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PENAL REFORM INTERNATIONAL

LGBTI persons deprived of their liberty:

a framework for preventive monitoring

A Detention Monitoring Tool resource

LGBTI persons deprived of their liberty: a framework for preventive monitoring

Penal Reform International and the Association for the Prevention of Torture (APT) would like to thank Jean-Sébastien Blanc for drafting this paper.

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Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide.

We promote alternatives to prison which support the reintegration of offenders, and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law.

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I. Introduction

In April 2012, Ban Ki-moon, the Secretary-General of the United Nations, delivered a memorable speech during the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity. He strongly condemned all attacks against sexual minorities and called for a paradigm shift in States' and peoples' attitude towards this specific group:

> *'We should all be outraged when people suffer discrimination, assault and even murder – simply because they are lesbian, gay, bisexual or transgender. We should all speak out when someone is arrested and imprisoned because of who they love or how they look. This is one of the great, neglected human rights challenges of our time. We must right these wrongs. […] Some will oppose change. They may invoke culture, tradition or religion to defend the status quo. Such arguments have been used to try to justify slavery, child marriage, rape in marriage and female genital mutilation. I respect culture, tradition and religion – but they can never justify the denial of basic rights.'*[1]

Although powerful and supportive of sexual minorities worldwide, the Secretary-General's words demonstrate that LGBTI[2] persons have historically faced and keep facing discrimination and violence in many aspects of their existence. Culture, tradition and religion continue to be used to justify the denial of basic rights in a significant number of countries. Some national laws provide for a specific protection to LGBTI persons against discrimination and violence as well as the entitlement to the same rights as other citizens, but others do not grant any specific protection or even criminalise behaviours that do not correspond to hetero-normativity[3].

At the international level, conventions have so far failed to explicitly provide protection to persons from sexual minorities, and there is no universal consensus regarding the status of LGBTI persons. However, several United Nations human rights mechanisms, including key Treaty Bodies and Special Procedures, have affirmed states' obligation to ensure protection from discrimination on the basis of sexual orientation and gender identity. The High Commissioner for Human Rights has also published a report dedicated to the issue of discriminatory laws, practices and acts of violence against persons from sexual minorities[4]. In a joint statement to the Human Rights Council on 10 June 2013, 29 national human rights institutions (NHRIs) with 'A-status' from around the world called for action to address violations against LGBTI persons and for the establishment of an 'appropriate mechanism to study, document and report to the Human Rights Council human rights violations, barriers and challenges on the basis of sexual orientation, gender identity and for intersex persons'.[5] Human rights principles protecting sexual minorities were established in November 2006 by a group of human rights experts[6]: the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity[7] (the 'Yogyakarta Principles').

LGBTI persons in detention – or persons perceived as belonging to this group – are in a situation of particular vulnerability, at risk of human rights violations and abuses – including by fellow detainees

1 'Culture, Religion, Tradition Can Never Justify Denial of Rights, Secretary-General Stresses in Message to Conference on Sexual Orientation, Gender Identity', UN Department of Public Information, 15 April 2013. Available at: www.un.org/News/Press/docs/2013/sgsm14944.doc.htm <accessed 7 October 2013>

2 LGBTI is an acronym standing for Lesbian, Gay, Bisexual, Transgender and Intersex persons. Sexual minorities are understood in this document as a synonym of LGBTI.

3 Hetero-normativity presumes that heterosexuality is the norm, and states that sexual and marital relations are only appropriate between a man and a woman. See Warner, Michael, *Fear of a Queer Planet: Queer Politics and Social Theory*, University of Minnesota Press, 1993.

4 UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights: *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41.

5 Joint NHRI statement to the UN Human Rights Council on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, 10 June 2013. Available at: https://www.humanrights.gov.au/joint-nhri-statement-human-rights-council-sexual-orientation-and-gender-identity <accessed 7 October 2013>

6 Signatories include: Manfred Nowak (Austria), former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Mary Robinson (Ireland), former United Nations High Commissioner for Human Rights; Martin Scheinin (Finland), UN Special Rapporteur on human rights and counter-terrorism and other eminent experts from all regions. For a complete list see: www.yogyakartaprinciples.org/principles_en.htm

7 www.yogyakartaprinciples.org

– throughout the entire criminal justice system[8]. The Special Rapporteur on Torture has encapsulated well the particular situation of sexual minorities in detention:

> *'[They] are often considered as a sub-category of prisoners and detained in worse conditions of detention than the larger prison population. The Special Rapporteur has received information according to which members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose. Prison guards are believed to use threats of transfer to main detention areas, where members of sexual minorities would be at high risk of sexual attack by other inmates. In particular, transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons*.'[9]

Owing to their regular visits to places of deprivation liberty and subsequent reports to the authorities, monitoring bodies – including National Preventive Mechanisms (NPMs)[10] – can play a pivotal role in helping to ensure that LGBTI detainees are protected and treated on an equal basis with other detainees. In doing so, monitoring bodies should bear in mind the principle of 'do no harm' and avoid identifying LGBTI detainees to staff and other inmates against their will and thereby exposing them to an even higher risk of abuse or victimisation. The specific country context and the particular place of detention will be relevant in determining an appropriate strategy for monitors, including whether or not they should proactively reach out to speak to LGBTI detainees during a visit.

The aim of this paper is to outline the main risk factors and situations to which LGBTI persons are exposed when they are deprived of their liberty in the criminal justice system, as well as to propose possible avenues of action that could be taken by monitoring bodies.

'States shall […] ensure independent oversight of all places of detention by bodies that are adequately mandated and equipped to identify arrests and detentions that may be motivated by the sexual orientation or gender identity of a person.'

Yogyakarta Principle 7 (D), The right to freedom from arbitrary deprivation of liberty

8 The paper only considers situations of risks for LGBTI persons in the criminal justice system. However, it is clear that some of the considerations analysed in this document may be relevant for other places where persons are or may be deprived of their liberty. For abuses towards LGBTI persons in other settings, see for example: *Review of homophobic bullying in educational institutions*, UNESCO, 12 March 2012; or people seeking asylum in immigration centres, in *Discrimination on grounds of sexual orientation and gender identity in Europe*, Council of Europe, 2d Edition, pp62-69, 2011. It is also worth mentioning the report of the Special Rapporteur on Torture on torture and ill-treatment in health-care settings, which includes a section about LGBTI persons, A/HRC/22/53, para76-79, 1 February 2013.

9 See Report of the Special Rapporteur to the Human Rights Council, 3 July 2001, A/56/156, para.23.

10 National Preventive Bodies (NPMs) are independent institutions established under the Optional Protocol to the United Nations Convention against Torture (OPCAT). Their mandate is to prevent torture and other ill-treatment in places of deprivation of liberty by *inter alia* regularly visiting places of detention and addressing recommendations to state authorities.

II. Concepts and protective framework

Many countries continue to have legislation which discriminates against LGBTI people. Such discrimination can range from a higher age of consent for sexual intercourse for homosexuals than for heterosexuals[11], to discriminatory and degrading medical examinations[12] or ambiguous decency laws. It can take the form of criminalisation of sexual relationships between persons of the same sex and of sexual orientation itself, which in some countries even carries the death penalty.

This document does not analyse human rights concerns related to the criminalisation of homosexuality, but focuses on discrimination and abuse in places of detention.

1. Definitions

LGBTI is an acronym used for Lesbian, Gay, Bisexual, Transgender and Intersex persons. Activists, civil society organisations, sociologists, the media and others may use other acronyms, including 'LGB', 'LGBT' or 'LGBTQ' (Q standing for 'queer'), which all reflect various identities, realities, demands and concerns. Many people labelled as LGBTI would not even identify themselves with this acronym, its underlying narrative or associated symbolism. Some may find it understandably confusing or arbitrary to conflate sexual orientation with gender identity. In some cultures, nobody will identify themselves as lesbian or gay because of the very strong social stigma; however, some may have experienced same-sex relationships. The terms 'men who have sex with men' or 'women who have sex with women' have therefore emerged to enable description of some people who might not identify as gay or lesbian. That said, and bearing in mind the complexity of the issue and the broad scope of groups and persons concerned, LGBTI will be the terminology used in this paper.

The terms lesbian, gay and bisexual can be understood through the prism of sexual orientation. According to the introduction to the Yogyakarta Principles, 'sexual orientation is understood to refer 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.[13]'

Transgender and intersex, by comparison, can be analysed through the prism of gender identity, understood by the Yogyakarta Principles 'to refer 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.[14]'

The issues and problems of transgender and intersex persons differ from those of lesbian and gay persons, and from each other. One of the main concerns for transgender persons relates to discrimination based on the fact that their perceived gender does not correspond to their biological sex, in particular problems accessing medical treatment such as sex reassignment surgery.

On the other hand, one of the main demands advocated by organisations defending the rights of intersex people, is to ban the mutilation of children where it has the aim of assigning a definitive biological sex to the child, on the basis of social and cosmetic considerations[15]. Realities, challenges and demands of these two groups may therefore be perceived as being entirely different. Despite the significant differences among the various groups concerned, experiences suggest that persons included under this terminology – or people perceived as belonging to one of the categories included in the

11 See for instance the Nevada state law criminalising consensual sex between same-sex teenagers, as a 'crime against nature'. Available at: https://www.leg.state.nv.us/NRS/NRS-201.html#NRS201Sec195 <accessed 7 October 2013>

12 In some countries men arrested on charges of homosexuality are compelled to undergo medical examinations intended to obtain physical evidence of anal sex. The UN Working Group on Arbitrary Detention considers that 'forced anal examinations contravene the prohibition of torture and other cruel, inhumane and degrading treatment, whether […] they are employed with a purpose to punish, to coerce a confession, or to further discrimination. In addition, they are medically worthless for the determination whether or not a person has engaged in same-sex sexual conduct.' Working Group on Arbitrary Detention, Opinion No. 25/2009 on Egypt, A/HRC/16/47/Add.1, paras.23, 28-29.

13 www.yogyakartaprinciples.org, p6.

14 www.yogyakartaprinciples.org, p6.

15 See, for example: www.intersex.ch

acronym LGBTI – represent a group in a situation of particular vulnerability while in detention. They are exposed to the risk of human rights violations and abuses from the very moment of their arrest to the time of their release.

Globally, lesbian, gay and bisexual detainees represent a small percentage of prison populations,[16] and transgender detainees are even fewer in number in most contexts. This small percentage may contribute to the neglect this group faces in detention, regarding their protection as well as their specific needs. As stated by the Special Rapporteur on Torture: 'While no relevant statistics are available to the Special Rapporteur, it appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations.[17]'

2. Protective framework

As mentioned above, international law fails to provide explicit protection from abuse and violence for LGBTI persons, let alone for their treatment while in detention. However, Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one must be subjected to torture or to cruel, inhuman or degrading treatment or punishment[18]. Article 9 (1) of the ICCPR also establishes that '[n]o one shall be subjected to arbitrary arrest or detention. Nobody shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. In addition, the dignity of all persons deprived of liberty – LGBTI people included – has to be upheld at all times and in all circumstances, as stated in Article 10 (1) of the ICCPR[19].

International human rights law provides general protection based on the core human rights principle of non-discrimination. 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'. Although human rights treaties do not explicitly mention sexual orientation and gender identity, lists of discrimination grounds are generally non-exhaustive, and usually include 'other status' which should be read to include discrimination based on sexual orientation and gender identity.[20]

In response to the scarcity of specific protection for LGBTI persons and the fragmented and inconsistent response from the international community, a high-level meeting was organised in the Indonesian city of Yogyakarta in November 2006, gathering human rights experts from diverse regions and backgrounds, including a former UN High Commissioner for Human Rights, UN Special Procedures' mandate holders, members of treaty bodies, judges, academics, NGOs and others. The outcome document, the Yogyakarta Principles, outlines a set of international human rights principles relating to sexual orientation and gender identity. Various Principles are of relevance for LGBTI persons in contact with the criminal justice system, including the right to freedom from arbitrary deprivation of liberty (Principle 7), the right to a fair trial (Principle 8), the right to treatment with humanity while in detention (Principle 9), and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (Principle 10).

Successive mandate holders of the Special Rapporteurship on Torture and other cruel, inhuman or degrading treatment or punishment have also played a crucial role in bringing attention to the fate of sexual minorities deprived of their liberty and advocating for better protection from abuse and violence. In his interim report to the United Nations General Assembly dated 3 July 2001[21], the Special Rapporteur dedicated a section to the issue of torture and discrimination against sexual minorities. He highlighted questions of their specific vulnerability to torture and ill-treatment, including restricted access to complaint procedures and medical treatment, harassment and violence by the police when arrested for alleged offences or when lodging a complaint, and

16 According to surveys conducted by Her Majesty's Inspectorate of Prisons (HMIP) (UK), about 4 per cent of people detained in prisons identify themselves as LBGTI compared to only 0-2 per cent of people held in police custody. However, collected data is thought to underestimate the true figure, as people may be concerned that the information gathered could be used against them.

17 See Report of the Special Rapporteur to the Human Rights Council, 3 July 2001, A/56/156, para.19.

18 In its concluding observations to states, the United Nations Committee against Torture (CAT) raises its concerns regarding attacks or other abuse by members of the police, armed forces or prison staff against members of the LGBT community. See for example: Committee against Torture, Concluding observations on the combined fifth and sixth periodic reports of Peru, adopted by the Committee at its forty-nine session (29 October – 23 November 2012). Available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_Peru_CAT_concluding_observations.pdf <accessed 7 October 2013>

19 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

20 Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, paras.21-22; Committee on the Rights of the Child, General Comment No. 4: Adolescent Health, para. 6; Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, paras.27, 32. See also jurisprudence of the European Court of Human Rights in relation to Article 14 of the European Convention on Human Rights, for example X *v.* Turkey (Application no. 24626/09), 9 October 2012.

21 See Report of the Special Rapporteur to the Human Rights Council, 3 July 2001, A/56/156, C. paras.17-25.

conditions of detention which may create *de facto* a sub-category of prisoners[22].

There are also relevant developments at the regional level and in the case law of regional human rights courts.

In 2010, the Council of Europe Committee of Ministers issued a recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. Recommendation 4 is to 'ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons'.[23]

The Council of the European Union (EU) adopted on 24 June 2013 'Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons[24]', which also consider situations of deprivation of liberty. The guidelines invite officials of EU institutions and EU Member States to *inter alia* '[c]ontact a state prosecutor, police authority or an established and independent visiting body to ask for permission to visit places of detention in order, for example, to assess the situation of LGBTI persons in detention' and '[s]uggest that international monitoring bodies have a special focus on LGBTI persons during their visits to places of deprivation of liberty'.

The Inter-American Commission on Human Rights, which has established a special unit on the Rights of LGTBI persons, regularly addresses the issue of LGBTI rights through its various rapporteurships, including the rights of LGBTI persons deprived of their liberty. For example, the Rapporteur on the Rights of Migrant Workers and their Families has expressed his concern and distress about the use of solitary confinement in US immigration detention facilities 'to ostensibly provide personal protection for vulnerable immigrant detainees, including homosexuals [and] transgender detainees'.[25]

22 The UNODC's *Handbook on prisoners with special needs* also includes a chapter dedicated to LGBTI prisoners. The Handbook outlines the issues faced by LGBTI persons in prison and recommends measures to address them, including on access to justice, complaints procedures, healthcare, detention conditions, protection needs and contact with family. It emphasises that '[t]he main and most important need of LGBT prisoners is protection from sexual abuse and rape, generally perpetrated by other prisoners': UNODC, *Handbook on prisoners with special needs*, 2009.

23 Recommendation CM/Rec(2010)5 adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers 'Deputies: www.coe.int/t/dg4/lgbt/Source/RecCM2010_5_EN.pdf

24 Council of the European Union, *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex persons (LGBTI)*, Foreign Affairs Council Meeting, 24 June 2013.

25 See 'IACHR visits US immigration detention facilities', Inter-American Commission on Human Rights press release No. 53/09. Available at: www.cidh.org/Comunicados/English/2009/53-09eng.htm <accessed 7 October 2013>

III. Risk factors and situations

Types and situations of risk are numerous for persons from sexual minorities in contact with the criminal justice system.[26] While all persons in police custody are at risk because torture and other ill-treatment most frequently occur in the early stages of detention,[27] LGBTI people are even more exposed to all types of abuse, whether homosexuality is criminalised or not (although where it is, these risks are even more acute). Arbitrary arrest, harassment, physical and pyschological violence, forced confessions, and rape by fellow inmates or law enforcement officials have been documented.

The chapter below does not provide an exhaustive list of risk factors, but seeks to outline particular risk peaks relating to police custody and to the penitentiary system respectively.

1. Arrest and police custody

Arrests on the basis of sexual orientation or gender identity occur frequently in some contexts, especially where homophobia and transphobia exist in police culture and where discrimination by public officials occurs with impunity. While in such contexts the police may frequently arrest LGBTI people following complaints from members of the public or on their own initiative, they seldom render assistance to LGBTI persons who have been assaulted as a result of their status, or for any other criminal complaint they may have.

In Ukraine, for example, there are persistent reports of human rights violations of LGBTI persons by the police, including unlawful detention, extortion, threats of outing and disclosure of confidential information, denial of legal protection and deprivation of water and food, as well as physical violence in detention[28].

In a report on impunity and violence against transgender women, human rights activists in Latin America, 95 per cent of the transgender defenders interviewed reported that they had suffered police brutality either on the street, in police patrols or in police stations[29].

Cases have also been documented in the United States of transgender sex workers being insulted in the streets by police officers, sometimes having their clothes or wigs violently pulled off. They were also questioned and searched more often than other people because of profiling applied by police officers. In some countries, carrying several condoms at a time is used by police and prosecutors as evidence in court to prosecute under anti-prostitution laws. As a result, transgender (and other) sex workers, trying to avoid being arrested with condoms, are at higher risk of contracting HIV[30]. In Lebanon, humiliating practices by law enforcement officials have been documented, including the case of a man who when arrested by police officers believed he was being robbed, as the officers did not identify themselves. He was brought to the police station and ordered to do sit-up exercises naked.[31]

Targeted violence is often deeply rooted in institutional cultures allowing for stereotyping and attitudes of disdain towards persons from sexual minorities[32]. In Nepal, for example, transgender persons known as metis have historically been one of the groups most discriminated against in the country, and abuse, violence and arbitrary arrests have been well documented. In 2011, a Supreme Court verdict acknowledged that Nepal had been negligent in protecting the rights of people of the 'third gender' and those of LGBTI persons in general. It ordered the government to take measures to protect this group, including specific anti-discrimination legislation, and

26 Risks also exist beyond release, as the persons concerned may fear discrimination when returning to the community, may have lost their home, or may find that they cannot return to their family because their incarceration has revealed to their relatives that they are LGBTI. According to the surveys of detainees conducted by Her Majesty's Inspectorate of Prisons (UK), LGB prisoners describe higher levels of anxiety about release and the period immediately following it than heterosexual prisoners.

27 See *Monitoring police custody: a practical guide*, Association for the Prevention of Torture, 2013.

28 See *LGBT vector of Ukraine. The situation of LGBT in Ukraine* (November 2011 – 2012), Council of LGBT Organisations of Ukraine, Nash Mir (Our World) Gay & Lesbian Centre, p21. Available at : www.gay.org.ua/publications/lgbt_ukraine_2012-e.pdf <accessed 7 October 2013>

29 See *The night is another country: impunity and violence against transgender women human rights defenders in Latin America*, Redlactrans and International HIV/AIDS Alliance, 2012, p15.

30 Human Rights Watch, *Sex workers at risk: condoms as evidence of prostitution in four US cities*, 19 July 2012.

31 Human Rights Watch, '*It's part of the job': ill-treatment and torture of vulnerable groups in Lebanese police stations*, 26 June 2013, p28.

32 See *Institutional culture in detention: a framework for preventive monitoring*, PRI/APT, 2013, pp8-9.

consequently reports of violence by law enforcement officials against metis decreased by 98 per cent.[33]

In countries with anti-homosexuality laws, police officers may feel that abuse will go unpunished. In the case of Tanzania, where the penalty for consensual sex between men is 30 years to life in prison, Human Rights Watch has documented various cases of homosexual and transgender persons sexually abused and otherwise ill-treated by law enforcement officers when arrested[34].

In addition to torture and other ill-treatment, persons suspected of homosexuality are more likely to be exposed to a large array of infractions of procedural safeguards, such as longer time spent in police custody, denial of legal counsel, or denial of requests to contact family members, etc.[35]

Monitoring bodies should be well aware of the laws, regulations and procedures regarding arrest and apprehension and check whether they have been complied with in cases involving LGBTI detainees.

It is unlikely that monitors will be present at the time of arrest, but during interviews with the detainees concerned, they may have the opportunity to assess whether the arrest was conducted on a discriminatory basis, the use of force was excessive or whether means of restraint were used in a prohibited and/or discriminatory way.

The circumstances of the arrest, notably the location (eg. police raid in establishments or public area frequented by sexual minorities), the number of police officers participating and the timing of the arrest (eg. late in the night), the language used etc, can prove useful indicators of police attitudes towards the LGBTI population.

> '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. […]'
>
> ***Yogyakarta Principle 7, The rights to freedom from arbitrary deprivation of liberty***

2. Interrogations

Similar to the time of arrest, interrogation is also a period of particular risk for the abuse and ill-treatment for LGBTI detainees. Important safeguards include clear procedures on how to conduct interviews, recording (or ideally video-recording) of the interrogation, written records with names of all persons present, and the presence of the detainee's lawyer.

Risks are greater for sexual minorities, as additional threats may be used by law enforcement officers to extort a confession. For example, police officers may threaten to reveal the detainee's sexual orientation to family members, friends or colleagues to obtain a confession or a transgender person may even be brought to the police station on a false pretext in order to ask them for money or sexual favours in exchange for their freedom[36]. Bribes and extortion by the police may occur not only for the purpose of extracting a confession, but also as a way of securing the person's release.

In countries where homosexuality is criminalised, the risk of a confession being extorted is higher, and the possibility of recourse to law as a means of redress for such abuses is very limited. In Cameroon, for example, with most trials for homosexuality based on confessions, law enforcement officers tend to resort to torture and ill-treatment in order to obtain the 'evidence' they are looking for[37]. Cases have been documented of people being beaten with truncheons, forced to sleep naked on the floor, threatened with being killed and filmed with cell phones by law enforcement officials[38].

Monitors may want to enquire during private interviews with detainees about the ways in which interrogations were conducted and whether physical

33 Acco Blue Diamond Society (BDS), the leading organisation working on behalf of the LGBTI community in Nepal. See also *An activist's guide to the Yogyakarta Principles*, August, 2010, pp89-91. Available at: www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf <accessed 7 October 2013>

34 Human Rights Watch, *'Treat us like human beings': discrimination against sex workers, sexual and gender minorities, and people who use drugs in Tanzania*, June 18 2013.

35 See *Coupables par association. Violations des droits humains commises dans l'application de la loi contre l'homosexualité au Cameroun*, pp48-51, Human Rights Watch, 2013.

36 Such cases were documented in Panama, Brazil and Guatemala, see *The night is another country. Impunity and violence against transgender women human rights defenders in Latin America*, Redlactrans and International HIV/AIDS Alliance, 2012.

37 *Coupables par association. Violations des droits humains commises dans l'application de la loi contre l'homosexualité au Cameroun*, Human Rights Watch, 2013.

38 *Ibid.*, pp44-45.

abuse or ill-treatment took place. The general attitude and the language used by law enforcement officials are key indicators regarding the treatment of LGBTI detainees. Information from registers, notably registers of incidents and medical files, can be useful to cross-check any information gathered.

3. Allocation of transgender detainees

The allocation of transgender detainees to detention facilities, and subsequently their placement in units and cells, should be determined with great caution, and the detainees concerned should be consulted on whether they want to be detained in a male or female facility. Decisions regarding their placement and protection while in detention should be taken with their informed consent.

In 2011, the Special Rapporteur on Violence against Women described a case in El Salvador in which a transgender woman was placed in a male-only prison and detained in a cell with gang members, where she was raped more than 100 times, sometimes with the complicity of prison officials.[39]

In March 2011, the Cook County Jail, in Illinois – one of the largest prisons in the US – introduced a new policy for transgender detainees. A gender identity committee meets periodically to review plans for each transgender detainee, including the allocation of detainees with men or women.[40] However, in the majority of countries, transgender detainees are automatically placed in facilities on the basis of their anatomical sex or sex assigned at birth.

The unique vulnerability of transgender detainees was recently taken into consideration in a landmark ruling by the Israeli Supreme Court.[41] In light of the fact that a transgender person sentenced to 15 months for robbery would have to be held in solitary confinement to protect him/ her from fellow prisoners, the Court reduced the sentence to 10 months, stating that the unusually harsh prison conditions constituted a mitigating factor. The verdict established a precedent for leniency due to particularly harsh prison conditions.

4. Body searches

Body searches are a particularly sensitive issue for LGBTI persons, especially if the person arrested is openly lesbian, gay or bisexual, or if the person cross-dresses or has undergone/is undergoing treatment for gender reassignment. Searches can magnify the risk of humiliation, abuse and discrimination as they may imply nudity and physical contact.

Staff members in detention facilities should be trained to conduct searches and non-discrimination should be mainstreamed throughout the training. Even where no physical abuse or violence during body searches occurs, it is essential that monitors enquire into whether police attitudes and language are respectful, and detainees are not purposely humiliated.

The decision to undertake a body search should always be guided by the principles of necessity and proportionality. Monitoring bodies should assess whether searches are conducted on a discriminatory basis (eg. LGBTI detainees being searched more often than other detainees) or whether the way in which they are conducted differs according to the person searched.

Detainees should never be asked to undress entirely and strip searches should be carried out in two steps (first clothes above the waist, then clothes below the waist).

International standards recommend that searches are conducted by staff of the same gender.[42] Although relevant for most prisoners, this standard is not necessarily protective for LGBTI detainees, as they may face abuse and humiliation when searched by staff of the same gender. LGBTI detainees who openly identify as LGBTI should if possible be given the choice of being searched by a male or female officer.

Transsexual detainees may not be recognised in accordance with their new identity and therefore searched by male staff even though they perceive themselves as female detainees (or vice-versa). Monitors could encourage detaining authorities to develop a specific policy[43] for searching LGBTI detainees. Such policies should not only relate to the gender of the officer in charge, but sensitise all staff and provide additional safeguards. In South Africa, the Police Services of Cape Town together with

39 See A/HRC/17/26/Add.2, paras.28-29

40 'For Transgender Detainees, a Jail Policy Offers Some Security', *New York Times*, 22 December 2011. Available at: www.nytimes.com/2011/12/23/us/for-transgender-detainees-a-jail-policy-offers-some-security.html?pagewanted=all&_r=0 <accessed 7 October 2013>

41 See 'Transgender convicts deserve leniency, Supreme Court says', *Haaretz*, 12 September 2013. Available at: www.haaretz.com/news/national/.premium-1.546826 <accessed 7 October 2013>

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

43 See, for example, the Correctional Service of Canada's Directive on searching inmates, which includes a protocol for searching transgender inmates (with the possibility of choosing between male and female officers carrying out the search, or a combination of both depending on the part of the body searched). Available at: www.csc-scc.gc.ca/text/plcy/cdshtm/566-7-cd-eng.shtml <accessed 7 October 2013>

Gender Dynamix, a local NGO providing help, advice and information for transgender people, developed Standard Operating Procedures (SOP) to ensure the safety of transgender people who are in conflict with the law. One of the main aspects of these procedures relates to searches, and establishes that 'if a trans-person is carrying an Identity Document that reflects her/his gender then that trans-person can demand to be searched by a police [officer] of the same gender, regardless of lack of genital surgery'.[44]

According to the French General Inspector of places of deprivation of liberty, 'as soon as the [sex reassignment] treatment has started, searches should be conducted with particular caution in order to guarantee that the dignity of the person is respected. Whenever the irreversibility of the gender reassignment process has been medically established by a multidisciplinary team in charge of the person concerned, searches should be undertaken in conditions preserving the dignity of the detainee as well as the staff, by officers of the same sex as the reassigned sex, without waiting for a change of the civil status. Such searches should be undertaken by officers made sensitive to the issue by the prison's management'.[45]

5. Violence amongst detainees

The experience of being deprived of one's liberty is harsh for any detainee, but LGBTI persons are more exposed to violence from fellow detainees. As the Special Rapporteur on Torture encapsulated well[46]: '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 discrimination.'

The risk of sexual abuse as a form of inter-prisoner violence is particularly high for LGBTI prisoners. According to the US Bureau of Justice Statistics, 3.5 per cent of men who identified themselves as heterosexual had been sexually abused by another inmate, compared to 34 per cent of bisexual men, and 39 per cent of gay men.[47] To prevent sexual abuse by co-detainees, a thorough assessment should be conducted for all inmates to ascertain their risk of either being victimised or a danger to others.

Attitudes of fellow detainees and staff may differ significantly depending on gender. For example, a study conducted in Costa Rica by the UN Office on Drugs and Crime (UNODC) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) has observed that in women's prisons where lesbian couples are formed, sexual diversity is more visible; it is tolerated (although not accepted by the detaining authorities); and gender identities are less questioned. In facilities for men, there are almost no gay couples (except in some cases where a transgender detainee is in a relationship with a male detainee) and the majority of detainees feel that their virility is questioned by homosexual relationships. In this situation, there is an increase of homophobia and transphobia compared to outside prisons, and instances of sex are often characterised by violence.[48]

It is common in many contexts that LGBTI detainees or those perceived as belonging to a sexual minority, are detained together, in the same cell, or the same unit. In such cases, the cells or units may be in worse physical condition than those located in other premises within the same detention facility. Sometimes LGBTI detainees will be housed together with other detainees considered to be at the very bottom of the hierarchy, and frequently on supposedly protective grounds. For example, in the main detention facility in Tegucigalpa, the capital of Honduras, 'prison outcasts' are detained together with LGBTI detainees held in the same unit as persons living with mental illnesses.

Given the fear of reprisals if they denounce such acts of violence to the authorities, detainees should also be given the option of confidentiality when reporting sexual abuse in prisons through both an internal and external complaints procedure. Inmates who are victims of sexual abuse should receive timely medical treatment and counselling.

6. Abuse by prison personnel

Torture and other ill-treatment are absolutely prohibited and cannot be justified under any circumstances, including when perpetrated for reasons relating to the sexual orientation or gender identity of the detainees. However, cases have been documented of LGBTI detainees being exposed to physical violence, rape or other sadistic behaviours and insults from prison personnel. For example, in US prisons, approximately half of all sexual abuse is committed by staff, not by inmates.[49]

44 See *Know your rights: changes to SAPS Standard Operating Procedures*, 15 March 2013. Available at: www.genderdynamix.org.za/know-your-rights-changes-to-saps-standard-operating-procedures/#more-1079 <accessed 7 October 2013>

45 *Avis du 30 juin 2010 relatif à la prise en charge des personnes transsexuelles incarcérées*, Contrôleur Général des Lieux de Privation de Liberté: www.cglpl.fr/2010/avis-du-30-juin-2010-relatif-a-la-prise-en-charge-des-personnes-transsexuelles-incarcerees <accessed 7 October 2010>

46 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.

47 Kaiser D and Stannow L, *Prison rape: Obama's program to stop it*, 11 October 2012.

48 UNAIDS/UNODC, *Diversidad Sexual, Derechos Humanos y VIH en el Sistema Penitenciario de Costa Rica*, 2012, pp42-45.

49 Kaiser D and Stannow L, *Prison rape: Obama's program to stop it*, 11 October 2012.

In Costa Rica, UNODC and UNAIDS have observed that homosexual practices result in physical punishments in some prison units and not in others, and concluded that the risk faced by LGBTI detainees of being exposed to violence depended on the penitentiary personnel concerned.[50] This shows that when such forms of abuse are not strictly condemned by the prison management and higher authorities, LGBTI detainees find themselves at the mercy of the staff supervising their unit.

In a women's prison in the US (Fluvanna Correctional Center in Virginia), lesbian women and inmates perceived as masculine-looking were reported to be held in a so-called 'butch wing' where they were humiliated and stigmatised.[51]

It is essential for monitoring bodies to assess whether LGBTI detainees are subject to any kind of violence, or are discriminated against by prison staff. Monitors should also check whether an internal policy condemning discriminatory attitudes exists and whether there is a confidential and independent system of complaints in place. Where no such policy exists, monitoring bodies should consider making a recommendation.

It may also be relevant to analyse the existing training programme, including continuing education, to understand whether such programmes include awareness-raising for prison staff on the issue of non-discrimination, and particularly about LGBTI detainees and their specific needs.

'States shall:

Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts.

[…]

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.'

Yogyakarta Principle 10 (A;C), The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment

7. Isolation and solitary confinement as a protective measure

Protecting detainees from other prisoners is the direct responsibility of the detaining authorities. As described above, the risk of acts of violence carried out by fellow detainees – such as rape, physical violence or psychological abuse – is high for detainees from sexual minorities. Detaining authorities should identify various strategies to mitigate those risks. Measures can involve the separation of detainees by categories, the careful selection of detainees who share living quarters, well-publicised anti-bullying policies and confidential complaints systems. Detaining authorities too often resort to solitary confinement as a means of protection from violence and omit to compensate for the lack of personal contact and activity.

As the Special Rapporteur on Torture noted, '[l]esbian, gay, bisexual and transgender individuals are often subjected to solitary confinement as a form of "protective custody". Although segregation of such individuals may be necessary for their safety, lesbian, gay, bisexual and transgender status does not justify limitations on their social regime, eg. access to recreation, reading materials, legal counsel or medical doctors'.[52] In addition, prolonged solitary confinement can amount to cruel, inhuman or degrading treatment or punishment and even torture.[53]

Given the harmful long-term consequences of isolation, in particular where it is imposed prolonged or indefinite, the use of solitary confinement is only justified in exceptional circumstances, for the shortest possible time and with adequate procedural safeguards. Although the rationale of segregating detainees in situations of vulnerability for protective purposes can be legitimate, it should be instituted only in agreement with the detainees concerned, with a clear procedure, and should neither lead to further stigmatisation, nor to a limitation on accessing services and education. In the UK, for example, a gay prisoner was granted Vulnerable Prisoner ('VP') status due to prior abuse by other inmates and transferred to the vulnerable prisoner unit. However by becoming a 'VP', he lost his job in the prison education block, was allowed only one morning session of basic education each day, and spent the rest of his time in his cell.[54]

50 See [48], pp50-51.

51 Kaiser D and Stannow L, *Prison rape: Obama's program to stop it*, 11 October 2012.

52 *Ibid*., p19

53 *Ibid*., p9

54 'Homophobia is still rife in UK prisons', *The Guardian*, 25 September 2012. Available at: www.guardian.co.uk/society/2012/sep/25/homophobia-rife-uk-prisons <accessed 7 October 2013>

Solitary confinement, as a protective measure, has been used in Turkey for LGBTI persons, effectively denying them the opportunity to join in activities run at the prison.[55] The European Court of Human Rights[56] found this practice to be in violation of Article 3[57] of the European Convention of Human Rights, as well as of Article 14 (non-discrimination). The applicant, a Turkish citizen who had been placed in solitary confinement as a protective measure, had asked the prison authorities to be separated from the inmates he was originally sharing the cell with because he had been intimidated and bullied for being gay. He was placed in an individual cell which measured seven metres squared for more than 13 months, with no access to open-air exercise and no contact with other inmates. This landmark ruling emphasises the problematic practice of placing LGBTI detainees in solitary confinement as the easiest way to protect them.

Equally, transgender detainees undergoing sex reassignment treatment should not be automatically placed in solitary confinement. As stated by the French Inspector of places of deprivation of liberty: 'Throughout the medical treatment, the penitentiary administration should ensure that the physical integrity of the person is protected, which should not mean that the person is necessarily placed in solitary confinement, and that the person should not be subjected to pressure or bullying of any kind and of any person in relation to his/her project [NB: of sex reassignment]. As soon as the person concerned asks for placement in individual cell, this should be granted.[58]'

Monitoring bodies should assess whether there is a balance between measures to protect persons in situations of vulnerability in detention and the conditions and modalities of such separation/isolation of detainees from others. Of particular importance is to assess whether the respective detainees consented to be under such a 'protective' regime and that it is not used as a way to stigmatise or punish targeted individuals. Where isolation from other detainees is used, prison regimes must ensure that prisoners have meaningful social contact with others, for example by raising the level of staff-prisoner contact, allowing access to social activities with other prisoners and more visits, arranging in-depth talks with psychologists, psychiatrists, chaplains, and volunteers from the local community, maintaining and developing relationships with family and friends, and by providing meaningful in cell and out of cell activities.

'States shall […] [e]nsure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity; 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.'

Yogyakarta Principle 9 (C-D), The right to treatment with humanity while in detention

8. Discrimination in accessing services and benefits

The provision of healthcare and meaningful activities derives from human rights safeguards, and LGBTI detainees must have access on an equal with other detainees. Where education, vocational trainings, workshops, sport and conjugal visits are available, detention authorities may limit detainees' access based on security considerations, or as a consequence of (necessary and proportionate) disciplinary measures. However, such activities must never be suspended or limited on a discriminatory basis.

Sexual minorities are often excluded from participating in such activities, either as a matter of discrimination or as a consequence of separating them from other detainees for protection. Monitoring bodies should carefully assess whether LGBTI detainees are denied access to any service or activities on the basis of their sexual orientation or gender identity. If this is the case, monitors should ascertain whether this restriction is applied in agreement with the detainees concerned, as punishments on the basis of sexual orientation or gender identity may easily be presented as a 'protective' measure.

If conjugal visits are authorised only for heterosexual detainees, monitoring bodies should make recommendations aimed at allowing all detainees to be given this opportunity on an equal basis in line with the principle of non-discrimination. In October 2011, the Supreme Court of Costa Rica ruled in favour of a detainee who had lodged a complaint about discrimination in the rules of the penitentiary

55 'Majority of imprisoned LGBTs kept in solitary confinement', *Hürriyet Daily News*, 27 July 2013. Available at: www.hurriyetdailynews.com/majority-of-imprisoned-lgbts-kept-in-jail-solitary-confinement.aspx?pageID=238&nID=51500&NewsCatID=339 <accessed 7 October 2013>

56 See [20], *X v. Turkey* (Application no. 24626/09), 9 October 2012.

57 'No one shall be subjected to torture or to inhuman or degrading treatment'

58 See [45], *Avis du 30 juin 2010 relatif à la prise en charge des personnes transsexuelles incarcérées*, Contrôleur Général des Lieux de Privation de Liberté.

system, which stated that 'intimate visits' could take place only with a person of a different sex. Homosexual detainees in Costa Rica now have the possibility of intimate visits on an equal basis with heterosexual detainees.[59]

> 'States shall […] ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner.'
>
> ***Yogyakarta Principle 9 (E), The right to treatment with humanity while in detention***

Access to *basic* healthcare should never be denied by detaining authorities, but the issue of *special* care, such as medical treatment for LGBTI detainees, is more controversial. LGBTI persons who have been victims of sexual violence may receive inadequate or no medical treatment for any resulting injuries, let alone the psychological support and mental health care necessary following incidents of sexual violence. Prison healthcare should provide counselling for mental health issues as a consequence of sexual violence or rape. In addition, confidential treatment for sexually transmitted infections (STIs) including HIV should be accessible to all detainees on a non-discriminatory basis. [60]

Access to psychological support should be available to transgender persons on an equal basis with other detainees. Regarding hormonal and/or surgical treatment, the principle of equivalence of care requires that such treatment be provided if it is available in the community and that detaining authorities should ensure that the treatment is not discontinued by the deprivation of liberty or the release of the person concerned.

As the French General Inspector of places of deprivation of liberty has described, 'any detainee identifying him or herself as the other gender should be given the possibility of being accompanied in this process and be taken in the charge of the medical services of the detention facility […]. Throughout the treatment, the person should benefit, whenever he or she needs it, from psychological counselling within the prison'.[61]

In the US, a federal judge for the District Court of the District of Massachusetts ruled that an inmate serving a life sentence without parole must be granted gender reassignment surgery as the only possible treatment for her gender identity disorder.[62]

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

60 UNODC, *Handbook on prisoners with special needs*, 2009, p108.

61 See [45], Contrôleur Général des lieux de privation de liberté, *Avis du 30 juin 2010 relatif à la prise en charge des personnes transsexuelles incarcérées*.

62 United States District Court, District Court of Massachusetts, *Memorandum and order on eighth amendment claim*, 4 September 2012. Available at: http://pacer.mad.uscourts.gov/dc/opinions/wolf/pdf/kosilek%20eighth%20amendment%20decision.pdf <accessed 7 October 2013>

IV. What can monitoring bodies do?

When monitoring bodies embark upon addressing the issue of discrimination and abuse in detention on the basis of sexual orientation and/or gender identity, this will require a series of considerations, ranging from the monitoring team's composition, strategy and even legislative issues, to knowledge-building on the situation of sexual minorities and adaptation of their monitoring methodology.

Of utmost importance is to be clear and unequivocal within the monitoring body about the fact that discrimination on the basis of sexual orientation or gender identity is unjustifiable. If there is a lack of consensus within the monitoring mechanism itself, monitors will not be able to effectively and credibly address the protection of sexual minorities in their work.

1. Legal basis

Where monitoring bodies are established by law and their powers enshrined in legislation, there is an opportunity to give more visibility to the specific risks faced by LGBTI persons. Where groups in situations of vulnerability are listed in the law, LGBTI persons should be included in the same way as others. In Honduras, the Bill establishing the NPM (CONAPREV – *Comité Nacional de Prevención contre la Tortura, Tratos Crueles, Inhumanos o Degradantes*) clearly states that the NPM's personnel has among other functions the responsibility to 'verify the existence of vulnerable groups such as […] LGBT, etc., in order to establish specific risks faced by such groups'.[63] The inclusion of LGBTI detainees in the list conveys a strong message to the authorities as well as to the general public.

2. Composition

The composition and membership of monitoring bodies are key elements contributing to effective oversight of places of detention. Article 18 of the Optional Protocol to the Convention against Torture (OPCAT) establishes that 'the States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country'. This should also be applicable to the extent possible to other minorities. Monitoring bodies could therefore put in place an institutional policy encouraging recruitment of representatives – whether staff, experts or honorary members – from minority groups and vulnerable persons, including LGBTI persons.

3. Policies

Some monitoring bodies, whether part of a National Human Rights Institution (NHRI) or Ombudspersons Office, have developed policies which explicitly prohibit discrimination against minorities, including sexual minorities.[64] Some of them proactively speak out to uphold the human rights of sexual and gender minorities. Such an approach enables monitoring bodies to convey a strong message of non-discrimination and inclusiveness of sexual minorities. For example, the Human Rights Commission of New Zealand has produced a policy named 'Born free and equal' which is also a statement to the public. It is based on the Yogyakarta Principles and stipulates that '[a]ll people, regardless of their sexual orientation or gender identity, have the same rights and freedoms. All sexual and gender minorities in New Zealand have these human rights, whichever word they use to describe their sexual orientation or gender identity. […] The Human Rights Commission recognises and values this diversity of identities and communities and acknowledges the difficulty encompassing this diversity under any single umbrella term.'[65]

63 La Gaceta, N°32,647, Honduras, 19 October 2011, Article 14.b

64 See, for example, the Care Quality Commission's 'Equality and human rights' policy', which includes sexual orientation among the special needs to be considered by it inspectors. (The Care Quality Commission is one of the bodies constituting the UK NPM.) Available at: www.cqc.org.uk/public/about-us/corporate-strategy-reports/equality-and-human-rights <accessed 7 October 2013>

65 See *Sexual orientation and gender identity*, New Zealand Human Rights Commission. Available at: www.hrc.co.nz/human-rights-environment/sexual-orientation-and-gender-identity <accessed 7 October 2013>

4. Training

In order to address the issues and risks faced by LGBTI detainees coherently and professionally, members of monitoring bodies will need specific preparation and possibly training. Such training may include knowledge building about the specific groups concerned, differentiating the categories, especially as regards sexual orientation as opposed to gender identity, and understanding the needs, risks, and the standards related to detention.

It can also prove useful to map existing practices, whether good (such as the existence of LGBTI prisoners' groups or consultative fora within places of deprivation of liberty) or whether discriminatory. In 2012, Inspectors of Her Majesty's Inspectorate of Prisons (one of the bodies constituting the NPM of the UK) participated in a workshop about LGBT prisoners designed to raise awareness about LGBT issues when inspecting places of detention. In small groups, a series of scenarios were discussed in order to identify the main issues and how outcomes for LGBT prisoners could be improved. The scenarios were based on recent prison inspection reports and from the personal experience of a gay former prisoner who helped devise the workshop.[66]

5. Working methods

The monitoring body's strategy and working methods pursuing the protection of rights of LGBTI detainees require careful deliberation. The need to sensitise the detaining authorities is essential but has to be balanced with the possible exposure of detainees to reprisals, additional abuse, further stigmatisation or sanctions.

With regard to visits, the question arises whether or not the monitoring body should proactively seek to interview LGBTI detainees.

In the light of the 'do no harm' principle,[67] monitoring bodies need to adjust their approach to selecting detainees for interviews during visits. In some contexts, requesting of the authority in charge of the place of detention to speak to LGBTI detainees may be appropriate, whereas in others it would expose them to an even higher risk of abuse or humiliation. If interviews with LGBTI detainees are conducted, the way monitors select individuals for interviews and the way interviews are conducted requires sensitivity.

In some countries, there may be reliable statistics on the LGBTI population, in others such information may be lacking or have been collected in a problematic way. Where the prison authorities are willing to provide information on LGBTI detainees, monitors should exercise caution in using and analysing such data.

The way information is gathered (through questionnaires, on perception, based on individual needs assessment etc) and the purpose of collecting such data should be carefully examined, as its compilation and use can also serve discriminatory purposes.

During interviews in private monitors need to exercise sensitivity and ensure that questioning is open and non-leading, as detainees may not be confident in identifying themselves as sexual minorities. Whenever a detainee relates any type of abuse or discrimination to his/her sexual orientation or gender identity, monitors require his or her informed consent in order to report the complaint to the authorities, and have to apply caution in their visit report.

Thanks to their visits and their recommendations to the authorities, together with other institutions and actors, monitoring bodies can contribute to the protection of sexual minorities deprived of their liberty from torture, ill-treatment, other abuse and discrimination.

66 See Dunn Peter, 'Slipping off the equalities agenda? Work with LGBT prisoners', in *Prison Service Journal*, March 2013, No.206, pp3-10.

67 The 'do no harm principle' is the overarching principle that should govern all visits to places of detention. The APT's practical guide on monitoring places of detention defines it as follows: 'Detainees are particularly vulnerable and their safety should always be kept in mind by visitors, who should not take any action or measure which could endanger an individual or a group. In particular, in cases of allegations of torture or ill-treatment, the principle of confidentiality, security and sensitivity should be kept in mind. Poorly planned or prepared visits, or visits not conducted in respect of the methodology or of the following basic principles, can actually do more harm than good', p29 of *Monitoring Places of detention: a practical guide,* APT, 2004.

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Detention Monitoring Tool

Addressing risk factors to prevent torture and ill-treatment

About this paper

This paper is part of PRI/APT's Detention Monitoring Tool, which aims to provide analysis and practical guidance to help monitoring bodies, including National Preventive Mechanisms, to fulfil their preventive mandate as effectively as possible when visiting police facilities or prisons.

The tool seeks to support such bodies in addressing systemic risk factors that contribute to an environment where torture or other ill-treatment occur. It includes:

Thematic papers: these analyse broader themes that will benefit from a comprehensive monitoring approach, examining regulations and practices throughout the criminal justice process with a systemic lens, such as gender, sexual orientation or institutional culture.

Factsheets: these provide practical guidance on how monitoring bodies can focus on a number of systemic issues that are particularly high risk factors for torture or ill-treatment, such as body searches or the working conditions of prison staff.

All resources in the pack are also available online at **www.penalreform.org** and **www.apt.ch**.

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