



APT note to the United Nations Special Rapporteur on Torture

Expert consultation on gender perspectives on torture and ill-treatment (Washington D.C., 5–6 November 2015)

04 November 2015

1. Introduction

The Association for the Prevention of Torture (APT) welcomes the initiative of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (CIDT) to further clarify and develop standards related to the prohibition of torture and CIDT from a gender perspective.

In view of the expert consultation set to take place in Washington D.C. on 5–6 November 2015, the APT respectfully submits this note to the Special Rapporteur for his consideration in the preparation of his new thematic report on gender perspectives on torture and ill-treatment, to be presented to the UN Human Rights Council in March 2016.

Our submission will be limited to the specific issue of torture and ill-treatment in relation to lesbian, gay, bisexual and transgender (LGBT) persons¹, with the purpose of elaborating on the information already made available by previous UN Special Rapporteurs on torture, in particular in the interim report submitted by Sir Nigel Rodley to the UN General Assembly on 3 July 2001². This document will address risk factors and situations that arise

¹ This submission does not address the particular issue of torture and other ill-treatment against intersex persons, because the APT does not have informed knowledge on this issue. This being said, we acknowledge that the mutilation of children for the purpose of assigning them a definitive biological sex, on the basis of social and cosmetic considerations, should be considered a mutilation and we therefore fully endorse the Special Rapporteur's call on all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery (Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Human Rights Council, UN Doc. A/HRC/22/53, 1 February 2013, §8)

² UN Doc. A/56/156, 3 July 2001, §§ 17-25, C. "Torture and discrimination against sexual minorities". Other reports by UN Special Rapporteurs on torture including references to torture and CIDT targeting sexual minorities are: UN Doc. E/CN.4/2002/76, 27 December 2001; UN Doc. E/CN.4/2004/56, 23 December 2003 (highlighting the issue of discrimination on the basis of sexual orientation in the context of torture related to HIV/AIDS); UN Doc. A/66/268, 5 August 2011 (on

for this population in the context of deprivation of liberty, including at the moment of apprehension by law enforcement officials³. Our submission will also highlight some proposed measures to enhance the protection of LGBT persons from torture and ill-treatment.

The scope of our submission is limited to the specific situation of LGBT persons, because the APT has been conducting research on the issue for the past two years and has launched several initiatives in this regard (that we summarize below). We trust that other contributors will focus on the situation of (non-LGBT) women and girls and their exposure to gender-based torture and ill-treatment. We hope that the overall contribution will enable to provide the Special Rapporteur with an overview of how gender perspectives relate to torture and other ill-treatment.

2. APT's work on LGBT persons deprived of liberty

In 2013, jointly with Penal Reform International (PRI), APT issued a paper entitled "*LGBTI persons deprived of their liberty: a framework for preventive monitoring*"⁴, which sought to raise awareness among monitoring bodies, in particular National Preventive Mechanisms (NPMs) established under the Optional Protocol to the UN Convention against Torture (OPCAT), about the specific situation of LGBTI persons deprived of liberty and to highlight the main risks to which they are exposed⁵.

In June 2015, the APT convened the Second Jean-Jacques Gautier Symposium in Geneva, dedicated to the situations of vulnerability of LGBT persons in detention. The Symposium gathered 13 NPMs from different parts of the world as well as other speakers, including experts on LGBT issues, representatives of civil society, State representatives and regional and international bodies monitoring places of detention, with the purpose of identifying the main issues faced by this specific group, as well as to identify strategies tailored to their needs⁶.

More recently, on 23 October, the APT was granted a hearing before the Inter-American Commission on Human Rights (IACHR) during its 156th regular session, on the human rights' situation of LGBT persons deprived of liberty in Latin America⁷. Alongside the APT, speakers included the Mexican NGO "Almas Cautivas", working on transgender women in prisons of the *Distrito Federal* in Mexico, the Argentinean Ombudsman for federal prisons

solitary confinement used for LGBT detainees); UN Doc. A/HRC/22/53, 1 February 2013 (on acts of violence against individuals based on sexual orientation and gender identity in health-care settings).

³ The issue of arbitrary detention of LGBT persons (although a matter of serious concern) will not be addressed, as it does not fall under the remit of the Special Rapporteur's mandate.

⁴ http://www.apr.ch/content/files_res/lgbti-persons-deprived-of-their-liberty-en-1.pdf. This document is part of a broader resource – "Detention Monitoring Tool" that also includes a gender-sensitive monitoring guide on women in detention (2013): http://www.apr.ch/content/files_res/apr-pri-paper-on-women-in-detention-en-1.pdf

⁵ The APT's database on prison issues – Detention Focus – also enables monitoring bodies and prison authorities to better respond to the needs of LGBTI persons deprived of liberty: http://www.apr.ch/detention-focus/en/vulnerable_groups/6/

⁶ The outcome report, published in October 2015, can be found at the following link: http://www.apr.ch/content/files_res/report-jig-symposium-2015-en.pdf

⁷ The recording of the hearing can be found here: <http://www.oas.org/es/cidh/multimedia/sesiones/156/default.asp> and more information on the hearing at the following link: <http://www.apr.ch/en/resources/discrimination-and-abuse-against-lgbt-persons-in-detention-first-ever-hearing-at-inter-american-commission-2015/>

(*Procuración Penitenciara de la Nación*) as well as the LGBT focal point of the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

We invite the Special Rapporteur to consult the abovementioned documentation for more detailed information on the issue of LGBT persons deprived of liberty.

3. Torture and cruel, inhuman and degrading treatment against LGBT persons: risk factors and critical situations

According to the International Lesbian, Gay, Bisexual, Transgender & Intersex Association (ILGA), 76 countries in the world still have homophobic laws that criminalise same-sex relations⁸. 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 limited⁹. In those circumstances, police officers may also feel that abuse will go unpunished¹⁰. Additionally, in such contexts, forcible anal examinations for the prosecution of suspected homosexual activities have been documented.¹¹

In view of the above, decriminalisation of homosexuality is a precondition for achieving any sustainable change to the situation of LGBT persons and ending impunity for violence motivated by discrimination based on sexual orientation and gender identity¹². The same can be said about the criminalisation and pathologisation of transgender identities.

This section will address the most important risk factors that expose LGBT persons to situations that can amount to torture and CIDT¹³. Although these factors are diverse in nature and scope, they all stem from discrimination based on sexual orientation and gender identity that is deeply-rooted in society. Such discrimination not only exacerbates the risks for LGBT persons deprived of liberty but also calls for a specific approach to tackle torture and ill-treatment motivated by homophobia and transphobia.

⁸ See ILGA's "State-Sponsored Homophobia Report 2015 In 10 years criminalizing countries drop from 92 to 76", 13 May 2015: <http://ilga.org/immediate-release-state-sponsored-homophobia-report-2015-10-years-criminalizing-countries-drop-92-76/>

⁹ See for example « *Coupables par association. Violations des droits humains commises dans l'application de la loi contre l'homosexualité au Cameroun* », Human Rights Watch, 2013 : https://www.hrw.org/sites/default/files/reports/cameroon0313fr_ForUpload_1.pdf

¹⁰ See for example "*Treat us like human beings': discrimination against sex workers, sexual and gender minorities, and people who use drugs in Tanzania*", Human Rights Watch, June 2013: <http://www.hrw.org/sites/default/files/reports/tanzania0613webwcover.pdf>

¹¹ See for example "*In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*", Human Rights Watch, 2003, as well as the 8th annual report of the United Nations Subcommittee on prevention of torture, CAT/C/54/2, 26 March 2015 : http://www.un.org/ga/search/view_doc.asp?symbol=CAT/C/54/2

¹² See in particular the 8th annual report of the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc, CAT/C/54/2, 26 March 2015, § 70

¹³ As our contribution focuses on risks factors in the context of deprivation of liberty, we do not address the State's obligation of non-refoulement under the UN Convention against Torture. However, we consider that LGBT persons fleeing persecution in their country of origin should be eligible for the refugee status. As stated by the Court of Justice of the European Union, "[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation (See Court of Justice of the European Union (Fourth Chamber), 7 November 2013, *Minister voor Immigratie en Asiel v X* (C-199/12), *Y* (C-200/12), and *Z v Minister voor Immigratie en Asiel* (C-201/12); (X and Y were nationals of Sierra Leone and Uganda respectively): <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=EN&mode=lst&dir=&oc=first&part=1&cid=221121>)

Most of the sources mentioned in this document refer to the criminal justice system, but it should be stressed that the risk of torture and other ill-treatment of LGBT persons exist in other contexts of deprivation of liberty, including in immigration detention facilities. Additionally, allegations of forced treatments and involuntary confinement in non-penal institutions, medical establishments and rehabilitation centres for drug users - whether State or privately run - are of particularly serious concern¹⁴.

3.1. Abuse committed by State officials

Even when LGBT persons are apprehended by law enforcement officials on legitimate grounds, they are exposed to a broad range of abuse during arrest, interrogation and detention. Extortion, denial of legal protection and deprivation of water and food, as well as physical violence have been often reported¹⁵. The threat of "outing" (revealing the detainee's sexual orientation to family members, friends or colleagues) or disclosing confidential information is often used during police interrogations to extort information and confessions¹⁶.

In a report on impunity and violence against transgender women in Latin America, 95 per cent of the interviewees reported that they had suffered police brutality either on the street, in police patrols or in police stations¹⁷. In prison contexts, LGBT detainees are particularly exposed to the risk of assault by prison staff. For example, in a recent survey conducted with 1,118 LGBT prisoners across the United States, "the vast majority of respondents experienced discrimination and verbal harassment by prison staff and more than a third were physically assaulted by prison staff"¹⁸.

Targeted violence stemming from and motivated by discriminatory attitudes towards sexual minorities is often deeply rooted in institutional cultures that allow for disdain towards LGBT persons and generate impunity for torture and CIDT. Additionally, structural failures affecting the criminal justice system, such as: impunity, corruption, overuse of pre-trial detention and overcrowding tend to make groups that are already marginalized and disenfranchised even more vulnerable.

3.2. Abuse committed by fellow inmates

As highlighted by the former Special Rapporteur on torture, LGBT persons are at the "bottom of the hierarchy" that exists informally in most prisons worldwide, and they hence

¹⁴ Such concerns were already raised by the Special Rapporteur on torture in 2001, see UN Doc A/56/156, § 243, July 2001. In the Regional Forum on the OPCAT in Latin America that took place in Panama in 2014, participants condemned the use of "privately-run (and often illegal) rehabilitation centres for drug users, which in addition provide "therapies" aimed at "de-homosexualisation" of patients": "Preventing Torture – A shared responsibility", Regional Forum on the OPCAT in Latin America, APT, 2014: http://www.apr.ch/content/files_res/report-regional-opcat-forum-en.pdf

¹⁵ See inter alia "LGBTI persons deprived of their liberty: a framework for preventive monitoring", APT/PRI, 2013: http://www.apr.ch/content/files_res/lgbti-persons-deprived-of-their-liberty-en-1.pdf

¹⁶ See for example "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, p. 21: www.gay.org.ua/publications/lgbt_ukraine_2012-e.pdf

¹⁷ See "The night is another country: impunity and violence against transgender women human rights defenders in Latin America", Redactrans and International HIV/AIDS Alliance, 2012, p. 15

¹⁸ See « Coming Out Of Concrete Closets A Report On Black & Pink's National LGBTQ Prisoner Survey », October 2015, p. 39: <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets-Black-and-Pink-October-21-2015..pdf>

“suffer double or triple discrimination¹⁹”. As such, they are often treated in a discriminatory manner by their fellow prisoners who may, for example, refuse to share common areas with them (for example during meals), use insulting language, and generally humiliate and abuse them in many different ways.

In some countries, this hierarchy is so strict and the stigma attached to LGBT persons is so strong that they are considered “untouchables” by both the staff and the prison population and treated as outcasts. Their living conditions are much worse than those of the rest of the prison population and they are tasked with doing chores that nobody else would do. This is notably the case in many countries from the former Soviet Union²⁰.

LGBT detainees are reportedly among the persons most exposed to sexual violence from fellow inmates²¹. For example, the US Bureau of Statistics found that inmates who identified their sexual orientation as gay, lesbian or bisexual are among inmates with the highest rates of sexual victimization in prisons (12.2%) and jails (8.5%), as opposed to 0.7% for other detainees in both jails and prisons²².

LGBT detainees who are victims of acts of violence, including sexual violence, tend not to report such acts to the authorities, as they do not trust the complaints mechanisms in place and fear reprisals. In a study carried out by the *Red Nacional de Diversidad Sexual y VIH* in Guatemala, 100% of the 54 LGBT detainees interviewed stated that they would not denounce violence against them for fear of reprisals²³.

It should be noted that in countries where the prison system is *de facto* “self-governed” or “co-governed” by detainees, in particular where the latter have control over disciplinary sanctions, the arbitrariness that prevails is particularly detrimental and threatening for LGBT persons.

Ensuring that LGBT detainees are protected from fellow inmates is the full responsibility of the State and failing to do so may constitute torture or CIDT. However, protective measures should always ensure that no human rights are violated through the protective provisions taken by the authorities (see 3.3. below).

3.3. The use of solitary confinement as a “protective measure”

It is the responsibility of the State to identify adequate measures and strategies to ensure that LGBT detainees are protected from discrimination, abuse and violence. However, when facing situations of abuse or when trying to prevent them from taking place, detaining authorities too often resort to solitary confinement, sometimes for weeks or

¹⁹ See 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”, UN Doc. A/HRC/13/39/Add.5, 5 February 2010, § 231

²⁰ See the example of Kyrgyzstan mentioned in the Jean-Jacques Gautier Symposium on “Addressing vulnerabilities of LGBT persons in detention”, 2015, p. 13: http://www.apr.ch/content/files_res/report-jig-symposium-2015-en.pdf

²¹ According to “National Prison Rape Elimination Commission Report” from June 2009, LGBTI persons were identified as particularly exposed to the risk of being raped in prisons alongside the younger, smaller, those unfamiliar with prison culture, victims of previous sexual abuse as well as persons with development disabilities and mental disorders (See <https://www.ncjrs.gov/pdffiles1/226680.pdf>). In Egypt, it has also been reported that persons accused of homosexuality are more likely to be subjected to be sexually assaulted by both guards and fellow inmates. See « Hypocrisie au sommet de l'état: les violences sexuelles commises par les forces de l'ordre en Egypte », FIDH, May 2015: https://www.fidh.org/IMG/pdf/egypte_rapport_francais.pdf

²² <http://www.bjs.gov/content/pub/press/svpjri1112pr.cfm>

²³ See: “Diagnóstico sobre las necesidades de la población LGBTI privada de libertad”, REDNADS, Guatemala, 2015

months and even years. A recent report from the US Department of Justice's Bureau Justice Statistics found that LGBT detainees are more likely than other detainees to have spent time in restrictive housing²⁴. The Special Rapporteur has already clarified that prolonged solitary confinement (defined as any period of solitary confinement in excess of 15 days) can amount to cruel, inhuman or degrading treatment or punishment and even torture²⁵.

Given the harmful long-term consequences of isolation, the use of solitary confinement is therefore only justified in exceptional circumstances, for the shortest possible time and with adequate procedural safeguards. Although the rationale of isolating detainees in situations of vulnerability from the rest of the detained population and 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. It should never be prolonged and be considered only as a temporary measure, before a more suitable option is identified.

The jurisprudence of the European Court of Human Rights is very clear in this regard, as it found, in the case of a Turkish detainee who was openly homosexual and had been held in solitary confinement for 13 months, that this measure was a violation of Article 3 (prohibition of torture) of the European Convention on Human Rights, in combination with a violation of Article 14 (non-discrimination)²⁶. The rationale behind the ruling is also clearly formulated in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, whereby Principle 9 (on "the right to treatment with humanity while in detention") stipulates that "protective measures involve no greater restriction of their rights than is experienced by the general prison population²⁷". It is therefore the responsibility of the States to identify protective measures that are neither discriminatory nor restrictive in such a way that they would amount to torture or CIDT.

3.4. Material conditions

It is beyond the scope of this submission to argue about whether the segregation of LGBT detainees from the rest of the population for the sake of their protection is an adequate solution, insofar as all their rights are respected and their access to services is warranted on an equal footing to their fellow detainees. However, it has been reported that when segregated from the rest of the population, LGBT detainees (sometimes together with detainees considered vulnerable on other grounds, like persons with physical or mental disabilities) are often held in housing units that are in worse conditions than the other premises of the detention facility.

Material conditions of detention in these facilities can be so poor that they can in themselves amount to torture or CIDT. In Paraguay for instance, the "*Coordinadora de*

²⁴ See "Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12", BJS, October 2015: <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>

²⁵ See "interim report prepared by the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment", UN Doc. A/66/268, 5 August 2011

²⁶ See European Court of Human Rights, *X v. Turkey* (Application no. 24626/09), 9 October 2012

²⁷ Although non-binding the "Yogyakarta Principles" outline a set of international human rights principles relating to sexual orientation and gender identity and are widely acknowledged as a reference document: http://www.yogyakartaprinciples.org/principles_en.htm

Derecho Humanos” expressed its serious concerns about the situation of transgender women in Tacumbú Prison²⁸. Quoting a report from the National Preventive Mechanism of Paraguay, the Coordinadora referred to a cell of 3x4 meters where 13 transgender women were held, without access to healthcare and without access to any services or activities for fear of being assaulted by fellow inmates. Similar concerns were raised by the Rapporteur on the rights of persons deprived of liberty of the IACHR after visiting the same prison. The IACHR’s Rapporteur also stressed the fact that, in addition to the inhuman material conditions, transgender detainees were subjected to various forms of violence and discrimination, ranging from verbal and physical aggressions to sexual violence²⁹. The IACHR Rapporteur’s conclusion is relevant beyond the Paraguayan context and should apply to all contexts of deprivation of liberty: “In consideration of the State’s special position as guarantor vis-à-vis persons deprived of liberty, including transgender persons, in addition to respecting their life and personal integrity the State has the obligation to ensure minimal conditions of detention compatible with human dignity³⁰.”

3.5. Discriminatory disciplinary measures

LGBT persons deprived of liberty are often discriminated against when they want to access activities (vocational, educational and recreational) or services available to other detainees. LGBT detainees can also be subjected to disciplinary measures on the sole basis of discrimination based on their sexual orientation or gender identity. This is particularly true for open displays of affection between detainees of the same sex³¹. Holding hands, hugging or kissing each other can be sanctioned as “exhibitionism”, notably in visiting rooms and when children are present³². Open displays of affection have also been sanctioned by arbitrary transfers to other prisons³³.

Discriminatory disciplinary measures targeting LGBT detainees can amount to torture and CIDT. In Colombian prisons, lesbians can be placed in solitary confinement simply for openly displaying affection. According to the NGO “Colombia Diversa”, solitary confinement (in “*calabozos*”) can last weeks or even months. Two women who were in a relationship in the prison of Valledupar were placed in solitary confinement for 18 months and one of them committed suicide in 2009³⁴. States have the duty to ensure that disciplinary measures never amount to torture or CIDT and are not motivated by discrimination based on sexual orientation and gender identity. In countries where homosexuality and/or transgender identities are criminalized, it is more likely that LGBT

²⁸ See: *Coordinadora de Derechos Humanos de Paraguay*, “Acá no hay homofobia”, in *Derechos Humanos Paraguay 2014*: http://www.codehupy.org/index.php?option=com_docman&task=doc_download&gid=39&Itemid=12

²⁹ See press release from the IACHR: “*Relatoría sobre los Derechos de las Personas Privadas de Libertad culmina visita a Paraguay*”, 15 September 2014: <http://www.oas.org/es/cidh/prensa/comunicados/2014/097.asp>

³⁰ Ibid.

³¹ The UK Prison and Probation Ombudsman issued a recommendation to “rewrite diversity policy to remove reference to displays of sexual orientation being in contravention of good order and discipline”, see “Learning lessons bulletin; PPO investigations issue 1, Sexual abuse in prisons”, February 2013: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2013/02/PPO-Learning-the-Lessons-Sexual-Abuse-in-Prisons-February-2013.pdf>

³² See for example the “*Diagnóstico sobre las necesidades de la población LGBTI privada de libertad*”, REDNADS, Guatemala, 2015

³³ Ibid.

³⁴ See “*Un continuo estado de cosas inconstitucional: situación carcelaria de la población LGBT*”, Colombia Diversa, 2011: <http://colombiadiversa.org/colombiadiversa/documentos/informes-dh/colombia-diversa-informe-dh-2008-2009-capitulo-4.pdf>

detainees will be sanctioned for reasons linked to their sexual orientation or gender identity.

4. Specific factors exposing transgender persons deprived of liberty

In addition to the risks outlined above, transgender persons deprived of liberty face specific situations, due to their gender identity and special needs arising from their condition that further expose them to torture and CIDT. Hereinafter are a few illustrations of these specific situations.

4.1 Allocation based on the persons' biological sex

Prisons are thought and designed worldwide as binary systems (male vs. female) and transgender persons (men or women) are usually allocated in detention facilities on the basis of their biological sex. When transgender women in particular are detained together with male detainees, they face exacerbated risks of being victims of violence and rape. 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 officials³⁵. Similarly, Human Rights Watch documented the case of a transgender female detainee in a male facility who was sexually molested by fellow detainees. When looking for protection from a warden, she was obliged to give him sexual favours in return³⁶.

The allocation of transgender detainees to detention facilities, and subsequently their placement in units and cells, should be determined with great caution. As mentioned above, confining them in solitary should not be a solution lasting more than a few days while a more suitable option is identified. Importantly, one should not assume that all transgender women would necessarily wish to be allocated with female detainees and their consent should be sought before deciding on any allocation.

4.2 Humiliating and invasive body searches

Body searches are procedures that imply particular risks for transgender detainees. International standards recommend that searches are conducted by staff of the same gender, but these standards are not necessarily protective or relevant for transgender detainees. In transphobic places of detention, or when prisons are not equipped and trained to handle transgender detainees, body searches can turn into extremely humiliating experiences for the persons concerned. Transgender women detainees are reportedly often asked to be entirely naked and to be on their knees in front of male prison officers who purposely humiliate them³⁷.

³⁵ See UN Doc. A/HRC/17/26/Add.2, §§ 28-29

³⁶ See "I'm Scared to Be a Woman", Human Rights Watch, Sept. 2014, available at: <https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia>

³⁷ See for example the *Comité Contra la Tortura de la Comisión Provincial por la Memoria: "La CPM interviene por las condiciones de detención del colectivo trans en la Unidad Penitenciaria N° 44 de Batán"*: <http://www.andaragencia.org/la-cpm-interviene-para-modificar-condiciones-de-detencion-del-colectivo-trans/>

In order to reduce the risk of abuse, humiliation and situations conducive to torture or CIDT, transgender detainees (both male and female) should be given the choice of being searched by a male or female officer. Additionally, searches involving nudity should always be carried out in two distinct steps (i.e., the detainee should be asked to remove his/her upper clothes and the lower clothes in two separate steps) and the staff involved in the searches should be trained accordingly. Finally, invasive body searches should be prohibited.

4.3. Denied access to specific health treatment

Transgender persons deprived of liberty who follow hormone therapy or who have undergone sex reassignment surgery are often denied the ongoing care they need³⁸, including in countries where such treatment would be available in the community. The majority of correctional facilities adopt the concept of “freeze framing” in their policies, whereby the individual is “freeze framed” at the stage he or she was at when they arrived in custody³⁹.

When hormonal treatments are abruptly stopped by the deprivation of liberty, transgender persons may suffer severe psychological distress as well as medical complications. For example, transgender women who stop hormone therapy are likely to see their hair and beard grow and their voice change. Cases have been reported of transgender female detainees injecting oil into their breasts and therefore endangering their life, after being denied adequate hormonal treatment⁴⁰. In particular, in countries where hormone therapy and gender reassignment surgery are available in the community, States should ensure that transgender detainees have access to such treatment in prisons as well, on the basis of the principle of equivalence of care. By not doing so, they endanger the physical and psychological well-being of such persons and may therefore breach their duty of care.

5. Measures to enhance the protection of LGBT persons against torture and ill-treatment

In this section, we propose key measures that in our view will contribute to a reduction in the risk of torture and CIDT motivated by discrimination based on sexual orientation and gender identity. These measures should be viewed as part of a holistic approach where all elements are interrelated and will work together to enhance the protection of LGBT persons against torture and ill-treatment:

- Decriminalisation and depathologisation of homosexuality and transgenderism are a pre-condition to enhance the protection of LGBT persons from torture and ill-treatment and to ensure they are not deprived of their liberty on discriminatory grounds.

³⁸ The former UN Special Rapporteur on torture had also expressed his concerns on this issue: see UN Doc. A/56/156, 3 July 2001, § 22

³⁹ See “Transgender Offenders: a literature review”, Laura Jones, Prison Service Journal, March 2013 N°26, UK

⁴⁰ This was reported to the APT by the Mexican NGO “Almas Cautivas”.

- Allegations of torture and CIDT against LGBT persons must be investigated in a prompt, impartial and independent manner; perpetrators must be sanctioned accordingly and discrimination based on sexual orientation or gender identity should be made an aggravating circumstance. The protection of LGBT persons denouncing such acts should be ensured throughout the process and independent complaints mechanisms should be made easily available.
- Impunity for torture and CIDT against LGBT persons should be combated at its roots. To this end, all stakeholders within the criminal justice chain – from law enforcement officers and prison guards to judges, prosecutors and lawyers – should be sensitized and trained on the prohibition of discrimination based on sexual orientation and gender identity as well as on the specific needs of LGBT persons in detention, in particular transgender persons.
- All policies and measures governing the situation of LGBT persons deprived of liberty should be taken in consultation with LGBT persons and organisations from the community, in line with the principle “nothing about us without us”.
- When the conditions of detention cannot warrant the protection of LGBT persons – in particular transgender persons, courts should consider alternatives to detention in their sentencing.
- All places of deprivation of liberty should be regularly monitored by independent bodies, who can gain first-hand information on the situation of persons deprived of liberty, including the most vulnerable. The APT believes that National Preventive Mechanisms established in compliance with the OPCAT can play a very important role in preventing abuse and ill-treatment of LGBT persons.

6. Conclusion

LGBT persons deprived of their liberty are particularly at risk of torture and other forms of ill-treatment. The initiative of the Special Rapporteur on torture to focus on torture and ill-treatment from a gender perspective will contribute to the development of standards and to the global reflection on the specific risks to which LGBT persons deprived of liberty are exposed. The lack of adequate standards for the protection of LGBT persons deprived of liberty contributes to their exposure to all forms of abuse on a discriminatory basis.

We believe that by addressing this important topic in his report, the Special Rapporteur will raise awareness on the urgent need to better ensure the protection of LGBT persons deprived of liberty. The fact that the revised Standard Minimum Rules for the Treatment of Prisoners, – yet to be adopted and also known as the “Mandela Rules”, do not refer to discrimination on the basis of sexual orientation and gender identity reflects in itself that LGBT persons deprived of liberty are and remain one of the groups most in need of protection and attention.