

LGBTI migrants in immigration detention

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As states increasingly use detention as a means of controlling migration flows, sexual minority migrants find themselves in detention facilities where they may face multiple violations of their human rights.

Increasingly, states detain irregular migrants as a means, they believe, to control migration flows and deter further irregular migration. Despite this trend, detention has not deterred migrants from crossing borders. Furthermore, conditions in immigrant detention facilities have been widely criticised as violating international law.

Sexual minorities in detention often face social isolation, physical and sexual violence directed at them because of their gender identity, and harassment by both facility staff and other detainees. In most prison settings, sexual minorities face a heightened risk of targeted physical and sexual violence. Transgender women¹ are particularly vulnerable to this abuse because they are usually housed with men; in the US, for instance, they are thirteen times more likely to be sexually assaulted than other detainees.

LGBTI detainees are often placed in 'administrative segregation' in response to complaints of sexual or physical violence or as a preventive measure. Although segregation may seem to be the only available means of protecting sexual minority migrants from violence, in many detention centres it is indistinguishable from solitary confinement, involving confinement for 23 out of 24 hours a day in a tiny cell with extremely limited access to the outdoors, exercise or other people. This practice can lead to severe mental health after-effects and may exacerbate Post-traumatic Stress Disorder (PTSD) or other conditions developed in response to violence in the country of origin or during migration. (In some cases, LGBTI detainees may self-isolate so as to avoid stigmatisation by refugees from their countries of origin.) Such solitary confinement is held by international human

rights bodies as amounting to torture, inhuman or degrading treatment when it deprives detainees of meaningful access to detention centre services or, although it is widely termed 'non-punitive isolation', is tantamount to conditions of penal solitary confinement.

The medical needs of sexual minorities in detention, whether or not they require a regular regimen of HIV medication or hormone therapy, are rarely met. In many migrant detention facilities, only urgent medical care is provided; interpreters are rarely provided during medical procedures; there are insufficient private spaces for medical consultations; and medical expenses are borne by the detainees. LGBTI migrants in detention face significant risk of HIV infection and exposure to other sexually transmitted infections (STIs). Some arrive in detention infected, often due to a history of sex work or exposure to sexual violence. Others are infected in detention, where rates of HIV, AIDS and other STIs tend to be higher than the rate in the general population. Infection as a result of sexual violence in detention is of particular concern to transgender women, who are often housed with men. Detention also increases

exposure to other infectious diseases, which heightens risk of HIV-related morbidity.

The lack of medical care available is also evidenced by the limited access of transgender detainees to hormone and other treatment associated with gender transition. In the US, however, according to recent guidelines, transgender immigrant detainees may receive hormone treatment but only if they were undergoing such treatment prior to being detained. Transgender migrant detainees also report invasive and voyeuristic medical examinations by officials who are unfamiliar with their medical needs or have had little exposure to individuals with gender non-conforming identities.

Sexual minority migrants, who experience high levels of physical and sexual violence in countries of origin, often suffer serious mental health after-effects. Detention conditions – including the loss of physical liberty (particularly when segregated), staff abuse, marginalisation by other detainees, lack of access to appropriate medical care, substandard hygiene, combined with the often indefinite



nature of immigration detention – exacerbate mental illness. Voyeuristic or offensive questioning of LGBTI migrants by migration authorities also detrimentally affects their mental health. Since access to mental health counselling in migrant detention is extremely rare, sexual minorities not only suffer ongoing after-effects of harm experienced in countries of asylum but also are often re-traumatised by experiences in detention.

Rights of migrants in detention

While LGBTI detainees – particularly those who are transgender – are often so visible in immigration detention systems that they are put at grave physical risk, they remain invisible where their protection concerns matter most: in the policies and guidelines that are designed to protect all detainees from harm and process migrants equitably and with dignity under international law.

The core elements of protection in human rights law that relate to detainees include the prohibition on torture, the prohibition on arbitrary detention, limits on detention time, non-discrimination clauses, and the right to liberty. Both the UN Human Rights Committee and the UN General Assembly have confirmed that these tenets of human rights law must be applied without discrimination to all peoples, including migrants. Other refugee-specific legal standards promulgated by UNHCR prohibit penalising migrants for illegal entry or presence, and assert that detention of asylum seekers should only be contemplated as a last resort.

In October 2012, UNHCR issued new guidelines governing the detention of refugees. Intended as guidance to governments, legal practitioners, decision-makers and others, they provide valuable leadership on the special concerns of LGBTI asylum seekers in detention. Guideline 9.7 states that:

Measures 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.²

Although extremely welcome, UNHCR's new Detention Guidelines alone are insufficient to address the severe problems that characterise the detention of sexual minority migrants. Ultimately, states must provide alternatives to detention for all self-identifying sexual minorities – establishing non-custodial measures and alternative sentencing procedures.³ In addition, migrant detention facility staff and management must be trained on and sensitised to the protection needs of LGBTI migrants. Access to appropriate health-care, welfare and contact with the outside world – including legal counsel, medical attention and external LGBTI support systems – must be ensured. LGBTI detainee safety and the ending of discrimination and abuse, both by other detainees and by prison officials, must be the highest priority.

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An expanded report of this research is to be published as an article in Volume 37 of the *Harvard Journal of Law and Gender*.

1. Assigned male at birth but with female gender identity.
2. Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 www.unhcr.org/refworld/docid/503489533b8.html
3. FMR 44 (forthcoming September 2013) will include a major feature on detention, including alternatives to detention www.fmreview.org/detention