

# Placement of trans and non-binary people

**A guide for prisons**



## Placement of trans and non-binary people: a guide for prisons

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Its contents are the sole responsibility of PRI and the authors.

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# Contents

<b>Introduction</b>	<b>04</b>
<b>Context</b>	<b>05</b>
Who are trans and non-binary people in prisons?	05
The experiences of trans and non-binary people in prisons	05
International standards	07
<b>Approaches to placement</b>	<b>09</b>
Approaches to placement: outcomes	09
Approaches to placement: criteria and exclusions	10
Approaches to placement: process	11
Approaches to placement: impact, challenge and review	12
<b>A framework for rights-based approaches to placement</b>	<b>14</b>
Human rights principles	14
<b>Conclusion</b>	<b>20</b>

# Introduction

Trans and non-binary people in prison face high risks for their wellbeing, health and safety. These include the risks of physical, sexual and psychological violence from both staff and their peers. The harassment and discrimination that trans people then experience in prison reflects wider stigma and discrimination in society and is often compounded by other forms of discrimination, including race and poverty. The over-criminalisation of trans people is a likely driver to their overrepresentation in prison populations.<sup>1</sup> At the same time, more countries are adopting laws that allow legal gender recognition through self-determination and there is increasing awareness and visibility of trans people in public life.<sup>2</sup>

This briefing examines current approaches around the world to the placement of trans and non-binary people within predominantly binary prison systems. While in some countries there have been important developments in policy approaches to the placement of trans prisoners in recent years, in others, policies have faced significant new hurdles. The majority of countries operate without any policy framework specifically aimed at safeguarding the rights of trans and non-binary people, or identifying and supporting their needs, resulting in a situation of “complete abandonment”.<sup>3</sup>

This guide sets out key issues that both policy makers and prison administrations and leaders should consider in the placement of trans and non-binary people. The guide provides bearing in mind the human rights of rights of trans and non-binary people to self-determination in the prison context. Attention to the rights and particular risks that trans and non-binary people in prison face is largely absent from the principal international human rights standards relating to prisons. With a view to addressing this gap, this briefing identifies examples of good practice and proposes building blocks for the development of future policy.

This guide is based on desk-based research conducted by Penal Reform International (PRI) in 2023, which specifically compiled the publicly available policies and practices on the allocation of trans people in prison from different jurisdictions. This was supplemented by interviews with experts, practitioners and other relevant stakeholders to provide a great in depth understanding of different policy approaches and practice. The guide builds on and complements PRI and TGEU’s previous work on trans people in prisons, including PRI’s framework for preventive monitoring and technical guidance on trans people and HIV in prisons and other closed settings<sup>4</sup>.

## Terminology

**Trans** is an umbrella term that includes people who have a gender identity that is different to their gender assigned at birth and people who wish to portray their gender identity in a way that is different to expectations based on their gender assigned at birth. This can include, among many others, transsexual and transgender people, non-binary people, transvestites, cross dressers, agender, multigender, genderqueer people, intersex, and gender diverse people who relate to or identify as any of the above.

**Non-binary** is an umbrella term for genders other than man and woman. It is also a term for a specific gender. While non-binary can be considered a trans identity, not everyone who is non-binary considers themselves trans.

**Gender identity** is a person’s inner sense of their gender. For trans people, their own gender identity does not match the sex they were assigned at birth. Gender identity, unlike gender expression, is not visible to others.

For a detailed guide on terminology, including terms to avoid and wider guidance on writing about issues that trans and non-binary people are dealing with, please see TGEU’s ‘Trans Media Guide’.<sup>5</sup>

1. ILGA World reports that trans people are explicitly criminalised in the laws of 13 countries. ILGA World, *Trans Legal Mapping Report 2019: recognition before the law*, [ilga.org/downloads/ILGA\\_World\\_Trans\\_Legal\\_Mapping\\_Report\\_2019\\_EN.pdf](https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf), pp.9-11. The Human Dignity Trust documents how other laws are used to criminalise trans communities and activists. Human Dignity Trust, *Injustice Exposed: The Criminalisation of Transgender People and its Impacts*, [www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminalisation-of-trans-people.pdf](https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminalisation-of-trans-people.pdf).
2. Predominantly in countries in Australasia, Europe and Latin America. TGEU data shows that in 2023, 11 of 54 countries in Europe and Central Asia based legal gender recognition on self-determination, with 2 providing full legal recognition to non-binary people (and 2 providing partial). [transrightsmap.tgeu.org/fast-facts](https://transrightsmap.tgeu.org/fast-facts).
3. UN Subcommittee on Prevention of Torture (SPT), *Ninth Annual Report*, 22 March 2016, CAT/C/57/4, para. 65.
4. Penal Reform International, Association for the Prevention of Torture, *LGBTI persons deprived of their liberty: a framework for preventive monitoring* (2013, updated 2015) [cdn.penalreform.org/wp-content/uploads/2016/01/lgbti-framework-2nd-ed-v7-web.pdf](https://cdn.penalreform.org/wp-content/uploads/2016/01/lgbti-framework-2nd-ed-v7-web.pdf); UNODC, UNAIDS, WHO, UNDP, PRI, *Technical Brief: Transgender people and HIV in prisons and other closed settings* (2022) [cdn.penalreform.org/wp-content/uploads/2022/08/Transgender\\_HIV\\_E\\_ebook.pdf](https://cdn.penalreform.org/wp-content/uploads/2022/08/Transgender_HIV_E_ebook.pdf).
5. [tgeu.org/trans-media-guide-for-journalists-and-editors](https://tgeu.org/trans-media-guide-for-journalists-and-editors).

# Context

## Who are trans and non-binary people in prisons?

Few prison systems can account for basic questions about how many trans and non-binary people are in their system, and even fewer produce data that provides any focused insights into different gender identities, and where people are held or how they are treated. The lack of official data poses significant problems for directing policy towards the needs of trans and non-binary people, as many prison authorities are likely to have an incomplete picture of the numbers and needs of trans and non-binary people detained.

Many trans and non-binary people are unlikely to disclose their identity due to safety concerns – and stigma – and this is exacerbated if there are no steps taken to ensure privacy, transparency or safety around data collection.<sup>6</sup>



Information about the lived realities of lesbian, gay, bisexual, trans and gender-diverse persons around the world is, at best, incomplete and fragmented; in some areas it is non-existent. [This] means that in most contexts policymakers are taking decisions in the dark, left only with personal preconceptions and prejudices or the prejudices of the people around them.<sup>7</sup>

**UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IESOGI)**



Authorities may rely on prejudiced or stereotyped ideas about gender diverse identities to identify trans prisoners.<sup>8</sup>

There is also a risk of oversimplification of trans identities, including how these intersect with other identities and forms of discrimination including racism and social disadvantage. For example, in Argentina, trans people in prisons are likely to be from disadvantaged social and economic groups, in informal labour or unemployed, or are foreign nationals.<sup>9</sup> In Peru, for instance, 44% of LGBTQI+ people interviewed by the country's National Preventive Mechanism had not completed their basic level education, and 9% were unable to read or write.<sup>10</sup> A Canadian study identified that 70.7% of all gender diverse people who were convicted of an offence had a history of trauma, and 71.7% had experienced abuse in their childhood. Almost half of the study's sample of gender diverse people were Indigenous, compared to one quarter in the general population.<sup>11</sup>

## The experiences of trans and non-binary people in prisons

There is a significant and growing body of evidence that documents the violence, ill treatment, and denial of rights that trans people face in prisons around the world. As far back as 2001, the UN Special Rapporteur on Torture highlighted the fact that trans people in prison were often held in worse conditions than the wider prison population, and were subjected to violence by staff and other prisoners, and the risks they faced in main areas of prisons.<sup>12</sup>

6. IESOGI 2019, paras 47-69.

7. Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IESOGI) (2019), *Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity*, A/HRC/41/45, para.71.

8. For example, the Peruvian National Preventive Mechanism asked 18 prisons and only 11 said they had LGBTQI prisoners. Defensoria del Pueblo, Peru, *Condiciones de internamiento de las personas LGBTI en 23 cárceles del Perú (2023)*, [www.defensoria.gob.pe/wp-content/uploads/2023/04/CONDICIONES-DE-INTERNAMIENTO-DE-LAS-PERSONAS-LGBTI-EN-23-CARCCELES-DEL-PERU.pdf](http://www.defensoria.gob.pe/wp-content/uploads/2023/04/CONDICIONES-DE-INTERNAMIENTO-DE-LAS-PERSONAS-LGBTI-EN-23-CARCCELES-DEL-PERU.pdf) p28.

9. Procuración Penitenciaria de la Nación, Argentina, *La situación de los derechos humanos en las cárceles federales de la Argentina (2022)*, pp.355, 368.

10. Defensoria del Pueblo 2023, pp.45-46.

11. Correctional Service Canada, *Research Report: Examination of Gender Diverse Offenders*, (2022) No. R-442, p.23 and p.32.

12. Report of the UN Special Rapporteur on torture, 3 July 2001, A/56/156, para.23.

### Testimony

“Some people, including other people in prison, frame trans self-determination as a type of “special rights.” I’ve had non-trans people ask me, “Why do trans people have a choice of where to live in prison? I don’t get to choose where I am housed.” This question fails to account for how sex-segregated spaces are uniquely harmful to trans people generally and how such spaces are sites of tremendous harm and violence.

Trans people, including trans men and women alike, experience sexual assault, physical violence, verbal harassment, sexual trafficking, and intimate partner violence in prisons at exceedingly high rates.

While prison is violent and horrible for anyone, it is particularly dangerous for trans people because of how sex-segregation foments violence against trans people in many ways – interpersonally, administratively, medically, and structurally. Because of the specific harms that trans people experience in prisons and the inability of prisons to protect them, trans people should be able to determine which gender facility they would be safer in and have that placement be presumptive. Returning to the idea of “special rights,” non-trans people are automatically housed by their gender identity and trans people are singled out for being housed by their sex assigned at birth. Policies that give some agency back to trans people to decide which gender facility they should be in are not indicative of “special rights;” such policies afford trans people what the policies already presumptively provide to non-trans people.”

**A.D. Sean Lewis,  
Attorney at the Prison Law Office, California<sup>13</sup>**

### Violence and harassment

An empirical study of sexual assault in California adult men’s correctional facilities found that 59% of trans women had experienced sexual assault (compared to 4.4% in a randomly selected sample), and many of these considered the assault to be rape.<sup>14</sup> In Kuwait and Cameroon, transgender women held in men’s prisons have reported being subjected to violence including rape and beatings and verbal assault.<sup>15</sup> Reporting bullying, harassment and assault may expose transgender people in prison to further danger, and in Kazakhstan

a transgender woman who was subject to sustained harassment and sexual assault reported her fears of retaliation after a senior ranking security official was convicted of assault.<sup>16</sup> The bullying and harassment of trans people has been highlighted as a common theme in complaints received by trans prisoners and official investigations into deaths that had occurred in England and Wales.<sup>17</sup>

### Degrading treatment, including searches

Trans people are too often singled out for humiliating treatment in prison. In Cameroon, two transgender women were forced to sleep wearing chains around their legs.<sup>18</sup> Degrading searches by prison staff that are not of the same gender identity are a source of great distress. This was the case for three trans women participating in Black Lives Matter and Black Trans Lives Matter protests in Miami who were subjected to humiliating searches.<sup>19</sup> In the US, significant legal precedent against cross-gender strip searches have focussed on cisgender prisoners, and are insufficiently applied to transgender prisoners.<sup>20</sup>

### Maintaining gender presentation

Trans people face unique challenges in being able to maintain their gender presentation while in prison, both through the lack of provision of items that they need (eg clothing, make-up, prosthetics) but also in being addressed with preferred names and pronouns. All of these curtail the possibility of social transition. In 9 out of 12 units visited by Brazil’s National Preventive Mechanism, trans men were prevented from expressing their gender through clothing or haircuts, and in 7 units visited, trans women were subjected to forced haircuts and/or were forbidden to wear their hair.<sup>21</sup> In California, trans people report having been disciplined or disadvantaged when trying to assert their identity, or when responding to transphobic bullying.<sup>22</sup> Positively in Thailand trans women are permitted to keep their hair shoulder length and wear makeup.

13. PRI correspondence with A.D. Sean Lewis, 23 February 2024. See also [therealnews.com/prisons-are-putting-trans-inmates-in-solitary-confinement-rather-than-appropriate-housing](https://therealnews.com/prisons-are-putting-trans-inmates-in-solitary-confinement-rather-than-appropriate-housing).
14. Jenness V. et al. (2007) “Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault”. [www.researchgate.net/publication/267817759\\_Violence\\_in\\_California\\_Correctional\\_Facilities\\_An\\_Empirical\\_Examination\\_of\\_Sexual\\_Assault](https://www.researchgate.net/publication/267817759_Violence_in_California_Correctional_Facilities_An_Empirical_Examination_of_Sexual_Assault).
15. Human Rights Watch (HRW), “Kuwait: Quash Conviction against Transgender Woman” 14 October 2021 [www.hrw.org/news/2021/10/14/kuwait-quash-conviction-against-transgender-woman](https://www.hrw.org/news/2021/10/14/kuwait-quash-conviction-against-transgender-woman); HRW, “Cameroon: Wave of Arrests, Abuse Against LGBT People”, 14 April 2021, [www.hrw.org/news/2021/04/14/cameroon-wave-arrests-abuse-against-lgbt-people](https://www.hrw.org/news/2021/04/14/cameroon-wave-arrests-abuse-against-lgbt-people) (all accessed 25/02/24).
16. Radio Free Europe/Radio Liberty, “The Story that Captivated Almaty”, 13 October 2020, [www.rferl.org/a/kazakh-transgender-inmate-wins-prison-assault-case-fears-reprisals-almaty/30891357.html](https://www.rferl.org/a/kazakh-transgender-inmate-wins-prison-assault-case-fears-reprisals-almaty/30891357.html) (accessed 25/02/24).
17. Prison and Probation Ombudsman, England and Wales, (2017), *Transgender prisoners: Learning Lessons* bulletin, p.5.
18. Reuters, “Transgender woman in Cameroon describes ‘hell’ of five months in prison” 17 July 2021, [www.reuters.com/world/africa/transgender-woman-cameroon-describes-hell-five-months-prison-2021-07-16](https://www.reuters.com/world/africa/transgender-woman-cameroon-describes-hell-five-months-prison-2021-07-16).
19. Pink News, “Trans protestors subjected to ‘dehumanising’ abuse and forced strip-searches, law suit claims”, 16 Feb 2022, [www.thepinknews.com/2022/02/16/trans-prison-abuse-florida](https://www.thepinknews.com/2022/02/16/trans-prison-abuse-florida). See also [namechangeproject.wufoo.com/forms/bucci-petition](https://namechangeproject.wufoo.com/forms/bucci-petition) (accessed 25/02/14).
20. [journals.law.harvard.edu/crci/wp-content/uploads/sites/80/2023/09/HLC206\\_Sanches.pdf](https://journals.law.harvard.edu/crci/wp-content/uploads/sites/80/2023/09/HLC206_Sanches.pdf).
21. Mecanismo Nacional de Prevenção e Combate à Tortura (MNPCT), *Relatório de inspeção nacional sobre a população LGBTI+ privada de liberdade no Brasil*, (2023) p.62.
22. The Real News Network, “Prisons are Putting Trans Inmates in Solitary Confinement Rather Than Appropriate Housing” 13 November 2023, [therealnews.com/prisons-are-putting-trans-inmates-in-solitary-confinement-rather-than-appropriate-housing](https://therealnews.com/prisons-are-putting-trans-inmates-in-solitary-confinement-rather-than-appropriate-housing).

## Accessing healthcare including gender affirming care

For many trans people in prison, accessing appropriate, continuous and quality healthcare – to include access to hormone treatment, sexual health and mental health services – is a major challenge.<sup>23</sup> Research shows that experiences of transphobia in prison are associated with a higher prevalence of internalising mental health conditions including depression, anxiety, stress/trauma-related disorders.<sup>24</sup> In the US, many attempts have been made, and sometimes won, to prohibit correctional authorities and others from providing gender-affirming healthcare including hormone treatment and sex reassignment surgery.<sup>25</sup>

The harsh realities faced by trans prisoners living under current approaches to their placement and treatment must be at the forefront of policy-makers' minds and guide future steps.

Policies should not be devised by misinformed views, that can be taken from sensationalist media and anti-trans campaigning,<sup>26</sup> around views that trans women will necessarily pose a threat to cis women in women's prisons.

Polymakers and prison administrations need to bear in mind the overwhelming evidence of ill treatment, violence and harm that trans people in prison experience to address the ongoing violation of the rights of trans people in prisons around the world.

## International standards

The core international and regional human rights-based standards relating to prisons – the UN Nelson Mandela Rules, UN Bangkok Rules and the European Prison Rules, among others – make no specific reference to LGBTIQ+ people or the issues they face in prison and provide no guidance for states on how to approach placement issues. However, their non-discrimination provisions require that prison administrations “take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings”<sup>27</sup> and are underpinned by the need to tackle structural violence and prevent discriminatory practices and social norms.<sup>28</sup>

A strong framework to guide states, including policy-makers, prison administrations and monitoring bodies, has instead been developed through soft law, technical documents, jurisprudence and the work of international detention monitoring bodies and UN special procedures. This body of work has brought a human rights focus to the treatment of trans and non-binary people generally and to the placement of transgender people in prison specifically, with input from trans experts and groups.

International human rights bodies have reiterated that there are specific risks trans people face in prison, and their rights to dignity and self-identity require tailored approaches to placement in prisons. Although there are some differences of emphasis, a human rights-based approach requires:

1. ensuring the participation of the person in question in the decision;
2. individualised decision-making, taking risks into account;
3. equal access to services and facilities.

## Key international guidance on the placement of trans people in prisons

**1. The Yogyakarta Principles (2007) and Yogyakarta Principles Plus 10 (2017)** establish how international human rights standards should apply to the treatment of people of diverse gender identities, including those who are deprived of liberty. They articulate the right to treatment with humanity and respect for inherent dignity, and the inalienable right to state protection. Regarding placement, they call on states to ensure:

→ That placement reflects the rights and needs of persons of all sexual orientations, gender identities, gender expression and sex characteristics, and to avoid further marginalising or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

→ The ability to participate in decisions regarding the facilities in which people are placed.<sup>29</sup>

**2. The UN Subcommittee on Prevention of Torture** focused on the prevention of torture and ill treatment against LGBTIQ persons in its 2016 annual report, highlighting the lack of institutional policies and methods to address self-identification, classification, risk assessment and placement. The SPT cautions that some measures taken may

23. Marie Claire Van Hout et al, *Contemporary transgender health experience and health situation in prisons: A scoping review of extant published literature (2000-2019)* in *International Journal of Transgender Health*, Vol. 21, 2020: Issue 3.

24. Matt Maycock (2023), *Mental Health of LGBTIQ+ people in prison*, Presentation to CoE-APT workshop, 15 February 2023, Slide 5.

25. The Appeal, “As Anti-Trans Bills Target Prisoners, Some Warn of a ‘Canary in the Coal Mine’”, 17 August 2023, [theappeal.org/anti-trans-legislation-prisoners-health-care/](https://theappeal.org/anti-trans-legislation-prisoners-health-care/); and American Civil Liberties Union, “Federal Court Upholds Transgender People’s Right to Access Medical Treatment in Prison”, 5 August 2011, [www.aclu.org/press-releases/federal-court-upholds-transgender-peoples-right-access-medical-treatment-prison](https://www.aclu.org/press-releases/federal-court-upholds-transgender-peoples-right-access-medical-treatment-prison); Inside Time, “Trans Trouble”, 15 January 2024, [insidetime.org/mailbag/trans-trouble](https://insidetime.org/mailbag/trans-trouble). See also Inter-American Court of Human Rights (IACtHR), *Advisory Opinion: Differentiated Approaches With Respect to Certain Groups of persons Deprived of Liberty*, OC-29/22, 30 May 2022, para 233.

26. Sarah Lambie, Architectural Review: “Outrage: trans incarceration”, 29 March 2022, [www.architectural-review.com/essays/outrage/outrage-trans-incarceration](https://www.architectural-review.com/essays/outrage/outrage-trans-incarceration).

27. United Nations, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, Rule 2(1) and (2), 8 January 2016.

28. United Nations, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, Preliminary Observation 9, December 2010.

29. The Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, 9 (A) and (C); The Yogyakarta Principles Plus 10, principle 9 (H) and (I).

appear protective but in fact operate to the detriment of individuals, singling out isolation/administrative segregation as an inappropriate way of managing the safety of LGBTQIA people. The SPT concludes that:

→ Decisions on the housing of transgender persons should be done on a *case-by-case basis*, “considering seriously their views as to their safety and, *to the extent possible, with their informed consent*”.

→ The “specificity of the needs of transgender persons makes the *involvement of transgender activists and experts particularly desirable*”.<sup>30</sup>

**3. The Inter-American Court of Human Rights** published an Advisory Opinion on “Differentiated Approaches With Respect to Certain Groups of Persons Deprived of Liberty” in 2022. In this document the Court sets out that the recognition of gender identity is vitally important for the full enjoyment of other rights and that lack of recognition has “special consequences” for those deprived of their liberty. It further recommends that states:

→ Consider the “*particularities of each prisoner and his or her specific risk in the special context of each State*”, while “*always taking into account as principal guidelines respect for gender identity and expression*”.

→ Avoid any situation that “produces problems of coexistence”, ensure the protection against violence.

→ Ensure the *participation of the person involved*.<sup>31</sup>

**4. The Council of Europe’s Committee for the Prevention of Torture (CPT)** has developed its position through country visits, and has recommended that trans people:

→ “should be accommodated in the prison establishment or 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. Further, the allocation of a person should always be based on a *needs and risk assessment*. If accommodated in a separate section, they should be offered activities and time with the other prisoners of the gender with which they self-identify.”<sup>32</sup>

30. SPT 2016, paras 64 and 76.

31. IACTHR (2022) paragraphs 238 and 247.

32. European Committee for the Prevention of Torture (CPT), *Report on the visit to Portugal 23 May – 30 June 2022*, (2022) CPT/Inf/(2023) 35, para 99.



# Approaches to placement

There are a range of approaches to the placement of trans and non-binary people in different prison systems, some underpinned by specific policy frameworks but a large majority without. Having legal recognition of gender identity is a key factor in influencing placement decisions in systems that are governed by policy and in those that are not, but there are other factors and criteria that inform these decisions.

Research carried out suggests that where prison systems have no policy on placement, trans and non-binary people are most likely to be held in a facility that does not correspond to their gender identity or separated from the main prison population. However, the existence of a policy framework relating to placement does not guarantee placement in line with gender identity.

In different regions, trans and LGBTQI+ groups have been instrumental in pushing for policies and practical approaches that better uphold the rights of transgender and non-binary people in prisons, including in relation to placement. Many have relied on the intervention of international bodies to underscore their concerns about the inadequacies of policy and practice relating to trans people in prison.<sup>33</sup> International standards and the recommendations of expert bodies have also been crucial for policy development. For example, in Brazil, the recent adoption of policy that introduces the possibility for trans people without legal gender recognition to express a preference on placement relies on both the Yogyakarta Principles and the opinion of the Inter-American Court of Human Rights.<sup>34</sup>

However, some processes have been retrogressive in terms of rights protections, enshrining new hurdles and potentially contributing to further stigmatisation of trans people in prisons, and a number of anti-trans groups have sought to give visibility to the issue of prison placement in making wider arguments against trans self-identification.

It is important to note that policy and developed practice are predominantly focused on the placement of trans women. Few policies explicitly include non-binary identities within their scope,<sup>35</sup> except for Canada's policy framework on "gender diverse offenders". In New South Wales, Australia, the placement policy includes both transgender and intersex people but not non-binary people. PRI found that non-binary identities are even less understood than trans identities and therefore even less likely to be supported through effective policy, even where a state has a policy for trans people.

## Approaches to placement: outcomes

### For trans and non-binary people WITHOUT legal recognition of their gender

The most common placement outcomes are:

#### 1. Unidentified

The trans or non-binary person conceals their identity – due to concerns for their safety or treatment – and as a result is housed among people who share their legal gender rather than their self-identified gender. This is particularly likely to be the case in prison systems that operate on discretion or informal criteria, but also occurs in prisons with policies that do not effectively protect the rights of trans people.

#### 2. Held in a facility that corresponds to their legal gender rather than their self-identified gender but in one of the following ways:

- Held in solitary confinement, often on the grounds of protection.<sup>36</sup>
- Living openly, sometimes among a protective group, but subject to harassment and abuse.

<sup>33</sup> Including OTrans in Argentina, Mermaids and Bent Bars in England and Wales, Scottish Trans in Scotland.

<sup>34</sup> Conselho Nacional de Justica (Brazil), Resolucao 366 2021, Article 7; and CNJ Resolucao 348/2020.

<sup>35</sup> For example, the policy adopted by the Scottish Prison Service, [www.sps.gov.uk/about-us/our-latest-news/policy-management-transgender-people-custody](http://www.sps.gov.uk/about-us/our-latest-news/policy-management-transgender-people-custody), 5 December 2023.

<sup>36</sup> For example, in Zambia (PRI research) and California, see The Real News Network, 2023.

### 3. In a separate facility away from the main population

– sometimes held together with other trans, LGBTQI+ or other groups of “vulnerable” prisoners, sometimes in a separate wing that may or may not be attached to the prison that corresponds to their gender identity.<sup>37</sup>

### 4. In a facility that corresponds to their assumed gender identity

– in a few instances (eg Canada and Catalonia) policies expressly facilitate placement decisions to be made regardless of legal gender recognition. In a larger number of states, this is a possible outcome of case-by-case decision making processes.

### For trans and non-binary people WITH legal recognition of their gender

In some countries and states, including Canada, Catalonia, California, New South Wales, New Zealand, Tasmania, Scotland and Switzerland, trans people with legal recognition of their gender identity are supposed to be held in prisons that correspond to their gender identity, with range of processes that in most cases require prior approval on an individualised basis.

In some instances, trans people with legal recognition of their gender are held separated from the main prison population, on the grounds of safety that preclude them mixing with cisgender prisoners. For example, a dedicated wing was created in a women’s prison in England with a view to holding trans women with legal recognition of their gender.<sup>38</sup> Trans women on this unit have extremely limited contact with the rest of the prison.<sup>39</sup> Also in Thailand, a Standard Operating Procedure (SOP) requires trans people to be separated and this entails trans people being assigned work that allows prison staff to be in close proximity to reduce risks of harm, and at night they are required to sleep at the infirmary or held in a separate cell.<sup>40</sup>

In others, prison authorities can override placement on the basis of legally recognised gender. In **one jurisdiction in Australasia** in a small number of cases trans women have been held in men’s prisons on the basis of a prison management assessment of risk and considerations of safety and good order.

### Different outcomes for trans men and trans women

Approaches to placement – through policy or practice – lead to different outcomes for trans women and trans men in prisons.

In **Turkey**, trans women whose official identification matches their gender identity are placed in women’s prisons; trans men in the same situation are held in solitary confinement in men’s prisons.

In **Bolivia**, trans men in prison are assigned on basis of sex assigned at birth but trans women are allocated initially according to sex assigned at birth but may be transferred to female facilities or different male facilities that pose less risk to their wellbeing.

In **New South Wales**, PRI was told that trans men are happy to be housed in women’s prisons, and do not request transfers as is the case for many trans women held in men’s prisons.

### Approaches to placement: criteria and exclusions

There are many formal and informal criteria used for decision-making on where to place trans and non-binary people, ranging from blanket rules to case-by-case decisions with tightly worded criteria. Legal gender recognition is only one of a range of criteria to inform decision-making.

Where there is no written policy, any decisions on placement are likely to be discretionary or ad hoc, taken by an individual prison officer or manager and largely based on legal gender marker or anatomy and informed by how prison staff view the person which may be different to how the person would identify themselves. As noted, this often also results in trans and non-binary people hiding their identities to avoid being subjected to harsh treatment or prejudice.<sup>41</sup>

Some policy and practice is based on a presumption *against* placement in line with gender identity (unless legally recognised), but with criteria where it may be considered. An increasing number of policies are based on a presumption *in favour* of placement in line with gender identity (even if not legally recognised) and/or individual preference, but these are few in number. These have a range of grounds for exclusion and/or criteria that guide decisions.

37. For example, in Jamaica (The Gleaner, “Gay Prisoners Not Denied Access, Says Warder”, 6 February 2019, [jamaica-gleaner.com/article/lead-stories/20190206/gay-prisoners-not-denied-access-says-warder](http://jamaica-gleaner.com/article/lead-stories/20190206/gay-prisoners-not-denied-access-says-warder); Argentina (see Procuracion Penitenciaria de la Nacion 2022, p.355); New Jersey (The Appeal, “New Jersey Rolls Back Protections for Trans Prisoners”, 17 January 2023, [theappeal.org/new-jersey-transgender-prisoner-policy-demi-minor/](http://theappeal.org/new-jersey-transgender-prisoner-policy-demi-minor/)).

38. BBC, “First UK transgender unit to open”, 3 March 2019, [www.bbc.co.uk/news/uk-47434730](http://www.bbc.co.uk/news/uk-47434730).

39. HM Inspectorate of Prisons, *Report on an unannounced inspection of HMP & YO1 Downview*, 12–23 July 2021 [www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2021/10/Downview-web-2021.pdf](http://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2021/10/Downview-web-2021.pdf).

40. Interview with PRI with prison practitioner.

41. Defensoria del Pueblo (Peru) 2023, p.18.

### Focus on policies with a presumption in favour of individual preference

Under **Catalonia's** 2019 policy, a trans person can request transfer to a prison that corresponds to their gender identity and may do so without the need for any psychological or psychosocial report. Although the final decision remains with the Department of Justice, this eliminates a barrier that was viewed as pathologizing trans identity.<sup>42</sup>

In **Switzerland**, respect for gender self-determination is the “overarching principle that should govern their handling and care [...] this does not mean that decisions shall be made solely based on this principle, but that gender self-determination should serve as fundamental guidance and inform all decisions to ensure the respect of the detainees’ right to dignity.”<sup>43</sup>

In **Canada**, staff must ensure that a newly sentenced gender diverse person is provided with an opportunity to indicate if they have a preferred institution type prior to admission. This triggers a process to identify whether the correctional services have sufficient information to honour this preference or not, and there are clear criteria to consider in assessing the individual’s risks and needs.<sup>44</sup>

In **California**, a recently revised law specifies that an individual who is incarcerated who is transgender, non-binary or intersex, *regardless of anatomy*, shall “be housed at a correctional facility designated for men or women based on the individual’s preference”. The law allows prison authorities to deny their request on the basis of management or security concerns, but they must explain this in writing in advance of denying the request. The law also includes express prohibition of discrimination in denying requests, specifying the person’s anatomy or physical characteristics as one of these prohibited grounds.<sup>45</sup>

There are a wide range of criteria and exclusions used in assessing where to place an individual, and/or to exclude the possibility of placement in line with gender identity. These criteria include:

#### Physical considerations and appearance

Most commonly, these include the consideration of the person’s genitals and/or whether the individual has medically and surgically transitioned.<sup>46</sup> In England and Wales, criteria relating to genitalia are specifically

directed at trans women<sup>47</sup> and in New Jersey a recent law change introduced “reproductive considerations” as a specific factor that can override placement.<sup>48</sup>

#### Security and risks

All of the policies reviewed include exclusion criteria or allow an override to a presumption of placement in line with individual preference on the basis of risk or security. Some of these include risk to the transgender person, but a greater emphasis appears to be placed on the potential risk posed by the transgender person. For example, in Canada, “health and safety risks” are assessed through a decision-making guide<sup>49</sup> and in Scotland a 2023 policy introduces a risk-based exception to placement in a prison that aligns with a transgender person’s gender identity, and operational guidance specifies risks center around any posed to the safety of the person in question or other people detained in the ‘men’s or women’s estate’.<sup>50</sup>

#### The nature of the crime and/or previous convictions

In England and Wales, the policy includes an extensive list of offences (if convicted or currently charged) that preclude placement specifically of trans women in the women’s estate unless authorised by the director general of the prison service and Secretary of State for Justice.<sup>51</sup> These include sexual offences, but also a non-exhaustive list of violent crimes. In Scotland the revised policy specifically precludes placing a transgender woman who is or has previously been convicted, or who is remanded before trial or awaiting sentence, for a list of crimes where the victim was female, in an annex titled “Violence against Women”, and is still deemed a risk to women.<sup>52</sup>

### Approaches to placement: process

#### Case conferences and classification committees

Prison authorities in Canada, England and Wales and Scotland have established a “case conference” process to bring together a range of authorities from different disciplines to take decisions on placement.<sup>53</sup> The crucial

42. Gayles TV, “Trans in Prison Without Pathologisation”, 16 November 2019 [gayles.tv/en/prison-mujeres-trans-catalunya](https://www.gayles.tv/en/prison-mujeres-trans-catalunya).

43. Europris, 270223: Policies for Transgender+ Prisoners: Question Submitted by Irish Prison Service on 27/02/2023, [www.europris.org/epis/kms/?detail=501](https://www.europris.org/epis/kms/?detail=501).

44. Correctional Service Canada, Commissioner’s Directive 100: Gender Diverse Offenders, in effect 2022-05-09 [www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/100.html#1](https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/100.html#1) para.31.

45. National Institute of Corrections (USA), The Transgender Respect, Agency and Dignity Act (Senate Bill 132), Section 4; 2606 [nicic.gov/weblink/transgender-respect-agency-and-dignity-act-sb-132](https://www.nicic.gov/weblink/transgender-respect-agency-and-dignity-act-sb-132).

46. For example: Mexico (WOLA et al, Trans Women Deprived of Liberty: Invisible Stories Behind Bars [2020] [www.wola.org/wp-content/uploads/2020/04/Trans-Women-Deprived-of-Liberty.-Invisible-Stories-Behind-Bars\\_Final-3.pdf](https://www.wola.org/wp-content/uploads/2020/04/Trans-Women-Deprived-of-Liberty.-Invisible-Stories-Behind-Bars_Final-3.pdf) p.13).

47. In England and Wales, there is a “presumption” that a transgender woman with “birth genitalia” should not be held in the women’s estate.

48. The Appeal, 17 January 2023.

49. Correctional Service Canada, 2022.

50. Scottish Prison Service (SPS), SPS Policy for the Management of Transgender People in Custody: Operational Guidance, February 2024.

51. Ministry of Justice and HM Prison and Probation Service, *The Care and Management of Individuals who are Transgender*, 11 January 2024. See Annex D – Sexual or Violent Offences, [assets.publishing.service.gov.uk/media/659e906fe96df5000df843e2/transgender-pf.pdf](https://assets.publishing.service.gov.uk/media/659e906fe96df5000df843e2/transgender-pf.pdf).

52. Scottish Prison Service (SPS), *SPS Policy for the Management of Transgender People in Custody*, December 2023, Annex 1: Violence against Women and Girls criteria.

53. In England and Wales, the policy envisages two different case boards – local and “complex” – with different memberships and a flow chart that aims to clarify what appears to be a very complicated system for determining scope and responsibilities.

role of a “technical and multidisciplinary professional team” in taking decisions on placement is underscored by the Interamerican Court of Human Rights.<sup>54</sup> In California, existing classification processes are used to inform decisions on prison placement of trans persons.<sup>55</sup> In New South Wales, case conferences are led by health staff but carried out jointly with the prison service classification and placement team, who make a recommendation to the commissioner.<sup>56</sup>

In Scotland, the case conference is explicitly required to ensure the transgender person can contribute to decisions about how they are supported and managed in prison, and according to the policy their role should include having the opportunity to “input into the agenda set for each case conference.”<sup>57</sup> In Canada, the person should be “consulted and involved” in the decision-making process<sup>58</sup>

### Separating initial and longer-term decisions

Some of the policies examined have separate processes for initial decisions on placement at the point of admission to prison and for longer term decisions, with different criteria for each. In Scotland, a lower bar is set for decisions on admission – for which should be “considered on an individual basis *as far as possible*” [italics for emphasis] and that because there may be “unacceptable risks that cannot be mitigated or this risk is as yet unknown”, transgender people may initially be located in an establishment that aligns with their sex at birth. In Israel, all transgender people “will sleep in separation, for the purpose of ensuring their safety” from “initial reception and up to 5 days from the date of their arrest”.<sup>59</sup>

The time allowed before a case conference or placement decision is made varies from 72 hours in Scotland, to 14 days for a local case board in England and Wales, or monthly for complex case boards. In Canada, case conferences should be held “without delay”.<sup>60</sup>

In Brazil, the policy explicitly allows the person to request a change of placement based on their preference at any point during their trial or sentence.<sup>61</sup>

### Decision-making responsibilities

Under most placement policies, prison management will be responsible for taking the decision on placement, informed by the deliberation of the case conference if this exists. More complex decisions will often be referred to the head of the prison administration. In New South Wales, Australia, if there are concerns about risks or contentious elements to a decision (eg a high profile individual), further evidence (eg from a psychologist) may be sought to inform a decision.<sup>62</sup> In a new and highly unusual development, the England and Wales policy expressly requires the authorisation by the Secretary of State for Justice of any decision of a case board to place a transgender woman with “birth genitalia and/or any sexual or violent conviction or current charge” in the women’s estate.

### Approaches to placement: impact, challenge and review

The policy approaches described in this guide must be evaluated for their ability to ensure timely placement decisions are made and that these uphold the rights and preferences of trans persons. It is crucial that they are able to account for their effectiveness in achieving these aims, at a minimum publishing data on the outcome of case conferences to include whether these are held on time, and many individual preferences were approved and how many rejected.<sup>63</sup>

In California, if a person disagrees with the decision taken by the classification committee, they have 60 days to file a grievance, but this process has been cited as inadequate as an enforcement mechanism by those involved in the process.<sup>64</sup> In Canada, the person must be given the opportunity to make written representations if the request for a transfer is turned down, before the decision is finalised. In Thailand, where trans persons are detained together (separated), a request can be made to be detained in the general prison population, however PRI was told that there have been no examples of this being allowed.

54. IACtHR 2022, para 248.

55. PRI interview with representative from Corrective Services New South Wales, 10 January 2024. See also California Department of Corrections and Rehabilitation, “How are gender-based housing requests evaluated?” at [www.cdcr.ca.gov/prea/sb-132-faqs](http://www.cdcr.ca.gov/prea/sb-132-faqs).

56. PRI interview with representative from Corrective Services New South Wales, 10 January 2024.

57. Scottish Prison Service 2023, pp2-3.

58. Correctional Services Canada 2022, paragraph 47.

59. [www.maavarim.org/\\_files/ugd/140814\\_5dfbd247de9e43dba632b466bd8f8fe1.pdf](http://www.maavarim.org/_files/ugd/140814_5dfbd247de9e43dba632b466bd8f8fe1.pdf).

60. Correctional Services Canada 2022, paragraph 45 and Annex B.

61. Conselho Nacional de Justica (Brazil), Resolucao 366 2021, Article 7.

62. PRI interview with representative from Corrective Services New South Wales, 10 January 2024.

63. See for example the data produced by the California Department of Corrections and Rehabilitation which shows that of 358 people housed in male institutions requesting to be held in female institutions, 42 were approved for transfer, 37 were denied, and 91 changed their minds. Of the 21 individuals housed in female institutions requesting to be held in men’s institutions, 3 were approved for transfer, and none were turned down [www.cdcr.ca.gov/prea/sb-132-faqs](http://www.cdcr.ca.gov/prea/sb-132-faqs).

64. The Real News, 2023.

The Inter-American Court's Advisory Opinion envisages a role for judges who oversee sentences in monitoring the recommendations of technical bodies that decide on placement, but we are not aware of whether any judges have taken this responsibility forward.<sup>65</sup>

Most of the policies based on individual case decisions are relatively new and there is limited evidence of how they work in practice, but where they have been viewed positively by those affected, this is because of their ability to understand the situation of an individual trans person, and because the process is participatory and seen to be fair (for example, but providing advance disclosure of evidence used in making a decision). Where they have been seen as less useful, this is because they are seen as setting out expectations of the prisoner and not what the prison should do to help, or because they ignore the prisoner's input. As one person who contributed to research by Bent Bars said, "I found that all this meeting does is cover the prison manager from legal repercussions."<sup>66</sup>

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<sup>65</sup>. IACtHR 2022 para 248.

<sup>66</sup>. Bent Bars, *Trans voices on Trans Prison Policy: a report on experiences of trans and non-binary people in prisons in England, Wales and Scotland*, October 2022. [static1.squarespace.com/static/632cd0d1baa2223bff9113e0/t/635c27ea7d1fe062f065509d/1666983916060/BBProject-trans-voice-on-trans-policy-2022.pdf](https://static1.squarespace.com/static/632cd0d1baa2223bff9113e0/t/635c27ea7d1fe062f065509d/1666983916060/BBProject-trans-voice-on-trans-policy-2022.pdf).

# A framework for rights-based approaches to placement

The most effective way of upholding the rights of trans people and protecting them from violence and abuse in prison will vary in different contexts: there is no single policy approach that will work across all prison contexts, and trans advocacy groups and individuals may have different views on what is most likely to uphold their rights in their particular national context.

Existing weaknesses in prison management, culture and conditions – such as overcrowding, corruption, inadequate resourcing and staff training, systems of self-governance – will all be relevant in considering the best way forward, but must not be an excuse to de-prioritise addressing the heightened risks faced by trans people in prisons. It is essential that prison administrations move away from informal and discretionary approaches and develop policy frameworks that are underpinned by human rights.

The wider legal framework for the recognition of gender identity will also have a significant bearing on policy development, though our analysis of existing policies demonstrates that policies based on individualised decision-making and a presumption in favour of placement with gender identity can and have been adopted in countries that do not have gender self-identification laws.

## Human rights principles

The following interconnected nine principles should underpin the development of policy and practical approaches to the placement of trans and non-binary people in prisons. They derive from international human rights standards relevant to the treatment of people deprived of liberty and the rights of trans and non-binary people.

## 01

### Principle: Self-determination and equality before the law

#### Recommendation:

**Adopt policies on the placement of individual trans and non-binary people in prisons based on a presumption in favour of meeting individual preferences in accordance with gender identity.**

*“Faced with the challenges of placement, many professionals wonder at what stage a person should be considered transgender and receive special care. However, trans identity is a self-determination process, which is not systematically accompanied by physical transformations or a change in civil status. Any transgender person who identifies as a woman is a woman and must be recognised as such. Any transgender person who identifies as a man is a man and must be recognised as such as well.”*

Contrôle général des lieux de privation de liberté, France<sup>67</sup>

Trans and non-binary people in prison must be supported to live safely in their gender identity when in prison. As well as being able to access personal items they need to express their gender, and to be addressed with preferred pronouns and names, trans and non-binary people must be able to express their individual preference about where they are housed, based on their own gender identity and expression as well as personal experiences of safety.

This must be facilitated at the point of imprisonment and at any point during the sentence. The focus in international prison standards on taking account of individual needs, particularly of the most vulnerable, including the UN Nelson Mandela Rules (Rule 2) require placement policies to be based on a presumption in favour of meeting individual preference in accordance with gender identity.

67. Controleur General des Lieux de Privation de Liberte (CGLPL France), *Opinion of 25 May 2021 on the treatment of transgender persons in places of deprivation of liberty* [unofficial translation] [www.cglpl.fr/wp-content/uploads/2022/08/Opinion-NPM-France-Transgender\\_EN-version.pdf](http://www.cglpl.fr/wp-content/uploads/2022/08/Opinion-NPM-France-Transgender_EN-version.pdf).

## 02

**Principle: State protection and the prohibition of torture and ill treatment****Recommendation:**

**Take measures that improve the conditions of detention for trans and non-binary people, and to protect them from the specific harms and heightened risks that they face.**

*“In [the state of] Pará, we found that the men’s unit of the prison uses containers in its structure to house the LGBTI+ population: real “sardine cans” which accumulate humidity, cold, heat, everything, always in excess. The prison structure is also poorly ventilated and excessively hot. To make matters worse, prisoners are not allowed to use fans. In this sense, there are reports of violence inflicted by the prison police officers [policias penais] who use pepper spray and close the containers with*

*the so-called “chapôes” [colloquial: doors with no holes or openings] of the cells, which turns the space into something like a giant oven, constituting physical and psychological torture”.*

Brazilian National Preventive Mechanism<sup>68</sup>

When the state detains someone, it becomes responsible for their safety and to protect them from harm, violence and discrimination, whether committed by officials or other prisoners.<sup>69</sup> Conditions of detention must be compatible with human dignity and not cause suffering and humiliation that are above and beyond what is inherent in detention. The obligation to prohibit torture, inhuman or degrading treatment requires states to put in place a legislative and regulatory of protection and to take operational measures to protect specific individuals from such treatment.<sup>70</sup> This gives a firm foundation for the expectation that states to adopt policies and practices aimed at protecting trans and non-binary people in prison, given the heightened risks and evidence of systematic ill treatment they face.

## 03

**Principle: Participation – “nothing about us without us”****Recommendations:**

**Ensure that trans and non-binary people are able to participate meaningfully in decisions made about them at both an individual and policy level.**

**Ensure that the views and experiences of trans and non-binary people inform policy development and wider measures including training and sensitisation of staff.**

Trans advocacy groups in different country and prison contexts may have different views on what is most desirable – including whether separate units for trans and/or LGBTQI+ people are preferable in highly insecure settings where being part of a visible group may be a protective factor – and individual trans or non-binary people in prison will have a personal view of their own placement. Centring the diverse views of those who will be directly affected by the development of placement policies is crucial.

Participation and active citizenship programmes build trust and confidence in prison administrations and are crucial to ensuring attention to the rights of marginalised groups including those of diverse gender identities, wherever they are housed. Trans and non-binary people must be able to participate meaningfully in placement decisions, and to do so they must be fully informed of the safety and general living conditions in the areas under consideration.<sup>71</sup> Mutual support initiatives led by trans and non-binary groups should be encouraged, and their views should inform policy development and wider measures such as training and sensitisation of staff, as well as evaluation of their effectiveness.<sup>72</sup>

**In practice**

The “Asociacion ‘Virgen de la Puerta’” is a group established by trans women held in a men’s prison in Lima, Peru. It promotes human rights and raises awareness of gender identity and sexual orientation issues. The group has been formally recognised by the prison authorities, and is supported by health services in the prison, who provide group therapy and other sessions.

<sup>68</sup>. MNCPT (Brasil) 2023, pp52–53.

<sup>69</sup>. Nelson Mandela Rules, Rule 1; Yogyakarta+10 Principle 30.

<sup>70</sup>. European Court of Human Rights, X and Others v. Bulgaria [GC], 2021, para 178; IACtHR 2022, chapter VII.

<sup>71</sup>. UNODC et al, 2022, p.4.

<sup>72</sup>. SPT 2016, para 71.

## 04

### **Principle: Non-discrimination and dignity**

#### **Recommendation:**

**Placement policies must seek to eliminate discrimination against trans and non-binary people, recognising their diverse and intersecting identities.**

**Placement policies and decision-making criteria must be subject to rigorous tests to ensure they do not introduce requirements that are discriminatory, or create additional disadvantages.**

*“This new genital status requirement places undue focus on trans people’s bodies, makes an unfounded association between genitals and risk, and discriminates against people who are awaiting or unable to access health care. In our view, the genital surgery requirement in the new policy is potentially in breach of international human rights and equality laws.”*

Professor Sarah Lambie, Bent Bars<sup>73</sup>

Governments must take concerted action to eliminate discrimination against trans and non-binary people in prisons, recognising also the multiple and intersecting forms of discrimination that they face. This requires a focus on recognising the inherent dignity and value of trans and non-binary people, as is expected of the treatment of all people in prison.<sup>74</sup> Rules and policies must be able to support the particular needs of trans women, trans men, and non-binary people, who may face different risks and whose needs may change over time. Placement criteria and any exceptions must pass a strict test to ensure they are not discriminatory (Principle 6).

There is also a risk that approaches to placement may create additional disadvantages, for example in access to support networks, work, education and rehabilitation services. This is particularly relevant to the creation of special units, which will likely lead to many individuals being held at significant distance from home and support networks.

## 05

### **Principle: Do no harm**

#### **Recommendation:**

**The privacy and confidentiality of trans and non-binary identities must be guaranteed through policy and practice.**

**Placement decision-making processes should consider risks to the individual and make any necessary mitigations proactively.**

**Restrictive measures that set out to “protect” trans and non-binary individuals must be phased out and alternatives designed.**

*“States and other stakeholders must respect the overriding principle to do no harm in every action conducive to human rights implementation. [There are] three factors interact in creating a risk of potential violence and discrimination based on sexual orientation and gender identity: criminalization, stigmatization and negation”*

UN Independent Expert on Sexual Orientation and Gender Identity<sup>75</sup>

All policies and practices relating to the placement of trans and non-binary people in prison must be tested against the principle of “do no harm”. Harm includes risks of violence or harassment from other prisoners, staff, as well as risks to their health and wellbeing. It also means that processes for requesting and taking up placement in facilities that correspond to a person’s gender identity must be rigorous in guaranteeing privacy, and ensuring against disclosure of their identity. Failure to do this can put the person at serious risk of harm. This requires a proactive approach to mitigating the risks of disclosure and harm, and that measures are tailored to the specifics of individuals and the circumstances of their placement.

“Do no harm” also precludes the use of restrictive measures such as solitary confinement or “protective custody” which may cause lasting harm to the individual’s mental health and wellbeing. Where these are seen as the only possible approach to safeguarding an individual’s safety, this should trigger management responses to design alternatives.

<sup>73</sup> Bent Bars, *Submission to the UN IESOGI*, March 2023, para.28.

<sup>74</sup> Nelson Mandela Rules, Rule 1.

<sup>75</sup> UN Independent Expert on SOGI, *Annual Report: Data Collection and Management*, A/HRC/41/45, 14 May 2019.



## 06

**Principle: Exceptions and risk****Recommendations:**

**Test any exceptions to placement in line with gender identity against the principles of proportionality, lawfulness, accountability, necessity.**

**Remove blanket exceptions from policy criteria and ensure all decision-making is on a case-by-case basis.**

**Ensure appropriate measures to manage risks do not undermine the overarching policy aim of upholding the rights of trans prisoners.**

*"I think that [the case board process for taking placement decisions] is important so that management and healthcare etc. can see where transgender people are on their journey, rules and regulations can be discussed, and both parties can talk about what is required and how to achieve it. I have been told of my meetings that they are still learning also, so having the case board facilitates this and more."*

Trans respondent to Bent Bars<sup>76</sup>

Existing policies on placement contain a wide range of criteria for and exceptions to placement in line with gender identity. Where approaches to placement are not written into policy, informal criteria and exceptions may still govern decision-making. To be consistent with human rights, any exceptions to the presumption in favour of placement in line with gender identity or individual preference (Principle 1) must be made on an individual basis and must be proportionate, lawful,

accountable, necessary and non-discriminatory. Blanket rules against placement according to gender identity on the basis of an individual's genitalia, or excessively broad exceptions based on offending history are incompatible with the principle of self-determination, and are potentially discriminatory (Principle 2).

The extent to which trans issues in prisons have, in some countries, been framed as a question of managing "risk" rather than upholding rights must be questioned. The fact that an increasing number of countries are adopting and implementing placement policies that expressly set out to ensure the self-determination of trans people held in prison is evidence that this can be done. The management of dynamic and diverse forms of risk is a day to day part of the effective management of any prison system, and singling out trans prisoners – predominately trans women – as the subject of particular focus cannot be justified on any evidential basis. Such arguments are often underpinned by stigmatised or stereotyped presumptions about trans people, and rarely engage with the extensive evidence of the risks trans people themselves face in prison and the significant impact that the inability to live in their identity has on their health, wellbeing, safety and indeed lives.

The Council of Europe has stipulated in a recommendation that "risk assessments should be conducted in an evidence-based, structured manner, incorporating appropriate validated tools and professional decision-making. Those persons undertaking risk assessments should be aware of and state clearly the limitations of assessing violence risk and of predicting future behaviour, particularly in the long term."<sup>77</sup>

## 07

**Principle: Enforceability****Recommendations:**

**Establish regular monitoring of the enforcement of placement policies.**

**Consider inviting the participation of trans advocates in overseeing policy implementation and publish data for wider scrutiny.**

*"In California, our transgender housing law prohibits the state prison system for denying trans people housing placement based on 'any discriminatory reason', and yet, when I review denials or ask prison officials why specifically someone got denied or why specific factors in general can lead to denials, state prison officials can't provide any information as to why or how they deny individuals. Our coalition of advocates is very concerned about who's getting denied and the rates at which Black and brown trans women in particular are getting denied or are facing excessive delays in being reviewed. For instance, if the state continues at its current rate of*

<sup>76</sup>. Bent Bars 2022, p.14.

<sup>77</sup>. Council of Europe recommendation CM/Rec(2014)3 of the Committee of Ministers to member States concerning dangerous offenders.

*reviewing trans housing requests, it will take 13 years to get through their current waiting list if no one else joins the list or reapplies after being denied.”*

A.D. Sean Lewis, attorney at the Prison Law Office, California<sup>78</sup>

The adoption of rights-based placement policies is insufficient without careful attention to the extent to which they are enforced. Evidence suggests that in many countries, placement policies are inadequately enforced.<sup>79</sup> This includes monitoring the extent to which trans people are in fact placed in line with their gender identity and individual preference, how long it takes for decisions to be reached, what the grounds are for denial of requests, and whether there are any trends

or patterns that would evidence discrimination in the application of the policy. Existing prison population datasets will likely be unable to provide sufficiently detailed insight into the enforcement of placement policies, and so prison administrations must adopt a tailored approach to monitoring the enforcement of their own policies.<sup>80</sup> Inviting the participation of trans advocates in such processes would be good practice (see Principle 3), as would publishing data on the implementation of placement policies so it can contribute to wider awareness raising and scrutiny by wider criminal justice stakeholders, parliamentarians, academics and others.

## 08

### Principle: Wider measures

#### Recommendation:

**Make comprehensive efforts to ensure the safety of trans and non-binary people in prison systems, through identifying their needs, providing staff training and awareness raising and providing gender-affirming support.**

A policy on placement must go hand-in-hand with wider measures aimed at addressing violence, harassment and abuse against trans prisoners as well as their ability to live in their gender identity.

Actions to address any situation where trans people are unable to live safely in prison in their gender identity without creating segregated spaces or concealing their identity must be included within national prison safety strategies. Where the situation of trans and non-binary people in prison systems is unknown or little understood, prison systems should conduct or commission research to develop a detailed understanding of the characteristics, backgrounds and situation of trans and non-binary people, with a view to improving support for their needs.<sup>81</sup> Any such research must be conducted in line with ethical research standards, to include safeguarding confidentiality.<sup>82</sup>

Staff training is crucial to tackle prejudice and stereotypes and raise awareness of the rights of trans and non-binary people.<sup>83</sup> Prison managers should model and communicate their high expectations of behaviour by staff and other prisoners towards trans and non-binary individuals, and ensure staff understand their responsibility to challenge transphobic abuse. Where placement policies are adopted, they could include the requirement for staff to sign an acknowledgment that they have read the policy and will implement it.<sup>84</sup>

Support to meet the needs of trans and non-binary people in prison (including their ability to maintain gender expression and access gender-affirming healthcare) are crucial and must be easily accessible. Barriers in access, whether due to refusal to provide or failure to advertise their availability, may lead to trans and non-binary people hiding their identities. Trans and non-binary people who wish to transition while in prison must be supported, and those who wish to change their identity documents must be able to do so without prejudice based on the fact of their imprisonment.<sup>85</sup>

<sup>78</sup> PRI correspondence with A.D. Sean Lewis, 23 February 2024.

<sup>79</sup> NBC News, “Trans, imprisoned and trapped”, 26 February 2020, [www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-putting-many-n1142436](http://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-putting-many-n1142436). See also Bent Bars 2022.

<sup>80</sup> For example, California Department of Corrections and Rehabilitation, SB132: Implementation Review Report November 2022 [www.cdcr.ca.gov/prea/wp-content/uploads/sites/186/2023/03/Final-SB132-CDCR-Assessment-Report\\_ADA.pdf](http://www.cdcr.ca.gov/prea/wp-content/uploads/sites/186/2023/03/Final-SB132-CDCR-Assessment-Report_ADA.pdf).

<sup>81</sup> For example: Correctional Service Canada, *Research Report: Examination of Gender Diverse Offenders*, (2022) No. R-442.

<sup>82</sup> See for example, Irish Penal Reform Trust, *Out on the Inside: the Rights, Experiences, and Needs of LGBT People in Prison* (2016) p9-10.

<sup>83</sup> CGLPL France 2022 para 1.3; SPT 2016 paragraph 79. See also Yogyakarta Principles, 9G; UNODC 2009, p 113 onwards.

<sup>84</sup> ACLU New Jersey, *Settlement of NJ Civil Rights Suit*, 29 June 2021 [www.aclu-nj.org/en/press-releases/settlement-nj-civil-rights-suit-promises-necessary-reform-affirming-transgender](http://www.aclu-nj.org/en/press-releases/settlement-nj-civil-rights-suit-promises-necessary-reform-affirming-transgender).

<sup>85</sup> Delaware Online, “Trans inmate first to begin hormones in prison” 27 May 2016, [eu.delawareonline.com/story/life/2016/05/27/transgender-inmate-first-begin-hormones-delaware-prison/83831252](http://eu.delawareonline.com/story/life/2016/05/27/transgender-inmate-first-begin-hormones-delaware-prison/83831252).

## 09

**Principle: Monitoring and oversight****Recommendations:**

**Detention monitoring bodies, including NPMs, must consider the placement of trans people in prison within their preventive monitoring role. This should encompass contributing to rights-based policy development, commenting on policies that undermine human rights responsibilities, drawing attention to the effects of placement approaches on trans and non-binary people in prison.**

**Ensure their own ways of working are tailored to understand the unique needs and risks that trans and non-binary people in prison face.**

*“[NPMs] may need to seek out and acquire the specific knowledge needed to facilitate a better understanding of the risks faced by LGBTI persons in detention settings and of ways to address their specific needs in a sensitive manner. This may involve a need to reconsider their existing policies, practices, and tools, as well as to devise new ones” Association for the Prevention of Torture.<sup>86</sup>*

Monitoring and oversight bodies play a crucial role in upholding the rights of trans and non-binary people in prisons, through drawing attention to their situation, and scrutinising the work of prison authorities.

Working under the international human rights framework for the prevention of torture and ill-treatment of people deprived of their liberty, many National Preventive Mechanisms (NPMs) have conducted crucial work in this regard, setting out clear statements of principle for the treatment of trans and non-binary people in prison,<sup>87</sup> filling significant gaps in building up a picture of their situation and how they are failed by prison administrations,<sup>88</sup> and scrutinising the day-to-day treatment of trans people in important detail.<sup>89</sup> As noted above, some international torture prevention bodies have played a crucial role in setting out expectations for the treatment of trans and non-binary people, and some have room for improvement.<sup>90</sup>

It is crucial that all detention monitoring bodies consider the placement of trans people in prison within their role, including NPMs. In line with their roles under the Optional Protocol to the Convention against Torture (OPCAT), NPM responsibilities could include contributing to rights-based policy development, commenting on policy where this undermines human rights responsibilities, examining the implementation of placement policies and drawing attention to the effects of informal and informal placement approaches on trans and non-binary people in prison.

Detention monitoring bodies must also consider their own organisations and how they conduct their work – consulting trans groups, ensuring they are welcoming places for trans staff to work, and making sure that their methodologies are suitably tailored to the unique needs of trans and non-binary people so that they can build up a faithful picture of their experience and the risks they face.<sup>91</sup>

<sup>86</sup>. Association for the Prevention of Torture, *Towards the effective protection of LGBTI persons deprived of liberty* (2018) pp35-36.

<sup>87</sup>. CGLPL France 2022.

<sup>88</sup>. MNCPT Brazil, 2023; Defensoria del Pueblo Peru 2023.

<sup>89</sup>. Independent Monitoring Boards, *Annual Report of the IMB at HMP/YOI Downview*, 1 May 2022-30 April 2023, p.14.

<sup>90</sup>. O’Connell, et al. *The European committee for the prevention of torture and the gendered experience of imprisonment*, Crime Law and Social Change, 23 February 2021. This study noted that the situation of transgender prisoners was only covered in 2 out of 31 reports studied, and without looking at significant issues including healthcare and sanitation. When the issues were considered, this was done without a standardised approach.

<sup>91</sup>. For an extensive overview of the key considerations for NPM monitoring methodologies, see APT 2018 (Chapter II).

# Conclusion

Around the globe, prison policy and practice have a long way to go to ensure that trans people are able to live safely and in their gender identity. While there are undoubtedly some practical challenges for deciding on placement within binary prison systems, there is a clear human rights imperative and practical need to move from ad hoc decision-making to one based on evidence and best practice.

There is an increasing number of examples in national policy that have forged a path towards effectively protecting the rights of trans and non-binary people to live in line with their gender identity while in prison. The politicisation of trans issues, underpinned by hostility, prejudice and unfounded association of trans people with sexual offences, must not cloud objective, evidence-based policy making in prison systems.

In this guide we document a range of ways in which policy approaches have introduced or entrenched discriminatory requirements, and there are sometimes fine-tuned differences that tip policies from being able to protect rights to introducing requirements that may be too broad or potentially discriminatory to be justified on human rights grounds.

This set of human rights-based criteria for policy development is produced by Penal Reform International to support all efforts to strengthen policy and practical approaches, so that trans and non-binary people in prison can live in safety and in their gender identity.

**About Penal Reform International**

Penal Reform International (PRI) is a non-governmental organisation working globally to promote criminal justice systems that uphold human rights for all and do no harm. We work to make criminal justice systems non-discriminatory and protect the rights of disadvantaged people. We run practical human rights programmes and support reforms that make criminal justice fair and effective.

Registered in The Netherlands (registration no 40025979), PRI operates globally with offices in multiple locations.

[www.penalreform.org](http://www.penalreform.org)

**About TGEU (Trans Europe and Central Asia)**

TGEU is a trans-led non-profit NGO working for the rights and wellbeing of trans people since 2005. TGEU is an umbrella organisation that represents over 200 member organisations in more than 50 countries in Europe and Central Asia.

[www.tgeu.org](http://www.tgeu.org)

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