



ALTERNATIVES TO DETENTION

Factsheet on international and regional law and practice related to the detention of and alternatives to detention for LGBTI people



UNHCR
The UN Refugee Agency



1. BASIC DEFINITIONS

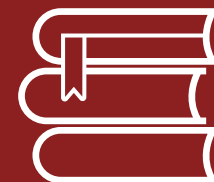
Before we start discussing international and regional law and practice related to the detention and alternatives to detention for LGBTI people, it is important to refresh on the basic concepts, terminologies and definitions.

The language that is used to talk about diverse sex, sexual orientation and gender identity **varies greatly across the world**. There are some words and phrases that are **commonly used** by the UN and the international community. However many people, including the persons we serve, **do not use** the “LGBTI” terms. As we work with and for persons of concern, it is critical that we respect the sovereignty of individuals in defining their own identities and that we use the terminology and language that is most acceptable by them. This is the first step to creating a safe and welcoming environment where LGBTI people can come forward to share their concerns and seek protection.

LGBTI is an acronym for:

- **L**esbian, a woman whose enduring romantic, emotional and/or physical attraction is to other women;
- **G**ay, a man whose enduring romantic, emotional and/or physical attraction is to other men; the term can also be used to describe women who are attracted to other women
- **B**isexual, a person who has a capacity for romantic, emotional and/or physical attraction to persons of the same sex and/or gender as well as different sex and/or gender;
- **T**ransgender, used by some people whose gender identity and, in some cases, gender expression differs from what is typically associated with the sex they were assigned at birth;
- **I**ntersex, which is an umbrella term describing a wide range of natural bodily variations related to sex characteristics that do not fit typical binary nations of male or female bodies.





Sometimes the letter 'Q' is added to the LGBTI acronym to represent the term 'queer' or 'questioning'. Those who are questioning, are people who are uncertain of their sexual orientation, sex or gender identity. The term queer, although traditionally having a negative connotation, is still used by some LGBTI people to describe themselves. It includes a wide range of sexual orientations and gender identities.

There are also other terms associated with sex characteristics, sexual orientation and gender identity. Let us refresh on some of them too:

- Sexual orientation relates to a person's enduring capacity for profound romantic, emotional and/or physical feelings and attraction to a person or persons of a particular sex and/or gender.
- Heterosexual is a person who is romantically, emotionally and/or physically attracted to a person(s) of a different sex and/or gender.
- Homosexual is a person whose romantic, emotional and physical attraction is to person(s) of the same sex and/or gender.
- Sex is the classification of a person as having a female, male and/or intersex characteristics. Note that a person's sex is a combination of bodily characteristics (including chromosomes XY for male and XX for female) but also reproductive organs and secondary sex characteristics.
- Gender refers to the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for individuals based on the sex they were assigned at birth.

- Gender identity refers to a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth or the gender attributed to them by society
- Transsexual is an old term for transgender, used by some whose gender identity differs from their assigned sex. Transsexual persons may take steps to alter their bodies through medical interventions such as hormone therapy, implants and surgery.
- Sexual and gender-based violence (SGBV) refers to any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion. It can be physical, emotional, psychological, or sexual in nature, and can take the form of a denial of resources or access to services. It inflicts harm on women, girls, men and boys.

All these terms related to LGBTI people and SGBV can be found in:

- **Guidelines on International Protection No. 9:** Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (points 8-11) and
- **Module** of the training package on Working with LGBTI Persons in Forced Displacement and the Humanitarian Context.

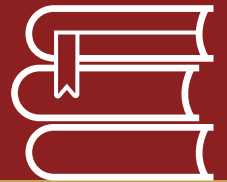
2. HUMAN RIGHTS VIOLATIONS AGAINST LGBTI PEOPLE

LGBTI people around the world are subject to various types of human rights violations, persecution and violence due to their real or perceived sexual orientation or gender identity. Those violations are experienced in their countries of origin, during their journey, displacement and in the country of asylum.

Human rights violations of LGBTI people are serious and widespread. Many LGBTI across regions also experienced homophobic and transphobic violence which included:

- physical violence, such as murder, torture, beatings, kidnapping and sexual assault and/or
- psychological violence, including threats, coercion, detention and the arbitrary deprivation of liberty, for example, forced psychiatric incarceration.

These attacks often constitute a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes (see more in United Nations High Commissioner for Human Rights' (UNHCHR) [report](#) on Discrimination and violence against individuals based on their sexual orientation and gender identity).



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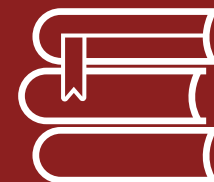
In its global report: Protecting persons with Diverse Sexual Orientation and Gender identities (2015), UNHCR has **highlighted** experiences of legislative, social and cultural discrimination, persecution and various forms of violence, harassment and intimidation faced by LGBTI people and perpetrated by the authorities, society at large, their community or host community and family, both in their home country and the country of asylum. LGBTI people find themselves in situations of heightened risk due to:

- Harm and violence perpetrated by, family member(s), a local community member(s), other refugees and asylum-seekers, employers, police officers and other authorities, including sexual and gender-based violence. Sometimes LGBTI people are denounced to the authorities by these actors.
- Isolation, stigma and rejection by family members, the community and the society at large.
- Limited confidential reporting mechanisms or limited access to existing mechanisms which may represent a risk of exposure, discrimination or further violence due to lack of confidential and safe spaces.
- Limited access to justice and exclusion because of prejudice and stigma. LGBTI people may also hesitate to report the crimes that have been committed against them out of distrust or fear of the consequences. Often, violence within the community may occur with impunity.

- Lack of protection from law enforcement officers, health and social care providers due to entrenched social discrimination, a lack of training, discouragement of LGBTI people from seeking assistance and other context-specific causes.
- Previous experience of detention in the country of origin which resulted in abuse, harassment isolation and/or extortion.
- Fear of reprisals. If LGBTI people denounce acts of violence to the authorities, they may be subjected to violence and harassment.
- Laws of general application are not specifically targeted towards LGBTI people but may be used disproportionately against them as a way to police the expression of identities that differ from the mainstream. These may include public debauchery, public morality, public order and impersonation laws.

Human rights abuses of LGBTI people in the home countries intensify their vulnerability during displacement and in the country of asylum. Many studies have shown a wide range of serious psychological and physical consequences of violence, torture, ill-treatment, rape and other forms of sexual violence LGBTI people may face at different times, prior and during their displacement. These experiences may lead to sleep and eating disorder, depression, social withdrawal, failure to function in daily life, self-neglect, suicidal tendencies, anxiety, aggression, and post-traumatic stress disorder (PTSD).





All human beings are born free and equal in dignity and rights. LGBTI people are entitled to the **same human rights** protections as all other human beings without discrimination based on their diverse sex characteristics, sexual orientation or gender identity. The rights of LGBTI people are situated in the existing international human rights legal instruments such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and other covenants and conventions. Taking this into account States have an obligation to:

- Protect individuals from violence, prevent, investigate, punish and redress deprivation of liberty and other acts of violence, acts of targeted, hate-motivated violence and incitement to violence directed at LGBTI persons. These acts should be fully investigated and prosecuted.
- Protect all persons, hence also LGBTI people, from torture and other cruel, inhuman or degrading treatment or punishment in custodial medical and other settings (Article 5 of the UDHR and Article 7 of the ICCPR)
- Protect the rights of privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention.
- Protect against arbitrary detention (Article 9(1) of the ICCPR).
- Protect of rights to equality before the law, equal protection of the law and freedom from discrimination (Article 26 of the ICCPR).
- Protect the right to the highest attainable standard of physical and mental health, meaning that LGBTI people should have access to health service without discrimination, including education, prevention, care and treatment programmes (Article 12 of the ICESCR).
- Protect the right to adequate housing, including protection of security of tenure and protection from eviction based on sexual orientation or gender (Article 25 of the UDHR, Article 11 of the ICESCR).

3. THE RISKS FOR LGBTI PEOPLE HELD IN DETENTION

Jansen and Spijkerboer rightly observed that in places of immigration detention, LGBTI people are often doubly marginalised; they are vulnerable to abuses in their home countries, and again while in detention. LGBTI people “in immigration detention are at a heightened risk of marginalisation, discrimination, and violence, both at the hands of fellow detainees and detention centre personnel.” (See more in Jansen and Spijkerboer, *Fleeing Homophobia. Sexual orientation, gender identity and asylum*, Routledge 2013).

Remember that Rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (**the Nelson Mandela Rules**) states that “(a)ll prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.”

Although the principles do not refer to LGBTI persons *per se*, they highlight several applicable to this group.



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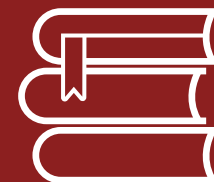
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The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment **highlights** that migrants, including LGBTI people, are being held in appalling conditions, with insufficient access to food, water and medical assistance. They face abuses, ill-treatment and torture. In particular, LGBTI migrants and asylum-seekers experience detention that is neither necessary nor proportionate and often for an indefinite duration. This has a great influence on their mental wellbeing and adds to the already extremely vulnerable situation.

In the **report** of the Special Rapporteur on SOGI it is mentioned that when trying to denounce violence and seek protection of the law enforcement officers, “trans persons are subjected to harassment, humiliation, abuse or arrest, based, inter alia, on the fact that their gender identity was not recognized.” The Rapporteur notices that “lack of recognition of gender identity may also lead to violations of human rights in other contexts, including torture and ill-treatment in medical and detention settings, sexual violence and coerced medical treatment.”

LGBTI people held in immigration detention are at risk of violence and abuse at the hands of personnel working in a detention facility and fellow detainees. They often find themselves at the bottom of an informal hierarchy and they are treated in a discriminatory manner. Fellow detainees may refuse to share common space with LGBTI people, use insulting language, humiliate and abuse in a various way. The sexual and physical integrity of LGBTI persons may be violated. (Read more in the Association for the Prevention of Torture’s **final report** on Addressing vulnerabilities of LGBTI persons in detention).





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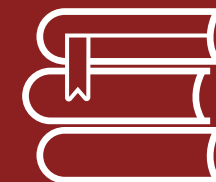
In case of **O.M. v. Hungary**, the European Court of Human Rights reaffirmed that deprivation of liberty has to be lawful, follow a procedure prescribed by law and “should be in keeping with the purpose of protecting the individual from arbitrariness” (par. 41). Moreover, asylum detention can only follow an individual assessment and should be the measure of last resort (par. 52). Taking this into account immigration detention of persons in situations of vulnerability/risk requires special measures from the authorities “to avoid situations which may reproduce the plight that forced these persons to flee in the first place” (para. 53). The detaining authorities should always consider “the extent to which vulnerable individuals (...) were safe or unsafe in custody among other detained persons, many of whom had come from countries which widespread cultural or religious prejudice against [LGBTI] persons” (para. 53). The authorities have to reflect on the individual circumstances of the persons concerned and if these measures are not in place, the detention fails to satisfy lawfulness and protection against the arbitrariness of detention. (para. 53).

In the United Kingdom, Stonewall and UKLGIG conducted several interviews with LGBTI asylum-seekers held in detention facilities and asked about their experience and well-being. The findings showed that:

- LGBTI detainees face discrimination and harassment from other detainees and sometimes from staff working in the facilities.
- Because of the fear of bullying and discrimination, many of them decide to hide their sexual orientation or gender identity.
- Transgender people face particular threats of violence in detention, especially when sharing bathrooms and bedrooms. They are scared to use communal places.
- Staff working in detention facilities often do not protect LGBTI detainees from abuse.
- They do not feel safe and protected by the staff and thus reluctant to complain and report the harassment faced.
- Detention has a serious impact on LGBTI detainees' mental wellbeing. LGBTI people often feel lonely and isolated. They are bullied and called names.
- LGBTI detainees are not provided with proper medical assistance and the healthcare staff is not well equipped to address their particular needs. This also concerns access to



Association for the Prevention of Torture (APT) underlines that the institutional culture of a detention facility plays an important role. If the personnel is prejudiced to LGBTI people it is more likely that the treatment of detainees will be bad. Personnel could be directly involved in discrimination and abuse for example through allocating them in the least comfortable cells or hesitating to react to the abuses and mistreatment. For example, in one of the women's prisons in the United States "lesbian women and inmates perceived as masculine-looking were reported to be held in a so-called 'butch wing' where they were humiliated and stigmatised."

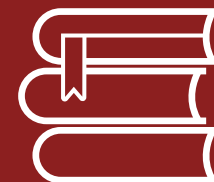


The Yogyakarta Principles is a non-binding instrument, however it highlights how existing human right law instruments (which are binding) apply to LGBTI people. The following principles are of particular relevance to the situation of LGBTI people in detention and when alternatives to detention are applied:

- Principle 2, the rights to equality and non-discrimination;
- Principle 5, the right to security of the person;
- Principle 7, the right to freedom from arbitrary deprivation of liberty;
- Principle 9, the right to treatment with humanity while in detention;
- Principle 10, the rights to freedom from torture and cruel, inhuman or degrading treatment or punishment;
- Principle 15, the right to adequate housing;
- Principle 17, the right to the highest attainable standard of health;
- Principle 23, the right to seek asylum.

Persons interviewed by Stonewall and UKLGIG experienced symptoms of trauma, depression and PTSD. Some of them have suicidal intentions. They often had to cope alone with all the experiences and in an environment where they felt isolated and victimised. They did not trust staff working in the detention facilities, including medical personnel and psychologists. Some of them did not have access to medication, in particular, persons with HIV/AIDS and transgender people undergoing hormonal therapy.





Guideline 9.7 in the [UNHCR's Detention Guidelines](#) specifically concerns LGBTI asylum-seekers. It says that: "(m)asures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation or gender identity. Where their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals."

You may wish to check other guidelines particularly relevant to LGBTI people:

- Guideline 1, the right to seek asylum must be respected;
- Guideline 4.1, detention is an exceptional measure and can only be justified for a legitimate purpose;
- Guideline 4.3, alternatives to detention need to be considered;
- Guideline 8, conditions of detention must be humane and dignified.

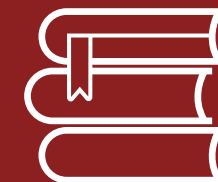
Transgender people have special needs which are often not recognised in society and find it especially difficult in detention facilities.

- Access to proper medical assistance is often not sufficient and there is limited or no access to the hormone replacement therapy (HRT) and other assistance required during a gender transition. Those who undergo sex reassignment surgery may be denied access to the ongoing care they need as it is regarded as unnecessary.
- When placing detainees in the detention facilities usually two options are available, either put them in a men or women's block. Moreover, often only gender is taken into account. Hence transgender women are placed together with women and this leads to several difficulties, in particular when they are considered men by the fellow detainees. On the other hand, placing transgender women in men's blocks expose them to the risk of sexual violence and physical abuse..

The Stonewall and UKLGIG's [report](#) shows that LGBTI asylum-seekers find it difficult to reintegrate with the host society when released from detention. This is due to their prior experience of detention. They do not often have a proper network to support them upon release and they face severe challenges to their mental wellbeing. Some of them are exposed to harassment in their new homes. Others have difficulties to socialise with the host community



The experience of immigration detention for LGBTI people may exacerbate emotional scars and lead to physical and emotional damage (read more in the [paper](#) on LGBTI migrants in immigration detention: a global perspective). Detention has a long-lasting impact on the individuals' post-detention life.



4. HOW TO ADDRESS THE SPECIFIC NEEDS OF LGBTI PEOPLE?

Immigration detention in the majority of cases is not an appropriate option for LGBTI people due to their particular needs, past experience and potential threats to their wellbeing and safety.

If LGBTI people have to be detained and detention follows international standards, it is the detention authority's responsibility to guarantee their safety and care for their wellbeing. LGBTI detainees have the same rights as any other detainees and their human rights should be fully respected. They should also be treated in accordance with the standards listed in the [UNHCR's Detention Guidelines](#) and [Immigration Detention Monitoring Manual](#).

APT [underlines](#) the detaining authorities should identify various stages to mitigate the risks of sexual, physical and psychological violence against LGBTI detainees. They can implement several measures, for example, the separation of detainees by categories, selection of detainees who share living quarters, publish and train on anti-bullying policies and keep in place and maintain confidential complaints systems.

The rationale of segregating individuals in heightened risk situations to protect them can be legitimate, however, it should be instituted only in consultation and agreement with the detainees concerned. There should also be a clear procedure in place. The segregation should not lead to outing a person, further stigmatisation or limitation of accessing services and education. (Read more here [Detention Monitoring Tool on LGBTI persons deprived of their liberty](#) pp. 14-16).

In some detention facilities, there could be a block or wing exclusively reserved for LGBTI people. ATP [argues](#) that this measure does not address their specific situation and protect against abuses and ill-treatment based on their sexual orientation or gender identity. Segregation of LGBTI people may lead to further stigmatisation and forced disclosure ("outing") of one's sexual orientation or gender identity.

Finally, isolating LGBTI detainees violates several human rights, for example, the right to equal protection and the non-discrimination principle. The segregation (or isolation) may limit access to the various services offered to detainees (education, medical assistance etc.).



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In 2012, the European Court of Human Rights in case *X v. Turkey* stated that segregating LGBTI detainees violated their human rights if they are deprived of full access to various services or are placed in a



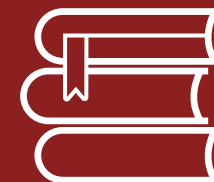
Special attention should be paid to the situation of transgender people. Their allocation in a detention facility has to be done with a great caution and with their full participation and informed consent. APT [advises](#) that their placement in a detention facility should:

- Follow consultations with the person concerned whether to place in a male or female section or facility;
- Allow transgender detainees to access special medical assistance;
- Ensure that transgender detainees receive adequate information and support;
- Ensure that the physical integrity of transgender detainees is protected without segregating or isolating them from other detainees;
- Uphold the right of transgender detainees to intimacy and privacy.

The Inter-American Commission on Human Rights recommends the states to “adopt the necessary measures to ensure that the decision on where to house trans persons in detention (including prisons, police lock-ups and migration detention centers), is conducted on a case by case basis, with due respect to the person’s personal dignity, and whenever possible, with prior consultation of the person concerned.”

See more in [IACHR’s report](#) on violence against LGBTI people.





Finally, when it comes to addressing the special needs of LGBTI persons in detention, one important factor should be taken into account. It is unrealistic, in many cases, to expect that LGBTI people will self-identify and disclose their sexual orientation or gender identity. Some of them because of fear of harm and abuse from other detainees or personnel working in a detention facility will conceal it at all times. UNHCHR underlines that the majority of LGBTI people have to hide their sexual orientation or gender identity to protect themselves against violence, this also includes during physical screenings and examinations at the border and the asylum procedures. Another group may have never experienced being open about their sexual orientation or gender and thus not used to speak or express themselves freely in front of others.

LGBTI identity and the associated risk of harm may be observed but is often hidden. For many, it is not safe to be open about one's sexual orientation or gender identity as the legal, economic, social, familial and personal repercussions of "coming out" are too severe. UNHCR and IDC advice that reducing barriers to disclosure and access to support requires:

- LGBTI persons to feel safe and trusting, and
- officials and service providers to be culturally competent and openly supportive of LGBTI persons and their families.

Note that even when these are achieved, some LGBTI people may choose to continue hiding their SOGI. This should be taken into consideration when putting in place services specific for LGBTI persons and ensure such services are open to all (which will allow those hiding their SOGI to benefit from them).

Remember! Situations of vulnerability are not fixed and will change over time. This is because of the changing circumstances. The vulnerability is shaped by internal (personal) and external (environmental) factors.

Read more in UNHCR and IDC's Vulnerability Screening Tool pp. 1-6.

Places of detention pose a particular risk of LGBTI people this is why UNHCR argues that alternative care arrangements, outside of detention facilities, should be in place to guarantee safety, access to adequate housing and medical assistance. There are three types of arrangements that may respond to the needs of LGBTI people:

- **safe houses,**
- **community-based care and**
- **independent, safe accommodation.**

In situations where proper care arrangements are in place, it is important to be aware of the risk factors attached to each of those arrangements for LGBTI people and ensure these risks are mitigated and addressed in consultation with LGBTI individuals and with the involvement of local LGBTI organisation.

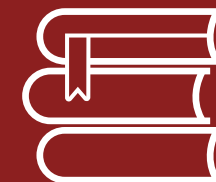
Some of the issues to consider are:

- Housing LGBTI people near other persons of concern may expose them to potential safety and security risks, this is particularly the case if the individual is member of a conservative community which is intolerant toward LGBTI persons.
- On the other hand, housing them far from their community may lead to their isolation, increase their exposure to harm from other sources and limit their access to services and support networks.
- In shelters or safe houses, which as a general rule should not be used to accommodate asylum-seekers for a long time, same-sex couples may be separated and transgender and intersex people may be at risk of humiliation and physical and mental harm due to the binary character of placement.
- Having specific shelters/safe houses for LGBTI persons may expose them to serious attacks and violence, had the shelter been known in the community.
- Healthcare centres may not provide appropriate services tailored to the specific needs of LGBTI people (for example related to physical or sexual

violence, psychological and mental health assistance, but also referral system to mental health and psycho-social support programmes for LGBTI people may be limited). Some services, such as HIV/AIDS treatment, hormone therapy and transition assistance may not be available or deeply stigmatized and result in humiliation or harm. Sometimes hospitals and health care centres may deny same-sex partners access to their ill or dying loved ones or refused to provide medical assistance to or discriminate against LGBTI people.

Critical to an effective response is the recognition that we work with LGBTI persons, even if they are not known to us. Our responses should therefore include the creation of safe spaces, inclusive services and accessible communication and feedback mechanisms which will allow timely and effective adaptation of our responses. Furthermore, it is important to recognise that LGBTI persons are not a homogenous group. There is no one size fits all. Each person is unique in their experiences, needs and capacities, and response should therefore take into account the specific needs of individuals with due consideration of the intersectionality of age, gender and other diversity characteristics.

You may wish to consult [UNHCR's guidance](#) on working with lesbian, gay, bisexual, transgender and intersex persons in forced displacement.





Alternatives to Detention



This material was developed within the project 'Global Technical Assistance and Capacity Building Programme to Prevent Detention of Children and to Protect Children and Other Asylum-Seekers in Detention' funded by the European Union.

The views expressed herein can in no way be taken to reflect the official opinion of the European Union.