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THE HANDLING AND CARE OF LGBTIQ+ PERSONS IN DETENTION

Framework Document

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SUMMARY

This document is the result of the work carried out by the Swiss Centre of Expertise in Prison and Probation (SCEPP). It intends to provide an overview of the issues faced by lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) persons in detention, along with a series of recommendations for their care. The document is part of a broader project aimed at developing recommendations concerning detained persons in situations of vulnerability. It seeks to bring the domain of deprivation of liberty into line with international standards and advances in society with respect to sexual orientation, gender identity and sex characteristics.

The framework document and its accompanying recommendations are the result of a survey conducted among professionals working in prison systems and the discussions and ideas of the working group set up for this purpose. The document was also submitted to the Swiss cantons for their perusal through the Conference of Cantonal Heads of Penitentiary Services [Conférence des chefs des services pénitentiaires cantonaux].

In addition to clarifying the relevant concepts, terminology and regulatory framework, and briefly presenting some good practices in other countries, the framework document identifies the main issues faced by LGBTIQ+ persons and by the institutions responsible for their care. These include, in particular, obstacles to obtaining data and to identifying vulnerability criteria; prevention and sanctioning of discrimination and violence based on sexual orientation or gender identity; detention placement criteria and search procedures for transgender persons; recognition of the right to gender expression; and access to health care, particularly in line with the principles of equivalence and continuity of treatment. A glossary of key terms specific to this subject matter forms an integral part of the document.

The **recommendations**, set out at the end of the document, are based on the findings of the survey as well as on good practices and international standards. Formulated as broadly as possible to give the cantons and institutions flexibility in their application, these recommendations are an opportunity to reflect on current practices and adapt them where necessary.

1. INTRODUCTION

1.1 Raison d'être and scope

The objective of this document, and in particular the recommendations contained in its closing section, is to address existing shortcomings as regards lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) persons in detention. It aims to guide institutions with a view to ensuring optimal and harmonized care of these individuals, who may have specific needs and are exposed to particular risks. Although this document was developed primarily for the enforcement of criminal sanctions (i.e. imprisonment), pre-trial detention and detention on security grounds, its guiding principles can also be applied to other types of detention, including administrative detention and police custody.

1.2 Concepts, definitions et principes

What does the acronym «LGBTIQ+»¹ stand for?

- **«Lesbian»**: refers to a woman who is physically, emotionally and/or romantically attracted to other women.
- **«Gay»**: refers to a man who is physically, emotionally and/or romantically attracted to other men; it is synonymous with the term «homosexual» (the term «gay» can sometimes include lesbian women).
- **«Bisexual»**: refers to a person who is physically, emotionally and/or romantically attracted to persons of both sexes.
- **«Trans»** (or «transgender»): refers to a person whose gender identity and/or gender expression* differs from the sex assigned to them at birth. Gender identity* is independent of sexual orientation.*
- **«Intersex »**: refers to a person who is born with variations in sex characteristics (whether genetic, hormonal and/or anatomical). Some people may not know they are intersex. Being intersex is independent of sexual orientation.
- **«Queer»**: refers to a person who does not identify with heterosexual sexuality and/or does not adhere to the binary view of gender and sexualities.

¹ A more comprehensive glossary, at the end of the document, defines other terms related to the subject. These terms are marked with an asterisk* when they first appear. The '+' sign next to the acronym is intended to reflect the diversity of identities concerned by non-heterosexual sexuality and/or non-binary gender identity.

LGBTIQ+ persons are a heterogeneous group, sometimes also referred to as «sexual and gender minorities». In reality, the acronym LGBTIQ+ encompasses various concepts, including sexual orientation, gender identity and expression, as well as sex characteristics*. Furthermore, the persons concerned cannot, of course, be reduced to one aspect of their identity. For that matter, some individuals, especially those in detention, do not identify with the LGBTIQ+ acronym and reject the labels sometimes associated with it. As such, it may be preferable to use other terms, such as 'MSM' (men who have sex with men) or 'WSW' (women who have sex with women), to avoid the risk of stigmatization or exclusion.

Despite these significant differences and the complexity of the issue of identity, the fact remains that LGBTIQ+ persons in detention face a similar range of risks of discrimination and abuse². These risks are mainly due to homophobia* and transphobia*, whether conscious or unconscious - phenomena that are often amplified in detention. Moreover, the lack of awareness of their needs is also a cause of problems they may encounter when they are deprived of their liberty.

In view of the high risk of discrimination that LGBTIQ+ persons face in detention, and in light of their specific needs, certain measures should be taken in relation to such inmates to ensure that their «dignity [is] respected» (Swiss Criminal Code, Art. 74), while at the same time taking into account their specificities («Account is taken of the gender-specific concerns and needs of the prison inmates», Swiss Criminal Code, Art. 75.5). Indeed, LGBTIQ+ persons can be seen as being in a situation of heightened vulnerability (vulnerability being understood here as the way in which certain personal characteristics can, in a prison context, become risk factors). This vulnerability is reflected, among other things, by a higher suicide rate for LGBTIQ+ persons than for the rest of the population. The United Nations Standard Minimum Rules for the Treatment of Prisoners, since their revision in 2015, establish a clear link between non-discrimination, vulnerability and taking into account the specific needs of certain categories of prisoners: «In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory. »³

Finally, it is essential in any initiative concerning LGBTIQ+ persons in detention that they be consulted about decisions affecting them, as well as the available care options.

² See, in particular, Association for the Prevention of Torture, Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide, Geneva, 2019.

³ The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 2.

1.3 Regulatory framework, standards and good practices

The legislative framework concerning LGBTQ+ persons in Switzerland remains incomplete. Even though the Federal Constitution prohibits discrimination on the basis of «way of life» (Art. 8 para. 2, i.e. without explicit mention of sexual orientation or gender identity), there was until recently a legal vacuum regarding the repression of incitement to hatred based on sexual orientation. As a result of a vote on 9 February 2020, legislation on racial discrimination (Art. 261bis of the Criminal Code) has now been extended (effective from 1 July 2020), so that discrimination and incitement to hatred on the basis of sexual orientation are today punishable by law. However, gender identity was not included in this legislative change, and to date there are no specific legal provisions making it possible to combat the discrimination that transgender persons can face.

As regards changing gender in civil status records, Switzerland is expected to soon adopt a simplified procedure⁴ which should allow transgender persons or persons with a variation in sexual development to have their gender and first name changed expediently in the civil status register. A simple declaration before the civil registry office will suffice for this purpose, without the need for prior medical examinations or the fulfilment of other conditions. These legislative changes will have a direct impact on practices in respect of placement of transgender persons in institutions for either men or for women. Furthermore, the recommendations in this document are also intended to contribute to adjustments to current practices.

Where deprivation of liberty is concerned, there are few standards concerning LGBTQ+ persons, contrary to other specific categories of detainees for whom specific standards have been adopted in recent years. In 2010, the Committee of Ministers of the Council of Europe nevertheless issued a recommendation on «measures to combat discrimination on grounds of sexual orientation or gender identity.»⁵ It states, inter alia, that Member States, including Switzerland, «should take appropriate measures 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.» (Appendix to Recommendation CM/Rec(2010)5, I.A.4).

At the global level, the adoption of the «Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity» (2006, revised in 2017), has filled an important gap, even though the principles are non-binding. Principle 9 is particularly relevant as it deals with the right to humane treatment in detention.⁶ The recommendations at the end of the document are in part based on this.

Internationally, some good practices have emerged in recent years. For example, the Brazilian Ministry of Justice and Public Security adopted in 2020 a «Technical Note»⁷ regarding LGBTI persons deprived

⁴ See, in particular, Message du Conseil fédéral concernant la révision du code civil suisse (Changement de sexe à l'état civil) du 6 décembre 2019 (19.081)

Swiss Federal Council Dispatch on the revision of the Swiss Civil Code (Gender Change in the Civil Register) of 6 December 2019 (19.081). [Note: the simplified procedure entered into force on 1 January 2022]

⁵ Recommendation CM/Rec(2010)5

⁶ <https://yogyakartaprinciples.org/principles-en/>

⁷ Ministério da Justiça e Segurança Pública, Nota Técnica N°7/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, Processo N°08016.018784/2018-01 Ministry of Justice and Public Security Technical Note N°7/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, Case N°08016.018784/2018-01.

of their liberty, including, notably, recommendations on the possibility for «transvestites» and transgender women to be transferred to a women's institution, regardless of their sex in the civil status records. The recommendations also promote the principle of self-determination with regard to gender expression, and the right to be called by the surname and first name of a detainee's choice and to include these names in records and documents concerning them. Finally, the recommendations place emphasis on the training of officers and professionals working in detention facilities.

With regard to transgender persons more specifically, **Canada** introduced in its guidelines⁸ the right for the person concerned to choose the gender of the officer conducting a full body search. Also on the subject of searches, current **United Kingdom** policy for persons who have not obtained a gender change in their civil status records but who can show that they live, or wish to live, permanently with the gender with which they identify requires that their preference for the gender of the person conducting the search be taken into account as soon as possible.⁹ In **Austria**, a Vienna court recognized in 2016 the right of a detainee to initiate a sex reassignment process in prison.¹⁰ In **France**, the Defender of Rights [Défenseur des droits] published a framework decision on respect for the gender identity of transgender persons¹¹ which contains a section on deprivation of liberty. It contains a recommendation that, inter alia, transgender detainees « [translation] be assigned to an institution or ward corresponding to their gender identity whenever they so request and have commenced a transition process, without waiting for the change in civil status records to take place. Searches should in such cases be carried out by officers of the same gender who have first undergone transidentity awareness training. »

In terms of case law, the Swiss judiciary has to date only rarely issued decisions in cases involving possible discrimination against LGBTIQ+ persons in detention. Nevertheless, the Federal Court ruled in 2012 in a case which aptly illustrates the challenges relating to care for transgender persons deprived of their liberty.¹² In essence, the detainee, whose civil status records indicated male gender at the time of their imprisonment, had requested the enforcement of their sentence to be deferred pending completion of their «gender reassignment»* so that they could then serve their sentence in a women's institution. Despite a diagnosis of transsexualism («gender dysphoria») made by an expert, which the expert deemed would have justified a deferment of the sentence, the request was rejected by the Valais Sentencing Court [Tribunal d'application des peines et mesures du Valais], a decision subsequently upheld by the Federal Court, which ruled that there had been no « [translation] extraordinary circumstances relating to the person» in the case. However, the Federal Court did not rule on the conditions of detention (long-term solitary confinement), themselves problematic in terms of respect for fundamental rights and the case law of the European Court of Human Rights. However, the fact that transgender persons should have access to hormone treatment and counselling was recognized.

Finally, there is to date in Switzerland almost no specific cantonal law or regulation providing for specific care of LGBTIQ+ persons in the prison system. However, there are a few exceptions that suggest that the situation is evolving in this respect. In the canton of Basel-Stadt, the recent revision of the Law on Execution of Criminal Sanctions introduced, in the article on the separation between men and

⁸ Correctional Service of Canada, Interim Policy Bulletin 584, Bill C-16 (Gender Identity or Expression).

⁹ Ministry of Justice, *The Care and Management of Individuals who are Transgender*, Reference: N/A, Re-Issue Date: 27 January 2020.

¹⁰ *Landesbericht für Strafsachen, Wien, Beschluss vom 29. April 2016.*

¹¹ *Décision-cadre du Défenseur des droits n°2020-136*, 18 June 2020

Framework Decision of the Defender of Rights No. 2020-136.

¹² Federal Court Judgment of 4 December 2012, *X contre Tribunal d'application des peines et mesures du canton du Valais* X v. the Valais Sentencing Court.

women, the consideration that must be given to the « [translation] gender identity of the incarcerated person. »¹³ In the canton of Vaud, the issue of transgender persons is addressed at the regulatory level, insofar as legislation on housing provides that « [translation] special situations (in particular transsexual or transgender persons) are reviewed separately and subjected to an adapted assessment. »¹⁴ This wording, although recognizing the possibility of gender non-binarity, is nevertheless rather vague as to the practical application of such recognition. Finally, the prison authority in the canton of St. Gallen has developed a working document on sexuality in prisons, which promotes a professional and taboo-free approach in order, inter alia, to better identify possible forced sexual relations and abuse of vulnerable detainees. The document also explicitly mentions the right of homosexual detainees to have access to long-term visits with their partners, under the same conditions as other detained persons.

A «postulate» entitled «Personnes LGBTIQ* en détention. Connaître la situation en vue de l'améliorer.»¹⁵ ([translation] «LGBTIQ* persons in detention. Knowing the situation in order to improve it») was submitted to the National Council on 15 March 2018. Despite a negative opinion by the Federal Council on 16 May 2018, the subject was taken up again on 5 December 2019. In her speech to the National Council on 16 June 2020,¹⁶ Federal Councillor Karin Keller-Sutter called for the postulate to be rejected on behalf of the Federal Council,¹⁷ while recalling that the management of institutions fell within the jurisdiction of the cantons, and invoking the relevance of the ongoing work conducted by the SCEPP on this issue. Similar initiatives have also been launched at the cantonal level.¹⁸

This document is therefore intended to help fill these gaps.

¹³ Basel-Stadt, Gesetz über den Justizvollzug (Justizvollzugsgesetz, JVG) vom 13. November 2019, Art. 1§2.c.

¹⁴ Vaud, [translation] REGULATION on the status of convicted persons serving a custodial sentence or measure (Swiss Review of Civil Procedure - RSPC) of 16 August 2017, Art.17.2; and [translation] REGULATION on the status of detainees placed in pre-trial detention (RSDAJ) of 28 November 2018, Art. 16.3.

¹⁵ Postulate 18.3267: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20183267>

¹⁶ <https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-videos?TranscriptId=264117>

¹⁷ The National Council went on to reject the postulate 98 votes to 80.

¹⁸ We cite, in particular, the proposed motion "[translation] for the respect of the rights of trans* persons in detention" (M 2691) submitted on 19 October 2020 to the Geneva Grand Council.

2. OVERVIEW OF THE SITUATION OF LGBTIQ+ PERSONS IN PRISONS

At present it is difficult to obtain more than a partial overview of the situation of LGBTIQ+ persons in detention in Switzerland due to the lack of official data and the decentralized nature of the prisons, given that the cantons have jurisdiction in this regard. In its report on medical care in Swiss prisons, the National Commission for the Prevention of Torture (NCPT) [Commission nationale de prévention de la torture, CNPT] noted that « [translation] knowledge related to the specific needs of LGBTIQ prisoners was usually lacking and that the institutions have very little information on the presence of this category of prisoners. »¹⁹

In order to remedy this situation and to establish a non-exhaustive inventory, interviews were conducted during the preparation of this document with professionals in the prison and probation service, the majority of which were detention managers and officers, but also health care staff. A few experts from civil society were also consulted. A total of 57 persons were approached, and 38 responded to a questionnaire in a written or oral interview, with anonymity guaranteed in the processing of the data. In addition, a working group of professionals was set up to ensure that the recommendations were aligned with practice as closely as possible.²⁰The following elements are largely based on these interviews and the discussions of the working group.

2.1 Data and statistics

Issue

The lack of data on LGBTIQ+ detainees makes it difficult to establish a concept of care. How many individuals are concerned? What challenges do they face? This is also what the above-mentioned postulate «LGBTIQ* persons in detention. Knowing the situation in order to improve it» seeks to clarify. The United Nations Subcommittee on Prevention of Torture similarly recommends that «appropriate models of data collection, processing and analysis»²¹ regarding LGBTIQ+ persons in detention be developed.

¹⁹ Résumé du rapport thématique de la Commission nationale de prévention de la torture sur la prise en charge médicale dans les établissements de privation de liberté en Suisse
 Summary of the thematic report of the National Commission for the Prevention of Torture on medical care in prisons in Switzerland (2018 – 2019), 14 November 2019.

²⁰ Members of the working group: Didier Burgi, former (until 30 September 2020) director of Tuilière Prison (Vaud); Philippe Haussauer, Senior Warden, with the cantonal detention office of the Canton of Geneva; Simone Keller, Director of Dielsdorf Prison (Zurich); Nicolas Peigné, nurse, Head of the Prison Medicine Unit (Service de médecine pénitentiaire), Geneva University Hospitals, Geneva; Erika Volkmar, Director of Fondation Agnodge; Beatrice Willen, nurse and President of the Forum of the nursing staff at detention institutions in Switzerland [Forum du personnel soignant des établissements de détention en Suisse]. For the SCEPP: Jean-Sébastien Blanc, Scientific Adviser – “Practice” Department; Barbara Rohner, Head of the “Practice” Department; Caroline Saner, Scientific Adviser - Basic Training.

²¹ Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 75 p.17.

However, given the sensitivity of such data and the importance of respecting the right to privacy, it is essential to ensure that any undertaking to collect data on sexual orientation and gender identity respects the principle of confidentiality. It is also important to observe the principle of self-determination. Finally, many detainees may not disclose their sexual orientation while in prison, leading to a significant phenomenon of under-reporting, as observed in other countries. It is therefore important to strike a balance between obtaining the necessary data, ensuring that it is treated confidentially, and respecting the right to privacy of the persons concerned. Furthermore, even if the numbers turn out to be small, addressing issues of discrimination, and in particular homophobia and transphobia, at the structural level can only benefit the prison system as a whole.

Almost all of the professionals interviewed acknowledged having dealt with LGBTIQ+ persons in detention at some point in their career, most being gay men, followed by transgender women.

With regard to homosexual men, there are reports of both openly gay men and persons who prefer to hide their sexual orientation to protect themselves, but who are nevertheless identified as homosexual by staff (by their 'mannerisms', 'speech' or 'dress'). The taboo of homosexuality among the detainee population, often reinforced by nationality and/or ethnic origin, was also highlighted on several occasions. Bisexual men are hardly mentioned at all, or are equated with homosexuals.

Situations of 'casual' homosexuality as well as male prostitution were also reported, particularly in closed institutions. Open institutions, which offer a wider range of leave and permissions, allow detainees to maintain a closer link with the outside world and, to some extent, to maintain or even initiate romantic and/or sexual relationships on the outside. Some respondents believe that this not only reduces the risk of sexual abuse in detention, but also allows non-heterosexual persons to maintain relationships without the risk of bullying and violence in detention.

Lesbian women detainees are, it seems, more likely to be open about their sexual orientation, and even to live openly as a couple within the institution (although it should be noted that few respondents mentioned this scenario, as the vast majority work in male institutions).

Nearly half of the respondents to this survey have worked in an institution that at one time or another has received transgender persons, primarily in pre-trial detention facilities. Most of them were transgender women (assigned male at birth), whether or not they had undergone surgery. Cases of transgender men appear to be much rarer and were only reported in one female institution.

Finally, none of the respondents mentioned the case of intersex detainees, although several acknowledged that they were not familiar with the concept. This lack of awareness partly explains the invisibility of this population, although people born with intersex characteristics are thought to represent between 1.7 per cent and 2 per cent of the total population.

According to the interviews conducted, no institution compiles data on LGBTIQ+ persons in detention, the main reasons given being, on the one hand, the protection of privacy (an argument also raised by the Federal Council in its response to the postulate «LGBTIQ* persons in detention. Knowing the situation in order to improve it») and, on the other hand, a lack of interest in compiling this type of data. This does not mean, however, that there is no information on LGBTIQ+ issues in some documents.

Indeed, some registers may include a «flag» feature to reinforce the protection of LGBTIQ+ persons, for example in the electronic «logbook». These flags mainly concern transgender persons, although several respondents mentioned reports concerning gay persons as well (in all cases for protection purposes). The risk of revealing a detainee's sexual orientation against his or her will ('outing') was also noted, which is why there is reluctance to ask questions about detainees' sexual orientation, and why great care is taken in the handling of data.

In at least one canton, the database used for managing institutions and monitoring detainees offers the possibility of entering 'mixed' (sic) for persons « [translation] who look like women but are male or vice versa, » as opposed to the 'male' or 'female' options. However, the purpose of this third category remains unclear.

2.2 Initial interview and placement

Issue

Regarding the execution of criminal sanctions, the penitentiary authority should ideally direct transgender persons to the most appropriate facilities early on, but this is not always the case. Furthermore, in pre-trial detention institutions, management of the institutions can easily be caught off guard when a transgender person arrives. In all cases, upon a detainee's arrival at the institution, the initial interview should identify certain vulnerability factors, including in relation to sexual orientation and gender identity. The identification of these factors should in turn help to inform decisions regarding accommodation within the institution and any special measures.

Separation from other detainees is sometimes chosen as a protective measure, especially for transgender persons. However, such measures should not be reduced to a form of solitary confinement, which, if prolonged, may be in breach of rules prohibiting torture and other cruel, inhuman or degrading punishment or treatment (beyond 14 consecutive days). The United Nations Special Rapporteur on Torture has stated that States should «ensure that protective measures do not involve the imposition of more restrictive conditions on lesbian, gay, bisexual, transgender and intersex persons than on other detainees. »²²

Moreover, the placement of transgender persons in a male or female institution generally does not take into account the person's self-identified gender and uses anatomical sex as the main criterion. The European Committee for the Prevention of Torture (CPT) recommends that «transgender persons should either be accommodated in the prison section corresponding to their gender identity or, if exceptionally necessary for security or other reasons, in a separate section which will best ensure their safety. If accommodated in a separate section, they should be offered activities and association time with the other prisoners of the gender with which they self-identify. » Similarly,²³ the United Nations Rapporteur on Torture recommends « [taking]

²² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, para. 70 (t).

²³ CPT Visit to Spain, CPT/Inf(2017) 34, para. 95.

individuals' gender identity and choice into account prior to placement and provide opportunities to appeal placement decisions. »²⁴

Placement decisions should therefore take into account the principle of self-determination, and, in all cases, it is important to consult the persons directly affected about their accommodation options. The forthcoming amendments to the Swiss Civil Code, which will allow for a simplified procedure for changing gender at the civil status office, will force institutions to modify their practices.

At the time of a detainee's arrival, the institution sometimes receives incomplete information, in particular regarding medical matters, and even more so if the arrival takes place at night or at the weekend. Such arrivals can be problematic for persons in vulnerable situations. One case was reported of a transgender woman, whose gender identity was unknown to the institution, who was placed in a shared cell and raped during the night.

Even in normal circumstances, given both the lack of time and resources and the often agitated state of the detainee on arrival, the initial interview appears only rarely to be the moment for identifying vulnerabilities (even less so in pre-trial detention facilities), with the possible exception of interviews conducted by medical and social services. The question of sexual orientation or gender identity is almost never asked (privacy is often invoked), unless it is «obvious» ([translation] «someone with clear mannerisms»), or in the case of an openly transgender person. In cases where it is felt that the person may be at risk, placement in a 'protected' or 'isolated' area will be considered and discussed at the initial interview. Allowing for a second interview later in the detention process to ask more sensitive questions, when the person is better prepared to answer them, was mentioned as a good practice.

In terms of placement, transgender persons are almost always accommodated in an institution on the basis of their anatomical sex and/or civil status records. Some respondents regretted the fact that they were at the tail end of the process, with decisions having already been made upstream. In some pre-trial detention facilities with male and female sections, transgender women are sometimes held in the female section. Most transgender persons in male institutions are housed in an isolated section for their protection, although this approach is not uniform. In some cases, placement is decided jointly with the detainee. Access to (solitary) walks, visits and chaplaincy is always guaranteed; otherwise, social contacts are essentially limited to interactions with officers. The conditions of detention can thus be described as solitary confinement, which is problematic from the point of view of respect for fundamental rights. There are also reports of gay men being placed in isolation at their request for their own protection, although often the official reason given is not sexual orientation, to avoid reinforcing stigmatization. Of the good practices that were identified, participation in workshops and training activities were highlighted as a way to reduce the deleterious effects of isolation.

Even though isolation is considered an effective measure to reduce the risk of violence, some respondents questioned its relevance, particularly in terms of the duration and the fact that separation does not address the root causes of homophobia or transphobia. However, cases of solitary confinement seem to be rather rare, and mainly concern transgender persons.

²⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, para. 70 (s).

In at least one canton, regulations on detention institutions (pre-trial detention, imprisonment and minors) provide that, for transsexual or transgender persons, the placement decision must be «[translation] the subject of a detailed assessment by the management of the institution, in close collaboration with the medical service. »

2.3 Searches of transgender and intersex persons

Issue

Full body searches are a security procedure whose sole purpose is to prevent the introduction and trafficking of prohibited items or products. They involve an inherent risk of humiliation, which is strongly reinforced for transgender and intersex persons. For this reason, alternatives should always be preferred, and a full body search should only be used as a last resort.

International and national standards specify that searches, always conducted in two stages, must be carried out by staff of the same gender as the detainee (Swiss Criminal Code, Art. 85.2). These provisions obviously do not take into account situations involving transgender or intersex persons. In order to ensure the dignity of transgender and intersex persons, the search procedure should respect the self-identified gender and be based on prior consultation with the person concerned.

As a matter of principle, and in order to avoid humiliating the person concerned, a search should never be conducted for the purpose of identifying the sex of the person on the basis of his or her anatomical characteristics.

Body searches of transgender persons is one of the few aspects of gender identity that is sometimes regulated in institutional guidelines or regulations, although this is a minority of institutions. Where specific instructions are in place, the most widespread practice is to ensure, if there is any doubt as to the sex of the person, that the search is conducted in the presence of officers of both sexes. The search of transgender women who have not undergone surgical reassignment is carried out, according to the practice observed in most cases, in two stages, with the upper part of the body being searched by a female officer and the lower part by a male officer.

A very small minority of institutions (in the survey) chose to ask the transgender person's preference as to the sex of the officer in charge of the search and kept to this choice, regardless of anatomical characteristics and in accordance with the principle of self-determination. This approach is clearly the one that best takes into account the particular situation and the dignity of the detainee concerned.

Some respondents acknowledged having received no training in this area and that they were not sure how to handle such situations were they to arise. None of the respondents had dealt with searches of intersex persons.

2.4 Prevention and punishment of homophobic and transphobic and violence

Issue

Internationally available information indicates that LGBTIQ+ persons deprived of their liberty are among the groups most vulnerable to discrimination and violence. Transgender women and young men who are (or are perceived to be) homosexual or bisexual are also among those groups at risk of being the victims of rape. In men's prisons, a certain culture of hyper-masculinity, as well as the prevailing taboo regarding sexual orientation and gender identity, contribute to the invisibility of the needs of the persons concerned, including in terms of protection. The lack of transparency around sexual relations in prisons also contributes to a blurring of the lines between voluntary and coerced sexual relations, including in the context of debt or 'favours'.

The violence suffered may be verbal, psychological, physical or even sexual. It is therefore essential that institutions are able to prevent such violence and punish the perpetrators where appropriate. The Council of Europe recommendation on the ethical and organizational aspects of health care in prison states that prisoners who fear acts of violence including possible sexual offences from other prisoners for any pertinent reason, or who have recently been assaulted or injured by other members of the prison community, should be able to have access to the full protection of custodial staff.²⁵

Detention officers can also be victims of such discrimination and violence, hence the importance of promoting an institutional culture that respects sexual and gender diversity.

²⁵ Recommendation No. R(98) 71 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison (Adopted by the Committee of Ministers on 8 April 1998, at the 627th meeting of the Ministers' Deputies), §64.

Generally speaking, there is no specific policy on the prevention of discrimination based on sexual orientation or gender identity in place at the institutions. Most of the respondents emphasized proximity to the detainees, dynamic security and common sense as means of defusing potential conflicts. When an institution is aware of the presence of LGBTIQ+ persons, closer monitoring is sometimes put forward as a preventive measure. Emphasis is also placed on communication and mediation in the event of problems, but some have noted the difficulty of talking about issues that are generally poorly understood. Most respondents emphasized the taboo of homosexuality and transidentity among detainees. Ethnic origin is sometimes mentioned as an explanation for the prevalence of homophobia and transphobia, which is said to be more pronounced within certain cultures.

Homophobic name-calling and insults are common in most institutions, but this is not necessarily directed at LGBTIQ+ persons. If necessary, verbal warnings or disciplinary sanctions are issued. Violence can also take the form of hate messages written on a wall or a cell door aimed at humiliating the person concerned. In cases of pressure, harassment or physical violence, a change of cell or section, or even of institution, may be considered to protect the person concerned, in addition to the sanction against the perpetrator.

Some respondents stressed that some detainees did not encounter particular problems in openly affirming their homosexuality, including during visits from loved ones, for example. By contrast, an example was given of a young man who was presumably gay who had been raped by an older detainee. Although the case was examined and a criminal complaint filed against the perpetrator, one of the difficulties lay in the fact that the two detainees continued to coexist in the same institution.

Some areas within the prison are reportedly more at risk, e.g. the showers, especially when detainees cannot lock an individual shower. Some vulnerable detainees, including homosexuals or those perceived to be homosexual, prefer not to shower for fear of being physically assaulted or raped.

In terms of institutional culture, a shift in the attitude of officers regarding LGBTIQ+ issues was evident in some interviews. Although some form of homophobia seems to have prevailed in prison culture, this has changed in recent years, at least in some institutions, albeit less so in the case of transphobia. The fact that more staff members are openly gay or lesbian is put forward as an explanation for this gradual opening up. Some people qualify this observation, notably in light of the persistence of homophobic (as well as sexist) comments or jokes. While most respondents felt that the presence of openly LGBTIQ+ staff was helping to change attitudes, some also pointed out that some of the detainees may attempt to use this information against the officers concerned.

2.5 Recognition of the right to gender expression

Issue

Gender expression refers to the way in which a person publicly expresses or presents their gender. This may include behaviour and outward appearance, such as dress, hair, make-up, body language and speech. Respecting gender identity, including when it differs from the assigned gender, is part of respect for human dignity and is considered by the European Court of Human Rights as «one of the most basic essentials of self-determination».²⁶

In this spirit, the Nelson Mandela Rules provide that file management systems should enable determination of a detainee's gender identity, respecting that person's self-determination (Rule 7.A). This recognition should allow transgender persons to be referred to according to their self-determined gender, by the name they have chosen, and to have access to products and accessories culturally associated with their self-defined gender. It should be recalled here that the exercise of the rights of detainees «may only be limited to the extent that that is required for the deprivation of their liberty and their co-existence in the penal institution» (Swiss Criminal Code Art. 74). Apart from duly justified security concerns, it is therefore problematic to deny transgender persons access to items and products that help them affirm their gender expression.

As a general rule, transgender persons in detention are referred to by the form of address (Mr or Ms) and name appearing on their identity documents. If a transgender person has not had their gender change recognized in the civil registry, the preferred approach by most institutions appears to be to call them by their official name. Other institutions (a minority of them) are more flexible and accept the name and form of address chosen «informally». However, some respondents stressed the importance of clarifying this approach and having a consistent one so that it is not left to the discretion of staff.

As regards the list of products made available to detainees, these are generally very «gendered», depending on the institution, and few arrangements seem to be made for transgender persons, even if in most cases a certain flexibility would be appropriate. In some institutions, items considered unnecessary, such as make-up, are not allowed for transgender persons, whereas they are allowed in women's sections/institutions. One respondent pointed out that the criterion for limiting certain items should not be the gender normally associated with a product, but rather the potential link between the desired item and the commission of offences.

²⁶ Case of Van Kück v. Germany (Application no. 35968/97), 12.09.2003, §73.

2.6 Access to the health care

Issue

In its report on medical care in Swiss prisons (2018-2019), the National Commission for the Prevention of Torture (NCPT) « [translation] recommends that prison authorities develop the conceptual bases to take into account the specific health needs of LGBTIQ persons while respecting their privacy. »²⁷ The NCPT further states that access to HIV/AIDS treatment must be guaranteed and that special attention must be paid to LGBTIQ+ persons believed to have been subjected to torture or other cruel, inhuman and degrading treatment on the basis of their sexual orientation or gender identity. Finally, it calls for access to hormone therapies for transgender persons.

According to the principle of equivalence, the type and quality of care should be the same as the treatments and therapies available outside of institutions. This principle is all the more important given that LGBTIQ+ persons, and in particular transgender persons, often have specific medical needs due, among other things, to a higher incidence of co-morbidity and past trauma. As reassignment treatment is covered by basic insurance, financial considerations should not be used as a reason to restrict access. In addition, since interrupting hormone treatment can have dangerous consequences, it is important to ensure the continuity of treatment being provided prior to detention. Transgender women who have undergone vaginoplasty* in particular need specific care and equipment, such as dilators, which should be available to them in detention. Finally, it is important that people who wish to initiate a reassignment process are able to do so while in detention.

According to the Swiss Federal Ordinance on Epidemics [Ordonnance fédérale sur les épidémies],²⁸ detained persons must be informed, within an appropriate period of time after their arrival in the institution, of the risks of exposure to and possible symptoms of infectious diseases, including HIV/AIDS, and other sexually transmitted or blood-borne diseases. Moreover, condoms and other protective materials should be made available to the entire prison population, ideally without exposing or revealing the sexual orientation of individuals.

Access to specific care is of particular importance for transgender persons, and it is important that their needs are assessed upon arrival at an institution. As the United Nations Subcommittee on Prevention of Torture has pointed out, «obtaining precise individual information as to gender identity is vital to determining proper treatment, including hormone and other treatment associated with gender transition. In the absence of mechanisms to obtain such information, grave health consequences ensue.»²⁹ The interruption, even briefly, of a treatment in progress can have painful consequences, both physically and psychologically, for the persons concerned. Detainees who wish to start a transition process while in detention should not be prevented from doing so.

²⁷ National Commission for the Prevention of Torture, Résumé du rapport thématique de sur la prise en charge médicale dans les établissements de privation de liberté en Suisse [Summary of the thematic report on medical care in Swiss prisons] (2018-2019), 14 November 2019.

²⁸ Federal Ordinance on Epidemics, Art. 30.2(c).

²⁹ Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, Para. 65.

Finally, intersex persons deprived of their liberty must have access to appropriate treatment for their condition, including hormonal treatment.

Equivalence of care in prison is a principle recognized in general terms by the Swiss Criminal Code³⁰ and by international standards.³¹ Some institutions translate the recognition of the particular health needs of LGBTQ+ persons into concrete terms in specific working documents, whether regarding HIV/AIDS treatment or specific care for persons who have allegedly been victims of torture or ill-treatment on the basis of their sexual orientation or gender identity.

Several respondents confirmed that condoms and lubricants were readily available in the prison infirmary, with a certain degree discretion being ensured, although this is not always the case.

For transgender persons undergoing hormone treatment, continuity of treatment appears to be ensured in most cases, with the consent of the doctor. However, at least two respondents reported the case of a transgender woman whose treatment had been interrupted for a few months, with visible consequences (notably the return of noticeable hairiness) that were very difficult to live with for the persons concerned, whose dignity was directly affected by this interruption. The need for awareness-raising and training on the specific needs of LGBTQ+ persons applies to all medical and nursing staff.

³⁰ Swiss Criminal Code, Art.75§1.

³¹ The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 24.

3. CONCLUSION

The research carried out to develop this document, and in particular the interviews conducted within this framework, allows us to sketch out an initial assessment of the situation of LGBTIQ+ persons in detention in Switzerland. The findings, while not offering a comprehensive view of the situation in detention facilities, do help to identify certain common trends and issues.

Firstly, they show that almost all of the institutions had had LGBTIQ+ inmates at one time or another. Thus, even though they are undoubtedly a minority population (especially transgender and intersex persons), their presence in Swiss prisons is a reality.

Secondly, despite changing attitudes and a semblance of openness towards LGBTIQ+ persons, prison remains an environment that can often be incompatible with the expression of sexual and gender diversity. This leads one to believe that some people prefer to conceal their sexual orientation or gender identity during their time in prison, thus contributing to their invisibility. Homophobia and transphobia run particularly high among the detainee population. Name-calling and insults are common, and the risk of physical violence is real. Staff also sometimes have discriminatory attitudes and language towards detainees, although this is often a result of a lack of understanding of their needs. Nevertheless, the situation seems to have improved somewhat in recent years, following, in small steps, the trends observed in society in general.

Thirdly, the legitimate invocation of the right to privacy, coupled with a certain discomfort with sexual and gender diversity, leads to invisibility and reduces opportunities to detect important vulnerability factors in initial and subsequent interviews.

Fourthly, care of transgender persons is particularly complex and often problematic when it comes to observing the principle of non-discrimination. The fact that placement criteria are not uniform and often do not respect self-determination in relation to gender identity or the opinion of the person concerned is particularly worrying. The gender binarism of the prison system and the lack of knowledge about transidentity issues partly explain this state of affairs, which affects the entire period of imprisonment of the persons concerned and leaves too much discretion to the management of the institutions. The practice of body searches varies greatly from one institution to another and carries a significant risk of violating the dignity of transgender persons. The right to gender expression, when it does not correspond to the assigned gender, is often undermined, whether by refusing to call the person by their chosen name or by not giving access to certain items and products. Finally, the continuity of gender reassignment treatment is not always ensured, while the possibility of initiating such treatment once in detention appears to be low.

With the exception of a few minor differences, the common characteristics mentioned above seem to transcend cultural and linguistic differences (German-speaking Switzerland versus those regions where French, Italian or Romansh are spoken), and differences related to institutions' capacities or functions (pre-trial detention or detention on security grounds/imprisonment). They not only show the importance of having uniform recommendations in this area. They also make it possible to formulate recommendations that are applicable to all the institutions concerned. The recommendations are based on these findings as well as on international standards and good practices abroad. Their wording is general so as to permit some flexibility in their implementation.

4. RECOMMENDATIONS

Regarding all LGBTIQ+ detainees:

The cantons and intercantonal concordats, i.e. the agreements between the cantons, shall ensure that the detention facilities under their authority:

1. Do not tolerate any form of discrimination, including that based on sexual orientation and/or gender identity or expression. Where appropriate, acts of violence, harassment and abuse are systematically sanctioned. In the event of a criminal complaint, detainees are supported in this regard. Preventive measures are also taken to reduce the risk of incidents and to promote a culture of respect and non-discrimination within the institutions. These measures also include discrimination against employees of the institutions.
2. Ensure that all persons have the opportunity, if they so desire, to safely disclose their sexual orientation and/or gender identity upon arrival at the institution, or later during their incarceration period.
3. Avoid using isolation as a protective measure for detainees who are vulnerable to violence or abuse because of their sexual orientation and/or gender identity and/or expression. If isolation is necessary because of a risk of violence, or because the person concerned requests it, this measure should last as short a time as possible. In any case, such a measure should not exceed 15 days³² (Nelson Mandela Rules, Rule 44). It is for the cantons to develop a concept of care that guarantees both the protection and the social interaction of the persons concerned.
4. Facilitate access for LGBTIQ+ detainees, even where specific protection measures are in place, to all educational, sporting and cultural activities and jobs on an equal basis with the rest of the prison population.
5. Guarantee the right to receive visits, including where there are intimate and/or conjugal visits, to same-sex couples, as well as to transgender and intersex persons.
6. Encourage their staff – including officers, managers, socio-educational and probation workers, medical and health care staff – to participate in existing training and awareness-raising on LGBTIQ+ issues and contribute to the dissemination of these recommendations.
7. In accordance with the « [translation] Order on the Control of Communicable Human Diseases [L'Ordonnance sur la lutte contre les maladies transmissibles de l'homme] », ensure that all detained persons have access to appropriate preventive measures (in particular condoms); provide information on infectious diseases and their possible symptoms, including HIV/AIDS, other sexually transmitted diseases and blood-borne diseases; and make available means for the prevention and treatment of sexually transmitted diseases and blood-borne diseases.
8. Identify and protect detainees who were allegedly persecuted in their country of origin or a third country because of their sexual orientation or gender identity, in particular victims of torture and

³² The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 44.

inhuman, cruel or degrading treatment or punishment, and provide, where necessary, appropriate care and support.

9. Facilitate access to representatives of LGBTIQ+ organizations in institutions for those detainees who so wish.

Regarding transgender and intersex persons specifically:

The cantons and intercantonal concordats shall ensure that the pre-trial detention institutions and prisons under their authority:

10. Take into account the principle of self-determination of gender identity in their criteria for placement in a male or female institution, or in a male or female section of the same institution. Transgender persons should thus be able to be assigned to an institution corresponding to their gender identity if they make this request and are undergoing a transition process, without waiting for the change in civil status records to become effective. The person concerned should be able to appeal the placement decision, where appropriate.
11. Consider the possibility of placement in an individual cell for transgender and intersex persons if they so wish and if conditions allow.
12. Respect self-determination in the choice of first name and form of address (Mr or Ms) in their oral communications with transgender and intersex persons, even when the gender change has not yet been recognized in the civil status records.
13. Take into consideration the principle of self-determination in gender identity as well as the opinion of the person concerned in choosing the gender of the officers in charge of the search procedure, which is in all cases carried out in two stages.
14. Prohibit the practice of conducting searches to determine an individual's sex characteristics.
15. Consider the specific needs for accessories and clothing commonly associated with the other sex, including for those who have not undergone surgery and/or whose gender reassignment is not yet recognized in the civil status records.
16. Ensure that the principles of equivalence in access to health care and continuity of health care are respected, in particular with regard to hormone therapies and other specific treatments related to gender reassignment or intersex.

5. GLOSSARY

Sex assignment

The process of determining gender, either by observing sex characteristics or based on a person's own feelings. Reassignment may or may not be accompanied by hormonal treatment or even surgery.

Biphobia

Feelings of hatred or aversion towards bisexual persons.

Sex characteristics

Physical characteristics relating to sex, including genitalia and other sexual and reproductive anatomical characteristics, chromosomes, hormones, and secondary physical features emerging during puberty.

Gender expression

The way in which a person publicly expresses or presents their gender. This may include behaviour and outward appearance, such as dress, hair, make-up, body language and speech.

Homophobia

The set of prejudices and discriminations faced by homosexual and bisexual persons. Feelings of hatred or aversion towards these persons.

Gender identity

Psychological, intimate and personal conviction of being a man, a woman, or in between, or neither (gender fluidity). It may be aligned with or independent of the sex assigned at birth.

Sexual orientation

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.

Phalloplasty

Surgical procedure to build a penis from female sex organs and transplanted tissue.

Transidentity

Identification with a gender other than the one assigned at birth. It may be accompanied by practices and ways of living that do not coincide with the culturally and socially expected role in relation to this assignment at birth.

Transphobia

The set of prejudices and discriminations faced by transgender persons. Feelings of hatred or aversion towards these persons.

Vaginoplasty

Surgical procedure to build a vagina and a clitoris from male sex organs and transplanted tissue.