

## Deprivation of liberty: experiences of lesbian and bisexual women and trans and intersex persons:

Joint submission to the Working Group on the issue of discrimination against women in law and in practice for the purpose of the thematic report on women deprived of liberty

1 October 2018

The International Lesbian, Gay, Bisexual, Trans and Intersex Association – ILGA, Campaign against Homophobia (Poland), Lambda Warsaw (Poland), Venus of Milo Association (Poland), Queer Sisterhood Project (Australia), Transvanilla Transgender Association (Hungary), ACCEPTESS-T (France), Alliance of Queer Egyptians Organisation (Egypt), FACSDIS (Haiti), Femmes Espoir (Mali), Transamical (Cameroon), Association pour la valorisation de la Femme (Cameroon), Oasis (DR Congo) and Transgender Network Switzerland – TGNS, are pleased to provide input to the Working Group on the issue of discrimination against women in law and in practice for the purpose of the thematic report on women deprived of liberty, to be presented at the 41<sup>st</sup> session of the Human Rights Council in June 2019.

This joint submission will be on experiences and issues faced by lesbian and bisexual women, and trans and intersex persons in a range of countries and regions. We appreciate that the Working Group focuses its mandate on women and girls, and our broad approach to include trans and intersex persons (including trans and intersex women and girls) is to acknowledge that just looking at women and girls does not encompass the gender-based discrimination faced by trans and intersex people who may not identify, or be identified by others, as women and girls. Nevertheless, the root causes of such gender-based discrimination are often the same as those faced by those who do identify, or are identified by others, as women and girls. Therefore, we hope the Working Group finds useful our broader inclusion and analysis of the situations.

We would also like to respectfully point the Working Group to the *Yogyakarta Principles +10*,<sup>1</sup> a document updating the 2006 Principles on the application of the international human rights law to SOGI.<sup>2</sup> In this document, a group of international human rights experts identified a set of state obligations relating to the right to treatment with humanity while in detention.<sup>3</sup>

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<sup>1</sup> Available at: [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf).

<sup>2</sup> Available at: [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf).

<sup>3</sup> YP+10, p. 18: “H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of [SOGIESC] faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and “protective” solitary confinement; I. Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all [SOGIESC] and ensure that persons are able to participate in decisions regarding the facilities in which they are placed; J. Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with [SOGIESC].”

## Detention related to criminalisation of SOGIE

According to ILGA's State-Sponsored Homophobia Report, in 2017 there were 45 States in the world that criminalised same-sex relations between women as well as men.<sup>4</sup>

In some countries, specific forms of gender identity and/or gender expression are also criminalised. For example, the UN Special Rapporteur on the right to health in his report following the country visit to **Malaysia** noted: *"Malaysia has become one of the few countries where transgender people are criminalized. Since the 1980s, a series of legislative initiatives, mostly undertaken under sharia enactments, prohibited 'cross dressing' and forced transgender people, who had historically enjoyed a certain degree of acceptance in society, to go underground. In 1982, a fatwa issued by the National Fatwa Council, prohibited Muslims from undergoing sex reassignment surgery and since then very few hospitals have performed such surgery. [...] The criminalization of same-sex conduct and of different forms of gender identity and expression has reinforced negative societal attitudes and has led to serious human rights violations of the rights of this group of the population, including significant barriers in access to health care. Law enforcement officials arrest transgender women and subject them to various abuses, including humiliation in the media, and physical and verbal abuse."*<sup>5</sup>

As reported by ODRI Intersectional Rights, there are some specific offenses, such as aggravated robbery, aimed at trans women in Latin America. In **Peru**, for instance, an aggravating circumstance is to commit the crime during the night. Trans sex workers have been indicted and sanctioned for cases where they retain cell phones of clients that refuse to pay for their work. In addition, Peru enables the police retention of anyone that does not hold an identification. This "neutral" measure affects indirectly trans sex workers that do not hold ID, or hold expired documentation. Sometimes, trans sex workers choose to not take with them personal IDs, because that makes the police harder to press charges against them. They may be taken out of custody, nevertheless police compiles administrative case files that are used against them in criminal procedures.

In **Cameroon** and **Mali**, there are problems of discrimination based on gender identity or expression by law enforcement or society. Lesbians or heterosexuals can be denounced because they spend time together. The associations document arbitrary detentions of women who go out together in the street, in places of consumption (nightclub, bar, hotel), especially if one of them has a rather masculine gender. Police can treat lesbians differently, for example in food rationing. Some women in Cameroon are deprived of regular visits in gendarmeries because they are presumed or actual lesbians.

In **Haiti**, bisexual women or sex workers, often lesbians, are imprisoned preventively without going to court. Their deprivation of liberty can last up to five years.

In **Egypt**, cases of lesbian women's detention from three months to three years in prison according to the Law 10/1961 have been documented.<sup>6</sup> The best-known case was that of

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<sup>4</sup> ILGA: Carroll, A. and Mendos, L.R., *State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva; ILGA, May 2017).

<sup>5</sup> A/HRC/29/33/Add.1 (1 May 2015), paras. 84 and 86.

<sup>6</sup> Human Rights Watch (2014), *In a Time of Torture: The Assault on Justice In Egypt's Crackdown on Homosexual Conduct*, <https://www.hrw.org/reports/2004/egypt0304/9.htm>.

September 2017 arrests following the rainbow flag displaying by Egyptians during a concert in Cairo.<sup>7</sup>

In the **Democratic Republic of the Congo**, women are being arrested at police stations or even detained under article 172 of the Penal Code which stipulates that any act against nature is punishable by a sentence of three months to five years of imprisonment.

### **Justice system**

The situation of LBT persons in prison has been addressed recently by the UN bodies, particularly Treaty Bodies and Special Procedures. For example, following the review of **Guatemala** in 2017, CEDAW expressed its concerns on *“the depriving of lesbian and transgender women of partner visits”* and recommended the State party to *“ensure that partner visitation rights are respected, without discrimination towards lesbian and transgender women.”*<sup>8</sup> Similarly, in the review of **Paraguay** the same Committee noted with concerns *“discrimination against lesbian women through the refusal of partner visits and against adolescent mothers who are denied the right to keep their children in their care”* and the *“reports of violence against women in detention and of abuse of transsexual detainees,”* and recommended the State to *“guarantee partner visits and visits of family members for all women, including for adolescent mothers, lesbian women and transsexuals.”*<sup>9</sup>

The Committee against Torture, reviewing a report of **Argentina**, mentioned the *“reports of degrading searches of transgender and transvestite persons on the public street or in police stations and their detention in humiliating conditions, particularly in Buenos Aires province.”* While the Committee welcomed the measures *“to improve the integration of transgender women in detention,”* it continued to be concerned about the *“lack of implementation of such programmes in provincial prisons and police stations.”* Consequently, the Committee recommended the State party to *“ensure that all cases of arbitrary detention, violence towards and ill-treatment of persons because of their [...] sexual orientation or gender identity are investigated, with a view to prosecuting and punishing the perpetrators of such acts and suspending the officials involved; and [to] ensure the adoption of policies and programmes specifically aimed at the integration and protection of persons detained on the basis of their sexual orientation or gender identity, at both federal and provincial level, and ensure full compliance with the Gender Identity Act.”*<sup>10</sup>

In **Russia**, there were at least two recent cases where trans persons were ordered to be placed in male detention facilities thus putting them in an extremely risky situation.<sup>11</sup>

In **Poland**, trans prisoners are not given the possibility to be allocated to either a male or female facility based on their self-determined gender identity. The procedure of allocating prisoners is done only on basis of the personal documents. At the same time, there were

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<sup>7</sup> Egypt Independent, “Two people detained for 15 days pending investigation over flying LGBT flags at concert in Egypt”, 2017, link: <https://www.egyptindependent.com/two-people-detained-for-15-days-pending-investigation-over-flying-lgbt-flags-at-concert-in-egypt/>

<sup>8</sup> CEDAW (2017), Concluding Observations: Guatemala, paras. 44-45.

<sup>9</sup> CEDAW (2017), Concluding Observations: Paraguay, paras. 44-45.

<sup>10</sup> CAT (2017), Concluding Observations: Argentina, paras. 35-36.

<sup>11</sup> [https://takiedela.ru/news/2016/11/11/transgender\\_sizo/](https://takiedela.ru/news/2016/11/11/transgender_sizo/);  
[https://takiedela.ru/news/2018/08/27/trancgender-v-sizo/?utm\\_source=facebook.com&utm\\_medium=social&utm\\_campaign=transgendernuyu-zhenschinu-nazara-gulevicha-z&utm\\_content=22208357](https://takiedela.ru/news/2018/08/27/trancgender-v-sizo/?utm_source=facebook.com&utm_medium=social&utm_campaign=transgendernuyu-zhenschinu-nazara-gulevicha-z&utm_content=22208357).

reportedly cases where solitary confinement was used for trans persons in prisons as a measure to ensure safety from transphobic violence from other inmates. The Trans-Fuzja foundation, Lambda Warsaw and the Campaign against Homophobia (KPH) have received several complaints regarding maltreatment of trans prisoners by allocating them without respect to their gender over the last years.

In **Hungary**, the placement of prisoners is based on their officially registered gender, exposing pre-gender recognition trans persons to the risk of harassment and humiliating treatment. In 2018, media reported about a case in which a trans woman awaiting legal gender recognition was placed in a male prison. Her access to hormones was restricted for several months. She was touched inappropriately and humiliated by a prison guard. She submitted a complaint, but it was rejected claiming there was no proof for the mistreatment.

In **Switzerland**, many trans prisoner women must wear men's clothing. Their feminine personal belongings and makeup are confiscated.

In **Egypt**, women experience physical and verbal violence because they are held in male prisons.

According to ODRI Intersectional Rights, medical services provided by penitentiary institutions in **Peru** refuse to qualify as medical urgencies the attention of chronic silicone complications such as relapsing cellulitis or necrosis. In some cases, trans women were humiliated and subjected to degrading treatment by medical workers. At the same time, trans women remain invisible in the statistics provided by the Peruvian State that address the deprivation of liberty of women.

In many cases, trans women cannot start a transition or change their legal documentation while being incarcerated. This problem is experienced by trans women in **France, Cameroon, Egypt** and **Switzerland**. In Egypt, gender reassignment surgery requires the approval of a medical board that includes of a member of Al-Azhar, a religious institution, who systematically blocks the files.

**Thailand** has had a recent 2017 national policy calling for the segregation of LGBT prisoners in certain prisons, a step towards addressing safety and sexual harassment faced by LGBT inmates.<sup>12</sup> An October 2018 internal review by the Department of Rights and Liberty of the Ministry of Justice and United Nations Development Programme (UNDP) shows that transgender inmates (assumed to be trans women only) continue to experience unequal treatment, challenges in accessing basic services, as well as sexual harassment by other inmates.<sup>13</sup> We see positive steps in the Thai government and UNDP recognising and working to address safety of LGBT inmates in Thailand, through policy review and consultation with the LGBT community. The review will be followed up with the development of guidelines to improve the management of transgender inmates in Thailand, led by the Department of Corrections and other partners. This guideline has the potential to raise discussion among other ASEAN countries on how to protect the rights of trans people in “closed settings”.

### **Other institutions**

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<sup>12</sup> <http://www.nationmultimedia.com/news/national/30309977>

<sup>13</sup> <http://www.th.undp.org/content/thailand/en/home/presscenter/pressreleases/2018/09/national-workshop-calls-for-new-standards-to-manage-transgender-.html>

## **Forced confinement in private contexts**

In **Peru**, there were some cases documented related to the detention of trans sex workers by private individuals, where they were forced to do forced labour and were stripped as a punishment. Peasant communities "Rondas campesinas" and neighborhood committees in Peru exercise in some regions police activities.

For LBT women who have sought asylum in **Australia**, often the persecutors were not only state parties, but family members too. When sexuality becomes known to families, LB women are cut off from any outside contact, and may be forcibly married in an attempt to "correct" their sexuality.

### **Case Study<sup>14</sup>**

*Samira is a queer woman from a Middle-Eastern country. Her family is conservative and is planning to get her married after Samira graduates from the university.*

*In the university Samira met another young queer woman and they started secret relationships. After her father read their correspondence, he prohibited Samira from attending the university and cut her off from the outside world.*

*Her family started to look for a potential husband. They wanted to get Samira married to "correct" her sexuality. Forced marriage for Samira would mean enduring rape on a regular basis.*

In **Mali**, women are circumcised, forced to give birth, to dress in gendered clothes, to be unable to go out freely at night and to have intimate and sexual relations with another woman, and in the countryside they are also unable to choose a husband.

### **Case Study:**

*In Cameroon, a woman was arrested in 2006 after being reported by her family for being a lesbian. She was taken by her mother and brothers to a police station where their male relative served. The case was not recorded. This detention was to make the lesbian woman to confess her sexual orientation. The police officer who was the relative of the family release the woman next day because he had not registered her and was afraid of the daily control of his superiors. Following her release, she was locked in her family home, chained and isolated, without food and water for three days and without being able to wash. She then was taken to a village for ten days to undergo enemas and incantations to purify her body.*

The problem of so-called "**conversion therapies**" has been particularly addressed by Treaty Bodies and Special Procedures in the recent years. For example, in 2014 CRC referred to the topic in its review of **Russia**,<sup>15</sup> in 2015 it was considered by each of the HRCtee in its review of the **Republic of Korea**,<sup>16</sup> by CEDAW in its review of **Ecuador**,<sup>17</sup> and by CAT in its review of **China**.<sup>18</sup> In 2016, the committees not only examined the issues in

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<sup>14</sup> Name is changed for privacy reasons. Case study obtained from the forthcoming PhD thesis of Tina Dixon. For privacy reasons some of the personal details in the case study have been amended or generalised. This includes a non-disclosure of countries.

<sup>15</sup> CRC (2014), Concluding Observations: Russian Federation, paras. 55-56.

<sup>16</sup> HRCtee (2015), Concluding Observations: Republic of Korea, paras. 14-15.

<sup>17</sup> CEDAW (2015), Concluding Observations: Ecuador, paras. 18-19.

<sup>18</sup> CAT (2015), Concluding Observations: China, paras. 55-56.

their country reviews,<sup>19</sup> but also maintained their position towards “conversion therapy” in two new General Comments. CESCR noted, in its General Comment No. 22 on the right to sexual and reproductive health, that “*regulations requiring that LGBTI persons be treated as mental or psychiatric patients, or requiring that they be ‘cured’ by so-called ‘treatment’, are a clear violation of their right to sexual and reproductive health.*”<sup>20</sup> In its General Comment No. 20 on the implementation of the rights of the child during adolescence, CRC referred to “*the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy*” and condemned “*the imposition of so-called ‘treatments’ to try to change sexual orientation*”.<sup>21</sup>

According to Chinese human rights defenders, there are still many psychological hospitals or clinics in mainland **China** that provide conversion therapy treatment. Additionally, a significant proportion of transgender women are forced to undergo conversion therapy for changing gender identity by their parents in hospitals or clinics in mainland China, and a certain number of lesbians are taken to the hospital or clinic by their parents for conversion therapy for sexual orientation. According to a research by Beijing LGBT Center, nearly one-tenth (151 participants, 9.14%) of participants have considered conversion therapy, and very few do so due to self-identity issues; the foremost reason was pressure from family or society.<sup>22</sup>

In the **DR Congo**, some families in agreement with their church and their customs lock lesbian women in the permanence to follow series of prayers and deliverance. The goal is to free them from bewitchment and witchcraft related to their alleged or actual sexual orientation. Other families exercise forced marriage on their daughter. Often, their husbands detain them in their homes in order to “abandon homosexuality”. Some lesbians still living with their families are deprived of their freedom to meet friends who could, according to their parent, incite them to perform “unnatural acts”.

In **Switzerland**, there is also a case of sequestration of a young trans person by his family with humiliating treatments. The facts took ends when the young girl was able to escape from her family home.

Cases of confinement in a family context are also documented in **Egypt** with acts of violence by family members. Girls and young women are sometimes forced to return to the family home by the family with the support of the police.

### **Migration and crisis situations**

In 2017, CEDAW Committee addressed the issue of trans women in the context of migration. In its Concluding Observations on **Costa Rica**, it expressed concerns on “*the inadequate conditions in migrant detention centres for transgender women throughout the*

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<sup>19</sup> See Concluding Observations on **Ecuador** by HRCtee and CAT. The State party was recommended to redouble its efforts to eliminate fully the practice of placing LGBTI persons in institutions for treatment to “cure their sexual orientation or gender identity”; to adopt the necessary measures to investigate, prosecute and ensure suitable punishment for persons responsible for such “treatment”; and to provide full reparation for victims, including rehabilitation and compensation.

<sup>20</sup> Para. 23.

<sup>21</sup> Para. 34.

<sup>22</sup> Beijing LGBT Center, Institute of Psychology, Chinese Academy of Sciences (2014), *Report on the mental Health of LGBT people in China*.

*refugee determination procedure” and recommended the State party to “adopt guidelines for appropriately addressing the protection of transgender women throughout the refugee determination procedure.”<sup>23</sup>*

In **Switzerland**, many trans migrant women in detention after administrative refusal of authorization to stay on the territory are incarcerated in prisons for men with their belongings and makeup confiscated. They are called by their first name. This problem also exists in **France**. Despite the 2016 Civil Status Change Act, trans migrants are locked up in male prisons and called by their birth identity.

In **Australia**, LBT asylum-seeking women are particularly vulnerable to further human rights abuses and violence, when placed in immigration detention. Often there are no safe zones within the immigration detention centres, or if they exist they are not informed of them. Having survived trauma and persecution, many LBT asylum-seeking women are unable to disclose their sexuality/gender identity even when the centre assumes that safe settings are created. A very limited psychosocial support or legal information is available for them.

It is vital that LBT asylum-seeking women are not detained. In situations when detention is used, all detention staff needs to be trained on the issues relating to gender identity and sexual orientation to ensure safety of LBT asylum-seeking women.

#### **Case Study<sup>24</sup>**

*Ashanti arrived in Australia by plane without a visa from an African country. She was helped to escape persecution and sexual violence because of her sexuality by a person smuggler. He held her passport, so Ashanti did not know her final destination. Upon landing in one of the Australian airports, the person smuggler handed her passport back and left her alone in the airport. Since she had not visa to enter Australia, Ashanti was placed in the immigration detention centre.*

*In the detention centre, she shared a room with a woman, but it was mixed gender in the common areas. Having just survived several rapes including a gang rape, Ashanti felt extremely unsafe and was spending most of the time in her room. She was isolated.*

*There were no social workers in the detention centre. Ashanti did not receive any significant psychosocial support to help cope with her trauma. There were also no visible signs (such as rainbow posters) indicating that it was safe for Ashanti to come out as a queer woman.*

*Additionally, there were no legal information available in regard to the process of seeking asylum.*

*After 2 months, the detention centre was visited by a family from the same African country Ashanti was from. This family were visiting the detention centre regularly to help new arrivals. They connected Ashanti to a lawyer who helped her lodge a protection visa application. In 2 months, Ashanti received her protection visa and was released from the detention centre.*

Trans migrant women in **France** are disproportionately affected by practice of incarceration for sex work. They often provide sexual services for fee to survive while waiting for a

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<sup>23</sup> CEDAW (2017), Concluding Observations: Costa Rica, paras. 38-39.

<sup>24</sup> From PhD thesis of Tina Dixon, Australia.

residence permit. They have little schooling in their country of birth and feel great distress at the administrative complexity. They experience relational and emotional isolation, and do not have information on their rights. All these impede their access to health, employment and housing. Once incarcerated, trans people are placed in accordance to their sex assigned at birth. Because of the gender bias, trans women are isolated for their protection. Less exposed, they however have less access to workshops, training, circulation in the prison. ACCEPTESS-T also has information on incidents of misconduct, such as insults or questioning by birth name, by peacekeepers and prison staff in general.<sup>25</sup> Trans persons are exposed to this violence, but also to bullying by other prisoners.<sup>26</sup>

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<sup>25</sup> ACCEPTESS-T, “Les Personnes trans incarcérées en France : Contexte, difficultés et préconisations”, 2015

<sup>26</sup> OIP, “Alessandra, femme trans en prison : « On s’est senties exhibées comme au zoo »”, 2017, lien : <https://oip.org/temoignage/on-sest-senties-exhibees-comme-au-zoo-personnes-trans-incarcerees-entre-isolement-et-humiliations/>