. Nevertheless, understanding the broader interactions of law enforcement with groups historically subjected to discrimination forms part of a systemic approach to scrutinising power relations and cultures within institutions.



Good practice
The role of LGBTI liaison officers within police services

The existence of LGBTI liaison officers within police services can generate increased awareness of LGBTI matters among officers and provide a “valuable resource for police organisations to draw on in tackling the under-reporting of hate crimes against LGBTI persons⁸⁴”.

In London’s Metropolitan Police, LGBT Liaison Officers play a fundamental role in how the police shapes and delivers services to LGBT people. While the sexual orientation or gender identity of an applicant is not per se a criteria for appointment, minimum knowledge, understanding, and commitment are required for the position. The role of Liaison Officers is to increase and improve the trust and confidence of LGBT persons

⁸⁴ European Union Agency for Fundamental Rights, *Professionally speaking: challenges to achieving equality for LGBT people*, 2015, p. 47.

in police services. They are therefore expected to raise awareness on LGBT matters, share information, including on hate crime perpetration rates, and foster reassurance and trust within LGBT “communities”. They are pivotal in managing critical incidents and supporting investigations, and in encouraging crime/incident reporting and securing the provision of information from LGBT people. Internally, they also contribute to developing an understanding of LGBT issues and of the diversity that exists among LGBT people.

While LGBT Liaison Officers⁸⁵ are first and foremost hate crime investigators, they also assist other units in operations that involve or have an impact on LGBT people, act as resource persons in liaising with victims and witnesses, and provide as referrals to appropriate support agencies. Liaison officers are also expected to develop links with local LGBT groups and venues and to develop initiatives encouraging the reporting of anti-LGBT hate crimes or incidents.

Monitoring checklist

- ✓ Is there a national law on hate crime? If so, does the law include sexual orientation or gender identity as discriminatory bias for hate crimes? Have individuals been prosecuted under this law?
- ✓ Is there any indication that LGBTI victims of hate crimes do not report them to the police? What are the reported reasons?
- ✓ Is data available regarding the outcome of administrative complaints and prosecutions of hate crimes? If so, what are the figures?
- ✓ Is there any indication that LGBTI persons have been harassed or abused by the police when trying to report a hate crime?
- ✓ Does the police have a system of LGBTI liaison officers (or officers with similar functions)? What are their roles and how are they perceived by fellow police officers and LGBT persons/organisations?

⁸⁵ Andy Pakouta and Anthony Forsyth, *LGBT Liaison Officer's Manual of Guidance*, London Metropolitan Police.

Chapter V

Monitoring the situation of lgbti persons in immigration detention facilities⁸⁶

⁸⁶ For a comprehensive methodology of the monitoring of immigration detention, see APT/UNHCR/IDC, *Monitoring Immigration Detention - Practical manual* (2014) : https://apt.ch/content/files_res/monitoring-immigration-detention_practical-manual.pdf

Immigration detention is an administrative measure and should therefore not be punitive—either in nature or in its impact. It should be authorized only when it is necessary, reasonable and proportionate to the legitimate purpose to be achieved, and only if less coercive alternatives cannot be found. Authorities usually resort to such form of detention for various purposes and at various stages of the immigration process, including upon arrival, during the processing of protection or legal claims (including asylum procedures), and in preparation for departure (including forced removal). Not all of these purposes constitute legitimate grounds for detention, and some may amount to arbitrary detention. Legitimate aims, such as health checks, may sometimes be used in a discriminatory or disproportionate manner against certain groups, including on the basis of gender identity.

Some reception centers are characterized by restrictions on movement and partial deprivation of liberty (such as nighttime curfews or prohibitions on movement beyond predefined perimeters), and therefore amount to *de facto* detention facilities. Other centers, usually encountered upon arrival (e.g. at airports) or purpose-built facilities for migrants whose asylum claims have been rejected, are *stricto sensu* places of detention. So-called off-shore detention facilities or deprivation of liberty on vessels must also be on the radar of torture prevention bodies, as risks of abuse are particularly acute in such settings. LGBTI migrants may also face restriction of movement or even deprivation of liberty in refugee camps (see below, “Deprivation of liberty in grounds related to migration”).

Risks of human rights violations, including torture and other forms of ill-treatment, are particularly high across all immigration deten-

tion facilities. Because of intersecting factors stemming from both their migration status and their sexual orientation or gender identity, LGBTI persons held in immigration detention settings are particularly vulnerable to abuse. The discrimination and violence they faced at home are frequently the reasons that forced them to migrate and that, in turn, can lead to additional forms of abuse in the countries of transit and destination, particularly when they are subjected to measures of deprivation of liberty. Immigration detention facilities should therefore be regularly monitored by independent oversight bodies.

1. Access to asylum and non-refoulement

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 23. The Right to seek Asylum

“Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

States shall:

- A** Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- B** Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;
- C** Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person’s sexual orientation or gender identity; [...]

- L** Ensure that inappropriate, invasive, unnecessary or coercive medical or psychological testing or evidence is not utilised to assess a person’s self-declared sexual orientation, gender identity, gender expression or sex characteristics when seeking asylum.”

Monitoring bodies may not be specifically mandated to assess how asylum claims are processed by the authorities⁸⁷. However, they should be aware that individuals might be forcibly returned to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture, in violation of international law. Persecution on the basis of sexual orientation or gender identity is increasingly considered to be a valid ground for claiming asylum, and LGBTI persons are being recognised⁸⁸ as constituting a “particular social group” under the Refugee Convention. Courts have also found that authorities assessing an application for refugee status cannot ask LGBT persons to be “discreet” or to conceal their sexual orientation in order to avoid the risk of persecution.

In order to speed up asylum procedures, asylum authorities may rely on so-called “safe-countries of origin” lists, which not only shift the burden of proof from the authorities to the asylum seekers, but are often drawn up without taking into account specific risks related to sexual orientation and gender identity. This entails the risk that persons in need of protection are not properly identified, and in particular LGBT persons whose asylum situation tends to be complex because of experiences of trauma, shame and stigmatization. “Safe countries” lists may also include States that criminalise sexual orientation or gender identity, and therefore cannot be considered safe for LGBTI individuals. If detainees are eventually sent back to their countries of origin, personal information (regarding for example the asylum seeker’s identity, criminal records, health status, and

⁸⁷ UNHCR has a mandated monitoring role as per its supervisory responsibility deriving from Art. 35 of the 1951 Refugee Convention. See *Policy on Detention Monitoring*, 3 December 2015, UNHCR/HCP/2015/7, para. 1-3.

⁸⁸ See *inter alia* Court of Justice of the European Union, *X and Y, nationals of Sierra Leone and Uganda respectively*, Judgment Of The Court (Fourth Chamber), 7 November 2013 and EU Directive (2011/95/EU), Art. 10. The Committee against Torture considers sexual orientation and gender identity as “indications of personal risk” that may affect the rights of a complainant under the Convention in case of his/her deportation, and of the outcome of a non-refoulement determination; see *General Comment N°4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, para. 45

sexual orientation) should not be shared with authorities from these countries, in order to protect their – and their families’ – lives, security and privacy. In particular, it is essential that sensitive information, including the person’s sexual orientation, is not shared with the authorities⁸⁹.

Monitoring bodies should also be aware that the process of determining refugee status in relation to persecution based on the applicant’s sexual orientation or gender identity can in itself lead to humiliating practices or cruel, inhuman or degrading treatment. The requirement of proving one’s sexual orientation or gender identity is often accompanied by a culture of disbelief on the part of the national authorities charged with conducting the assessment, and the way the assessment is conducted may be inherently humiliating. Detailed questions about the applicant’s sexual practices or tests to prove his or her sexual orientation should be prohibited. Similarly, the production of “evidence” such as images or films of applicant’s intimate acts should never be requested. So-called “phallographic” tests measuring sexual arousal while watching pornographic material must be considered incompatible with the right to human dignity, the right to be free from inhuman and degrading treatment, and the right to privacy. There is evidence that adjudicators, in looking to establish a person’s sexual orientation, may reject accounts of individuals having same-sex relationships while in detention by asserting that such relationships were the result of a lack of available opposite-sex partners. Bisexual people may also be told that they can “choose” their sexual orientation in order to be safe.

Safeguards should be in place to ensure that LGBT persons are not prevented from disclosing their sexual orientation or gender identity during interviews, in particular when this information could have an impact on the determination of their refugee status. Asylum claim interviews should always be conducted in private, including at the registration stage. Furthermore, asylum seekers should be given the possibility to choose the gender of the interviewer, as well as the gender and nationality of the interpreters, particularly in countries

⁸⁹The UN Special Rapporteur on the human rights of migrants stressed that “[s]ensitive personal information (regarding for example the identity of the asylum seeker, criminal records, health or sexual orientation) should not be shared with authorities from countries of origin in order to protect the life, security and privacy of the persons concerned and their families”, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/38/41, 4 May 2018, para. 36.

where there is cultural disapproval or stereotyped and ethnocentric views of LGBT individuals.

Similarly, delays in disclosing sexual orientation or gender identity should not negatively affect the asylum procedure, given the sensitive nature of questions relating to someone's personal identity and sexuality, as well as feelings of shame, emotional trauma, and internalized homophobia or transphobia that are sometimes experienced by LGBT asylum seekers. Difficulties in expressing their experiences in accordance with commonly used labels and terminology may also exacerbate their invisibility, and asylum officers should therefore be cautious in applying such labels and ensuring they do not fail to recognize a valid claim. It is of particular importance that the right to legal recognition of self-defined sexual orientation and gender identity is guaranteed, as this may be a prerequisite for States to appropriately recognise LGBTI persons as a group in need of particular legal protection. Bisexual persons might be pressured by immigration officers to avoid same-sex relationships in order to be safe.



Good practice

UNHCR Guidelines on international protection regarding claims to refugee status based on sexual orientation and gender identity

Pursuant to its mandate, the United Nations High Commissioner for Refugees (UNHCR) issues Guidelines on international protection to provide legal interpretative guidance for governments, legal practitioners, decision makers, and the judiciary. In 2012, the UNHCR published Guidelines on international protection N°9 on "Claims to refugee status based on sexual orientation and/or gender identity⁹⁰".

The guidelines provide authoritative interpretation on well-founded fear of being persecuted on the grounds of sexual orientation and gender identity, and consider that being able to avoid persecution by concealing or being "discreet" about sexual orientation or gender identity is not a valid reason for denying refugee status. The guidelines also provide a series of measures that aim to ensure that refugee claims relating to

⁹⁰ UNHCR, *Guidelines on international protection N°9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/09.

sexual orientation or gender identity are properly considered during the refugee status determination process. The measures include:

- Creating an open and reassuring environment for the interview and ensuring that the claim will be treated in confidence (interpreters must also be bound by confidentiality);
- Ensuring that decision-makers maintain an objective approach and do not reach conclusions based on stereotypes;
- Avoiding (both interviewers and interpreters) expressing any judgement about the applicant's sexual orientation or gender identity (highlighting the need for specialized training);
- Ensuring the use of vocabulary that is non-offensive;
- Taking into consideration specific requests made by applicants in relation to the gender of both the interviewers and the interpreters;
- Demonstrating sensitivity when questioning about incidents of sexual violence;
- Taking additional safeguards when interviewing women and children.

The guidelines also stress that the applicant's testimony is the primary source of evidence and call for banning requests for applicants to bring documentary evidence of intimate acts. They also caution against expecting couples to be physically demonstrative and against resorting to medical "testing" of applicants' sexual orientation. Although the guidelines have been primarily developed for policy-makers and governments, they also contain useful provisions and advice for monitoring bodies.



Case law (1)

Court of Justice of the European Union, A, B, C v. Staatssecretaris van Veiligheid en Justitie, 2014

The Court of Justice of the European Union ruled in 2014 that persons seeking asylum on the basis of their sexual orientation must not be subjected to tests or interrogations in order to "prove" their homosexuality. The judgement arose from a Dutch request for a preliminary ruling, following the rejection of three asylum claims by Dutch authorities, on

the basis that each applicant had failed to prove his same-sex sexual orientation. According to the Court, the assessment must examine the applicant's individual situation and should not be based on stereotyped notions. Questions concerning details of an applicant's sexual practices are to be considered contrary to fundamental rights. The Court also found that the applicant's credibility could not be questioned "merely because he did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution".

The Court's ruling ultimately aims at putting an end to humiliating and degrading practices like submitting applicants to "tests" in order to demonstrate their sexual orientation, or even demanding the production of "evidence" such as films of their intimate acts, because such evidence by "its nature infringe[s] human dignity."



Case law (2)

Court of Justice of the European Union, F v. Bevendorlasi és Allampolgarsági Hivatal, 2018

Asked by a Hungarian administrative and labour court whether the authorities could assess an asylum seeker's statements about his sexual orientation on the basis of a psychologist's expert report, the Court of Justice of the European Union held that recourse to such a report, for the purpose of assessing the veracity of a claim made by an asylum seeker about his sexual orientation, would not be consistent with the 2011/95/EU Directive of the European Parliament and of the Council, read in light of the Charter of Fundamental Rights of the European Union.

In this case, in which a Nigerian national claimed to be fleeing persecution on the grounds of his homosexuality, the Court found that recourse to a expert psychological report for such purposes constitutes an interference with the individual's right to respect for his private life (Art. 7 of the Charter, "Respect for private and family life"). Importantly, the Court noted that consent for such psychological tests is not necessarily given freely, because it is imposed under the pressure of the circumstances in which an asylum seeker finds himself.

Furthermore, the Court observed that such interference is particularly serious because it is intended to give an insight into the most intimate aspect of the asylum seeker's life. A psychologist's expert report seeking to determine an asylum seeker's sexual orientation was deemed

not essential, and the Court stated that national authorities must have personnel with appropriate skills, and ought instead to rely on the consistency and plausibility of the statements of the person concerned.

Monitoring checklist

- ✓ Is there any indication that LGBT persons are sent back to their countries of origin where they may be at risk of persecution on grounds of their sexual orientation or gender identity?
- ✓ Are “safe-country” lists used to speed-up asylum procedures? Is there evidence that such lists include countries where LGBT persons would be at risk of persecution on the grounds of their sexual orientation or gender identity?
- ✓ Are LGBT migrants expected to “prove” their sexual orientation or gender identity during asylum claim procedures? Is there evidence that humiliating questions or degrading practices are used by immigration officers assessing asylum claims?
- ✓ Are interviews with asylum seekers conducted in private to ensure that LGBT asylum seekers can disclose their sexual orientation or gender identity in a safe and dignified manner?
- ✓ Is information provided about the fact that asylum claims can be made on the basis of persecution stemming from asylum seekers’ sexual orientation or gender identity?
- ✓ Are asylum seekers given the possibility to choose the gender of both the interviewer and the interpreter?
- ✓ Are asylum seekers given the possibility to choose the nationality/ethnicity of the interpreter?
- ✓ Are officers assessing asylum claims trained/sensitised about the specific needs of and risks for LGBTI persons? Is similar training offered to interpreters?

2. Vulnerability screening upon arrival and diversion from detention

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 23. The Right to seek Asylum

“Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

States shall: [...]

- N** Ensure that the detention of asylum seekers is avoided, and is only used as a measure of last resort and for the shortest possible time.”

During immigration processes, screening procedures should be in place to identify individuals in situations of particular vulnerability, in order to ensure their protection and to divert them from detention, which should always be a last resort. However, many State policies apply “one-size-fits-all” immigration detention models, which do not take into consideration individual circumstances and special needs. Monitoring bodies should be aware that even if vulnerability screening procedures are in place, it may be difficult for LGBTI persons to disclose their sexual orientation or gender identity in a safe, voluntary, and dignified manner, particularly inside immigration detention facilities.

It is essential that any disclosure of sexual orientation or gender identity is kept confidential unless decided otherwise by the person directly concerned. Any forced disclosure of a person’s sexual orientation or gender identity would not only infringe their right to privacy, but also on their right to be treated with dignity and humanity, by potentially exposing them to serious risks of abuse.

Initial screenings should aim at identifying individual needs, but also the best options available to the person concerned, particularly regarding housing. In its revised “Deliberation on the deprivation

of liberty of migrants”, the WGAD stated that because they are in situations of vulnerability LGBTI persons must not be detained⁹¹, and some States have adopted presumptions against detention that apply either explicitly or implicitly to LGBTI persons. Ongoing screening mechanisms should be in place to identify situations where the safety of LGBTI migrants cannot be guaranteed in detention, or where the detention regime amounts to ill-treatment. In such cases, LGBTI migrants should be released and proper alternatives to detention should be sought.



Good practice **Safe shelters for LGBT asylum seekers**

After numerous incidents of violence against LGBT asylum seekers in reception centers in **Germany** were documented by the Lesbian and Gay Federation of Germany (LSVD), the state government for Berlin classified LGBT refugees as a social group in need of special treatment and protection, in particular with regard to housing. This was followed in 2016 by the opening of a special shelter for 125 LGBT asylum seekers, run by *Schwulenberatung Berlin* (a counseling center for LGBT people) and staffed with gay- and trans-friendly personnel. Assistance is also provided to ensure that LGBT migrants are able to find housing in the private sector as soon as possible.

While *Schwulenberatung Berlin* recognizes that it would be better to make reception centers safe for LGBT migrants, the current situation and their high exposure to violence calls for a presumption that alternatives are needed to ensure their protection. Furthermore, as part of the state government’s policy, all staff working in reception centers are to receive special trainings on the situation of LGBT asylum seekers.

Monitoring checklist

- ✓ Do interviews with asylum seekers and other migrants include vulnerability screenings to identify specific protection needs?

⁹¹ Working Group on Arbitrary Detention, *Revised Deliberation N°5 on the deprivation of liberty of migrants*, 7 February 2018, para. 41.

- ✓ Are vulnerability screenings conducted prior to any form of detention, to ensure that alternatives are first considered?
- ✓ If initial vulnerability screenings are in place, do they include specific considerations relevant to the situation of LGBTI persons?

Do the interviews provide for the safe and dignified disclosure of sexual orientation and gender identity?
- ✓ Do trans asylum seekers have access to legal gender recognition upon arrival?
- ✓ What safeguards are in place to ensure the confidentiality of information regarding applicants' sexual orientation or gender identity? Who has access to this information?
- ✓ If an applicant is deemed vulnerable because of their sexual orientation or gender identity, what measures are taken? Is there a scheme in place to divert such detainees from regular reception/detention centers if their safety cannot be ensured? What are the alternatives?

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Principle 23. The Right to seek Asylum

“Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

States shall:

- E** Ensure that persons seeking asylum are protected from violence, discrimination and other harm committed on grounds of sexual orientation, gender identity, gender expression or sex characteristics, including during the determination of their claims and in reception conditions; [...]

- N** Ensure that the detention of asylum seekers is avoided, and is only used as a measure of last resort and for the shortest possible time;
- O** Ensure that placement in detention, where used, avoids further marginalising persons on the basis of sexual orientation, gender identity, gender expression or sex characteristics or subjecting them to violence, discrimination or other harm;
- P** Ensure that solitary confinement is not used to manage or to protect persons at risk of discrimination, violence or other harm on the basis of sexual orientation, gender identity, gender expression or sex characteristics, and release or refer asylum seekers to alternatives to detention, if effective protection cannot be provided.”

3. Deprivation of liberty on grounds related to migration

While some of the issues and risks attendant to placement in immigration detention are similar to those occurring in prisons, others are specific to detention in immigration settings. In particular, monitoring bodies should be aware that many LGBT migrants have fled their countries of origin because of persecution on the basis of their sexual orientation or gender identity. Such persecutions may stem from laws criminalizing same-sex relationships and/or from behaviours and appearances not conforming to social, cultural and religious norms. It might therefore be particularly problematic for LGBT persons to be detained together with detainees from the same country of origin, who might share the same discriminatory views that forced them to flee in the first place. If this is the case, abuse and harassment are likely to continue in the new closed environment, and LGBT migrants may be at risk of becoming victims of violence, including hate crimes, committed by fellow nationals. LGBT persons as such can end up facing a continuum of marginalisation, as targets of identity-based mistreatment both in the countries they fled and in detention places in receiving countries. If their security cannot be guaranteed, alternatives to detention should be sought. Indefinite segregation or placement in solitary confinement of LGBT migrants, even for safety reasons, cannot be justified and protective measures must guarantee access to recreation and family visits on an equal basis with other immigration detainees.



Case law

European Court of Human Rights, *O.M. v. Hungary*, 2016

In 2016, the European Court of Human Rights found that the detention of an Iranian national, while his asylum request was being processed, violated his right to liberty and security (article 5.1). The applicant, who had been forced to flee his country of origin because of his sexual orientation, requested asylum upon arrival in Hungary. Asylum authorities decided to place him in detention because of an alleged risk of absconding, despite the fact that he had expressed fear of harassment in asylum detention, with explicit reference to his sexual orientation.

In its decision, the Court found that the applicant's detention "verged on arbitrariness" and considered that the authorities had not given due consideration to his claims of belonging to a vulnerable group in his country of origin, when they ought to have exercised "particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place." Importantly, the Court also found that the authorities had failed to take into account the extent to which vulnerable persons, including "LGBT people like the applicant", are "safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons".

Monitoring bodies should also be aware that LGBT migrants are particularly vulnerable to sexual assaults by fellow detainees or staff members, but are often afraid to report such abuse for fear of reprisals by perpetrators or due to mistrust in the system. Additional barriers for reporting include language limitations and fear of retaliation by immigration authorities, and in particular of deportation. Trans women, especially if placed in gender-inappropriate facilities, are highly vulnerable to sexual abuses, including in showers and other communal areas. Trans women also run the risk of being accused of soliciting sex from other residents/detainees when they attempt to report sexual violence to the authorities. They are reportedly threatened with disciplinary action more frequently than other detainees.

In some contexts, LGBT migrants may be held in refugees camps, where they are particularly vulnerable to abuse. They may be confined in special shelters within the camp perimeter for protective

purposes. Such segregation measures can be double-edged, as they can create resentment among other refugees and bring undesired visibility to LGBT persons, while at the same time not necessarily providing sufficient security; however they also may embolden other LGBT migrants to seek support⁹².



Good practice (I)
Specific guidance regarding the care of transgender detainees in immigration detention

The **United States** Immigration and Customs Enforcement agency adopted in 2015 a memorandum⁹³ providing specific guidance on the placement and care of transgender detainees. The document includes provisions regarding the right to self-identification, including as regards housing decisions, which may not be based solely on identity documents and the physical anatomy of the person. Additional privacy is also required for initial screenings to ensure confidentiality of interviews and guarantee safe disclosure of the person's gender identity. According to the guidance, sensitive information, including the detainee's gender identity, must not be shared either with other detainees or with staff members "who do not have a need to know the information".

The guidance also includes an obligation, during the initial medical screening, to inquire into the detainee's self-identification and history of transition-related care, with a view to ensuring continuation of treatment, including hormone therapy and mental health care.

The document also includes positive provisions regarding searches, training, and liaison officers. However, it has been criticized for not excluding the possibility of placing detainees in "protective segregation", which can be used "only as a last resort and when no other temporary housing option exists."

There is a high risk that authorities resort to isolation and segregation as forms of protective custody because they have not devised a

⁹² See in particular Gitta Zomorodi, *SOGI-Related Forced Migration in East Africa: Fleeing Uganda after the Passage of the Anti-Homosexuality Act*, the Global Philanthropy Project, July 2015.

⁹³ U.S. ICE, *Further guidance regarding the care of transgender detainees*, US Department of Homeland Security, 19 June 2015.

safer way of holding LGBT persons in detention. While such measures can themselves constitute an infringement of the prohibition of torture and other ill-treatment, they can also paradoxically increase the visibility of LGBT persons and therefore make them targets for harassment and abuse by fellow detainees or detention staff. Such measures can also deprive LGBT persons from accessing programmes, services, and activities. For fear of bullying, discrimination, and isolation, LGBT persons may be forced to hide their sexual orientation or gender identity, which in turn can have a negative impact on their asylum claims.



Good practice (II) **Combatting discrimination in reception centers**

In the **Netherlands**⁹⁴, an independent research conducted among residents and former residents of immigration reception centers in 2011 concluded that asylum seekers who were discriminated against based on their sexual orientation or their religion hardly ever reported such incidents to the reception centers' authorities. The Central Agency for the Reception of Asylum Seekers decided on this basis to initiate the "Willingness to report in case of discrimination" project. In parallel, COC Netherlands (an NGO advocating for the rights of LGBTI persons) launched the "Pink Security Network", a project that aims to establish a social network of LGBTI asylum seekers and improve their safety, coupled with trainings of reception staff in nine reception centers.

On this basis, the Central Agency for the Reception of Asylum Seekers established a working group on discrimination and drafted a protocol on how to deal with incidents towards asylum seekers. Posters are also displayed in reception centers with strong messages about zero tolerance in case of acts of discrimination.

Finally, when couples are provided with suitable accommodation, in particular at reception centers, same-sex couples must not be discriminated against in accessing similar accommodation and services.

⁹⁴ ILGA-Europe, *Good practices related to LGBTI asylum applicants*, Sabine Jansen, May 2014, p. 49.

Monitoring checklist

- ✓ Is a staff member officially dedicated to supporting LGBTI detainees in the detention/reception center and, if so, are detainees made aware of the fact that support is available to them?
- ✓ Do staff members know how to address incidents targeting LGBTI migrants?
- ✓ Are staff members trained about specific risks faced by LGBTI migrants? Do trainings include topics such as vulnerability screenings and body searches of trans and gender non-conforming persons?
- ✓ What contingency planning is in place to ensure the safety and security of LGBTI migrants in the facility?
- ✓ Are specialist community support organisations invited to provide support and advice to LGBTI detainees, and do they have good access to detainees?
- ✓ Are immigration detainees given the possibility to have their cases reviewed after an initial detention order?
- ✓ Are there notices, such as signs or posters, indicating that discrimination will not be tolerated in the facility?
- ✓ If couples are provided with separate accommodation, are same-sex couples afforded the same housing option?

4. Health services

The quality of health services should be at least of the same standard as those provided in penal establishments. Immigration detention centers are often characterized by a lack of guidance regarding the provision of specific healthcare, including hormonal treatment for trans persons who already initiated their treatment in their countries of origin or during transit. Sometimes blanket policies

denying hormone treatment are in place. The interruption of such treatment has severe consequences. Reports show that individuals in needs of gender-reaffirming hormone replacement therapy and life-sustaining HIV/AIDS medications often experience lengthy delays when seeking medical care in immigration detention facilities. Immigration detention facilities, like other places of deprivation of liberty, are considered high-risk environments for STI transmission. This is aggravated when there is limited or no access to prevention commodities such as condoms and lubricants.

Access to a doctor also represents a key safeguard against torture and ill-treatment, and seeing healthcare staff upon arrival to an immigration detention facility may be the first opportunity for a migrant can raise an allegation of mistreatment.

See Chapter III (6) (“Access to healthcare”) for more guidance on monitoring access to healthcare⁹⁵.

⁹⁵ See also APT, IDC, UNHCR, Monitoring immigration detention: Practical manual, pp. 146-156.

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LGBTI persons have historically been subjected to discrimination, abuse, and institutional violence, across all regions of the world. Discriminatory and abusive patterns are magnified in detention contexts, making Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons who are deprived of their liberty particularly exposed to risks of ill-treatment and even torture. This manual is a direct response to the growing demand for practical guidance on this topic, and covers prisons, police custody and immigration detention facilities. This publication has benefited from the expertise of numerous experts and practitioners from diverse disciplines.

“This guide - prepared by the Association for the Prevention of Torture with great attention to the current state of international human rights law, best practices in the field of torture prevention, and the wealth of experience of the extraordinary group of experts that provided its substance - will provide an understanding of the factors of risk and the acts, patterns and extreme manifestations of torture and ill treatment against LGTBI persons, and is an invaluable blueprint for any conceptual understanding of these.”

Foreword by Victor Madrigal-Borloz,
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