

Transgender Prisoners, Identity, and Detention: Policy Recommendations

**Human Rights Watch
March 1, 2006**

1. Terminology

Gender identity is used here to mean a person's internal, deeply felt sense of being male or female (or something other than or not entirely captured by the terms male and female). Almost all societies, moreover, define certain behaviors and qualities as "masculine" or "feminine"—including such attributes as dress, appearance, mannerisms, speech patterns, and social behavior and interactions. The way a person adopts or adapts such behaviors and qualities is usually called **gender expression**.

A **transgender** person is one whose inner gender identity (and, usually, outward gender expression) differs from the physical characteristics of their body at birth. Transgender people may or may not dress or assume traditional gender roles of the opposite sex, but for our purposes we generally mean persons who would, given the choice, describe their gender as opposite to the one they were assigned at birth. Female-to-male (FTM) transgender people were born with female bodies but have a predominantly male gender identity; male-to-female (MTF) transgender people were born with male bodies but have a predominantly female gender identity. Human Rights Watch generally uses the term **transsexual** to refer to someone who has undergone the complex of cosmetic and reconstructive procedures and hormone therapies usually known as **sex reassignment surgery** (SRS) so that his/her physical sex corresponds to his/her internal gender identity.

2. The problem: transgender people lacking safety and dignity in prisons

Transgender people have existed, under many names and cultural identities, throughout history. Their deviation from their birth gender is often apparent to others and attracts discrimination, harassment and violence in many societies. Deprived of work options, and frequently objects of fetishization, many turn to sex work. Large numbers of transgender people thus end up passing through criminal-justice systems. Statistics on transgender people are hard to come by; "No one counts trans people," one advocate told us.¹ However, a recent study of the transgender community in San Francisco found, in the course of general inquiries, that nearly 14% reported discrimination in jails or prisons.² This meant that at least one in seven—probably far more—had been incarcerated at one time, alarming because San Francisco has one of the most progressive jail systems in the country--and 14% is nearly double the average incarceration rate in the U.S.

¹ Interview with Dean Spade, Sylvia Rivera Law Project, February 2005.

² Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, The National Center for Lesbian Rights & the Transgender Law Center (2003).

The discrimination transgender people face in prison systems is more than simple inequality: it can threaten dignity, safety, bodily integrity, and even life. One FTM prisoner wrote to the ACLU in the United States that after being housed in a men's ward,

I find myself at the mercy of other prisoners. Within three months of my arrival to prison, I found myself sexually enslaved by a single domineering prisoner and forced to perform sexual favors in exchange for my "protection" due to the deprivation of reasonable safety. After requesting Protective Custody asserting claims of prison rape and sexual slavery, I was blatantly denied Protective Custody on repeated occasions and forced from one prison to the other where I was continuously raped, extorted, and sexually assaulted at the hands of other prisoners.³

In country after country, measures taken to "protect" transgender people in detention actually end up punishing them. Oya, an MTF transgender person in Turkey, told Human Rights Watch in 2003:

I spent one and one half months in the Bayrampasa Cezaevi prison, alone in a cell barely more than a meter square. I was in the men's part of the prison. ... When you enter the prison you are stripped naked and they search and search several times. You are among ten guards and you are naked. ... They treated me as if I were ridiculous—they made fun of me, looked as if I did or were something inhuman. Looking at my breasts and penis and smiling and laughing. Because I didn't want to make them feel powerful I wasn't showing my tears. ...

My cell was called Quarantine. It was locked so no one could enter. ... I wasn't allowed to share the same space with other prisoners. My room was the only one with the door always locked. I was never allowed to exercise. ... The guards told me there was work to do in the kitchen once. They took me somewhere instead, and tried to rape me. Nine guards. I fought them off, I threatened to scream. But then I had intercourse with two of them because I wanted them to be kind to me.

It was a hot summer. The cells had no toilets. And for seven days I wasn't allowed out of my cell even to the toilet. I put my piss in plastic cups they passed into the cell. I tried not to shit, because of the smell. There was no water in my cell. When I didn't go out even to wash my face it turned black because of the heat and dirt. I asked the guards why they did this to me: they said, "The prisoners are going to rape you if you go out." Then finally they relented, and locked the other prisoners in when they let me out to use the toilet.⁴

It is not enough to criticize such failures of policy and practice. States need guidance in how to treat transgender detainees in conformity with all prisoners' safety and dignity. A

³ *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners*, Stop Prisoner Rape and ACLU National Prison Project (2005), p. 4.

⁴ Human Rights Watch interview with Oya, Istanbul, September 30, 2003.

recent survey of U.S. state correctional systems showed that only six have policies specifically on the treatment of transgender prisoners.⁵ At the same time, an increasing number of countries—including many European states as well as South Africa and some Latin American countries—are developing such policies; and a growing body of both international and domestic law addresses discrimination based on gender identity and expression. This paper outlines some of the issues involved, and recommends policy guidelines.

3. State recognition of gender

Issues of treatment within the prison system are closely related to the larger question of how states recognize and regulate gender, and allow change of legal identity.

Post-operative transsexuals now have some legal support for a right to recognition of their chosen gender. In the 2002 cases of *Goodwin v United Kingdom* and *I. v United Kingdom*, the European Court of Human Rights considered the cases of two transsexual women who claimed that the U.K.'s refusal to change their legal identities and papers to match their post-operative genders constituted discrimination. Reversing a number of its previous decisions — and offering a major victory for transgender people's rights — the Court held that their right to respect for their private lives, and also their right to marry, had been violated.

The legal position of transgender people who do not wish, or are financially or physically unable, to undergo sex-reassignment surgery is more tenuous. The development of those techniques some six decades ago allowed a new approach to transgender existence: a “medical model” where being transgender became a problem that surgery could repair. This model is in many ways artificial and flawed. Not all transgender people want SRS or see physical alternation of their bodies as the “answer.” Moreover, it is arbitrary to decide that a certain complex of surgeries and therapies, by altering appearance and genitalia, alter “sex.” They do not change chromosomal sex, and are so intricate that governments draw the line in many different places to determine which parts of the procedures actually constitute a “sex change.”⁶

Whether they have had SRS or not, transgender people face myriad difficulties relating to their civic identity when they cannot change their official documents to reflect the gender they live as—affecting their ability to drive, vote, travel or rent housing, for example. If they face detention, they also face the probability that they will be housed

⁵ Interview with Dean Spade, Sylvia Rivera Law Project, January 2006. Of 29 police departments surveyed by Amnesty International in 2005, only 31% had a policy on transgender detention: See *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, Amnesty USA (2005).

⁶ One standard often applied, as in the 2003 case of *Heilig v Maryland* (Maryland Court of Appeals) is that the change be “irreversible,” although the increasing sophistication of cosmetic surgery makes this determination increasingly problematic. For a general overview of these issues, see Dean Spade, “Resisting Medicine, Re/modeling Gender,” *Berkeley Women’s Law Journal*, Vol. 18, pp. 15-37., and Riki Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (Ithaca: Firebrand, 1997), as well as Colette Chiland, *Changer de Sexe* (Paris: Editions Odile Jacob, 1997).

according to the gender on their identity papers—subjecting them to possible violence and abuse.

An increasing number of jurisdictions are moving toward the premise that gender should not be identified with genitalia (“real” or “artificial”), but rather should be legally determined primarily on the basis of how a person thinks, feels, and lives. For instance, Hungary’s Equal Treatment Act, adopted in 2003, included gender as well as sexual orientation as a protected category. It stipulated that official recognition of a change of gender require only two psychiatric evaluations determining that the person experiences and inhabits a particular gender identity, rather than surgical procedures.⁷

4. Prison Placement Practices

People who deviate from gender norms will almost always be at particular risk of violence in the context of prison cultures. As Human Rights Watch has found, “empirical data on prison sexual violence suggest that it is not a random activity, but arises from the choosing of particular victims who...are believed to be more vulnerable.”⁸

Few prison systems in the U.S. or worldwide have clearly articulated policies on how to address the needs of transgender inmates. The testimonies above illustrate the two most common responses: to house transgender prisoners with their birth gender; or to impose protective measures which almost always involve punitive isolation and deprivation of rights.

The argument usually used against housing transgender prisoners (particularly those who have not undergone SRS) with their chosen gender is that they may pose a threat to other prisoners—particularly women. While any such threat should not be discounted, neither should authorities act on the premise that sexual violence is exclusively heterosexual—denying the documented reality of rape throughout same-gender facilities. To do so ignores prison authorities’ responsibility to take effective measures to prevent rape in all situations; segregation by genital sex should not be represented as in itself sufficient. Meanwhile, many transgender prisoners stress not just the physical violence they undergo, but the assault on their dignity they experience when their names, identity and selfhood are disregarded daily in the prison system.

One response in some systems, in the U.S. and abroad, has been to segregate transgender prisoners. San Francisco presently houses transgender prisoners, as well as gay men identified as vulnerable, in separate facilities. a specific dorm—which can hold 15-20 prisoners and is reportedly rarely full--or in single-celled administrative segregation.⁹

⁷ See Judit Takacs, “How to Put Equality Into Practice” (Unpublished research paper available at <http://www.policy.hy/takacs/research-paper>) at III.2.

⁸ Human Rights Watch, *No Escape: Male Rape in United States Prisons* (2001).

⁹ Telephone interview with Alex Lee, Director of the Transgender-Intersex Justice Project, October 21, 2005. Similar policies are in place in the Alameda County jail and (until recently) at Rikers Island in New York City.

However, in other situations where such prisoners are few in number, the result has been effective isolation.¹⁰ One transgender woman in U.S. immigration detention told Human Rights Watch that when she complained of possible assault,

*They moved me to solitary confinement, lock-down for 23 hours a day. 75-80% of the people there are informants and sexual offenders who are at risk in the general population jail. ...They never let me come out for a break until late when everyone else has gone away. The phones were available from 8 am until 10 pm. They let me out after the phones shut down – midnight, 1 a.m., so I couldn't call anyone, the ombudsman, the warden, a lawyer. They said I was a security risk, and they were short-staffed, so they couldn't let me go to the law library, and so on. Immigration officers don't come to solitary because that's not where immigration cases are.*¹¹

Even in San Francisco, transgender inmates are denied opportunities, to attend school or access the drug recovery program, routinely offered to other prisoners.¹²

Given the differences in resources among detention systems, the many different situations and needs of transgender prisoners, and the multiple other factors which may impinge, a single across-the board rule would be unrealistic and probably counterproductive. Model protocols in force or being contemplated by criminal-justice systems generally emphasize the importance of *respecting a prisoner's own identification* unless there are strong countervailing reasons; of *flexibility rather than rigidity* in assessing options for placement, so as to maximally respond to individual situations and needs; and of *creating a clear procedure* to decide all individual cases.

For instance, model rules devised by the National Lawyers Guild and the San Francisco Human Rights Commission (but not yet enacted) require that “Jail staff will always address transgender inmates by the inmate’s adopted name. This is true even if the inmate has not gotten legal recognition of the adopted name. In addressing or discussing an inmate who is transgender, staff will use pronouns appropriate for that person’s gender identity.” (See attachment) They also would require that the jail:

- a) House prisoners “based on their gender identity, not their genitalia”: If the person’s legal I.D. is inconsistent with their appearance or stated identity, “jail staff will ask the inmate whether he or she is female or male, and house accordingly,” if necessary in cells for vulnerable members of their gender.
- b) Rather than place FTM individuals with women or isolate them in individual cells, house pre-operative or non-operative FTM’s in the vulnerable male section.

¹⁰ Darren Rosenblum, “Trapped’ In Sing Sing: Transgendered Prisoners Caught in the Gender Binarism,” 6 Mich. J. Gender & L. 499, 529 (2000).

¹¹ Human Rights Watch/Immigration Equality telephone interviews with Andrea (name changed at her request), December 27, 2005 and January 3, 2006.

¹² Telephone interview with Alex Lee, Director of the TGI Justice Project, October 21, 2005.

- c) Borrow or share space with other jails, if county jails are too small to accommodate separate units for vulnerable inmates.
- d) Not house inmates in solitary confinement indefinitely because of administrative convenience.
- e) Maintain the current policy of allowing transgender inmates to wear gender-appropriate clothing.¹³

5. Searches of Transgender Inmates

Searches of transgender inmates often entail unnecessary humiliation and intrusion in two respects. Although most prison regimes respect the universal norm that prisoners be searched whenever possible by a guard of the same gender, this norm is ignored with respect to transgender prisoners, who often are searched by guards of their birth gender. There is also accumulating evidence that transgender detainees are subjected to more intrusive and unnecessary searches by guards out of curiosity or animus.

Part of the problem is a lack of standards. Of 29 U.S. police departments responding to a 2005 survey by Amnesty International, only 24% had a policy regarding strip searches of transgender inmates.¹⁴ In Los Angeles, Chicago, New York, and San Antonio, the general policy was to have officers with the same *genitally determined* sex conduct searches of these inmates. Thus, a male officer would search a pre-operative transgender female inmate.

San Francisco's model protocols would require that "All searches of the transgender inmate's person will be done by two officers of the gender requested by the transgender inmate. If the inmate does not specify a preference, then the search will be done by officers of the same gender as the transgender inmate's gender presentation (e.g. a female-to-male inmate expressing no preference should be searched by a male officer."¹⁵

¹³ National Lawyers Guild & City & County of San Francisco Human Rights Commission, "Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail" (August 7, 2002). Similarly, in a 2001 case, *Synthia Kavanaugh and the Canadian Human Rights Commission v. Attorney General of Canada*, the Canadian Human Rights Tribunal ruled that the then current policy of housing pre-operative MTF prisoners in facilities with the male population was discriminatory. The court recognized that this policy failed to take into account the special vulnerability of transgender persons as a group under Section 5 of the Canadian Human Rights Act. Rather than setting a blanket policy, however, Tribunal ordered that the corrections service assess transgender prisoners' housing needs on an individual basis after consultation with a medical expert.

Similarly, the Corrective Services of Australia have a variable policy on transgender prisoners dependent on physical characteristics. In the first instance the relevant factor is what gender the prisoner most closely resembles, followed by the external genitals. These factors are subject to risk assessment for transgender inmates carried out by the Corrective Services. In all instances a transgender person is considered as an inmate with special requirements.

¹⁴ See *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, Amnesty USA (2005).

¹⁵ National Lawyers Guild & City & County of San Francisco Human Rights Commission, "Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail" (August 7, 2002).

6. Access to Medical Treatment

While some transgender people do not desire surgery or other therapeutic interventions, some find surgery and/or hormone treatments essential to having a body aligned with their identity. For people who have begun hormone therapies, being taken off them can cause physical distortion and severe psychological stress. In one case taken up by the ACLU, an MTF Virginia prisoner taken off estrogen treatments mutilated herself in over 20 attempts at self-castration. Prison officials responded, "The taxpayers of Virginia will not be expected to subsidize an elective procedure . . . In fact, to continue estrogen treatment for this inmate would perpetuate the problem, not make it better."¹⁶

Policies on allowing such medical treatment vary widely. In the U.S. the issue has been extensively litigated. In *South v. Gomez and Benson*, the Ninth Circuit Court of Appeals reaffirmed an inmate's right to continued hormone treatment.¹⁷ The Court held that the harm physical and emotional harm suffered by a prisoner when treatment was abruptly cut off amounted to cruel and unusual punishment.¹⁸

Given the different resources of prison systems, and the generally poor state of prison health care, a blanket recommendation that states provide hormone therapy or

¹⁶ Frank Green, "ACLU of Virginia Takes Inmate's Case: Transsexual Seeks Hormone Treatment," *Richmond Times-Dispatch*, June 8, 2002.

¹⁷ 211 F. 3d 1275, 2000 WL 222611 (9th Cir. (Cal.)).

¹⁸ Other decisions have generally affirmed this holding. See *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) (dealing with the Virginia case described above, and holding that a transgender prisoner whose hormone treatment was terminated had stated a valid claim that the lack of adequate treatment for her compulsion to mutilate herself after her hormone treatment was cut off could constitute deliberate indifference); *Allard v. Gomez*, 2001 WL 638413 at **1 (9th Cir. June 8, 2001) (finding a triable question of fact as to whether a transgender prisoner was denied hormone therapy based on "an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff's] medical needs"); *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000) (finding Eighth Amendment violation where a prisoner's course of hormone treatment was abruptly cut off after being transferred to a new prison); *Barrett v. Coplan*, 292 F. Supp. 2d 281 (D.N.H. 2003) (holding that a transgender prisoner had stated a valid Eighth Amendment claim when prison officials refused any treatment for her gender identity disorder); *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D.N.Y. 2003) (denying qualified immunity to defendant prison officials who refused a transgender prisoner all medical treatment for her gender identity disorder based on a blanket policy), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002) (finding that plaintiff's "transgenderism" constituted a serious medical need and directing prison officials to provide adequate treatment as recommended by a physician experienced with treating gender identity disorders and without excluding the possibility that necessary treatment might include initiating hormones or providing sex reassignment surgery); *Wolfe v. Horn*, 130 F. Supp. 2d 648 (D. Pa. 2001) (noting that abrupt termination of prescribed hormonal treatment by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute deliberate indifference); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990) (granting preliminary injunction directing prison officials to provide estrogen therapy to transgender woman who had been taking estrogen for several years prior to her transfer to a new prison), *aff'd*, 932 F.2d 969 (6th Cir. 1991). *Cf. Kosilek v. Nelson*, 2000 WL 1346898, at *3 (D. Mass. Sept. 12, 2000) (assuming without deciding that transgenderism is a serious medical need, but finding insufficient evidence of deliberate indifference).

access to SRS across the board would be unreasonable. States should, however, allow patients to continue hormone therapies that were underway at the time of incarceration.

We intend to continue to research the mental and physical health needs of transgender inmates, including issues relating to pursuing new medical therapies and interventions while in prison, and may want to develop policy further in this area.¹⁹

7. International Law

The United Nations Standard Minimum Rules for the Treatment of Prisoners clearly prescribe that “men and women shall so far as possible be detained in separate institutions.”²⁰ The Rules do not, however, specify a definition of “men and women.” The recommendation self-evidently stems from an insistence that all prisoners be protected. Non-discrimination is also a core principle of the Rules.

The Basic Principles for the Treatment of Prisoners, adopted by the General Assembly in 1996,²¹ state that “[a]ll prisoners shall be treated with respect due to their inherent dignity and value as human beings.” In this light it is important to note the most sweeping affirmation of transgender people’s rights to date, that of the European Court in *Van Kück v Germany*. The Court referred to “the applicant’s freedom to define herself as a female person” as “one of the most basic essentials of self-determination”: it stated that “the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.”²²

United Nations human rights mechanisms have shown concern over the situations of transgender people in prison. The Committee Against Torture condemned allegations in Brazil of “ill-treatment and discriminatory treatment of certain groups with regard to access to the already limited essential services” in prison, “notably on the basis of social origin or sexual orientation.”²³ The Special Rapporteur on the Right to Health joined the Rapporteurs on Freedom of Expression and on Torture, and the Special Representative on

¹⁹ U.S. generally have not held that a prison conduct any surgery, either genital or non-genital, to advance a transgender inmate’s transformation process. This refusal is consistent with the more general refusal on the part of the U.S. government to provide public monies for transgender surgery. However, Canada allows prisoners to apply for sex reassignment surgery after undergoing the same psychological evaluation imposed on free persons. In the Netherlands and most Scandinavian countries, where SRS is covered by national health insurance, it is available within prison systems. Moreover, the European Court of Human Rights’ 2003 decision in *Van Kück v. Germany* set a promising precedent in terms of a state’s positive obligation to pay for transformative surgery. The Court found that access to SRS was an essential aspect of dignity, and that Germany’s requirement that the plaintiff prove the medical necessity of treatment “in the field of one of the most intimate private-life matters” placed a “disproportionate[ly]” large burden on the person desiring surgery.

²⁰ Approved by the Economic and Social Council’s resolutions 663c (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

²¹ Resolution 45/111, 14 December 1996.

²² “Case of Van Kück v. Germany,” Application no. 35968/97, ECHR judgment, 12 June 2003 at ¶82.

²³ Committee Against Torture, Concluding observations, Brazil, A/56/44, May 16, 2001, para. 119 (b).

Human Rights Defenders, in 2004 in condemning police abuse of transgender people arrested in Nepal.²⁴ In a lengthy statement to the General Assembly in 2001, the Special Rapporteur on Torture declared that

it appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. ... [M]embers of sexual minorities, when arrested for other alleged offences or when lodging a complaint of harassment by third parties, have been subjected to further victimization by the police, including verbal, physical and sexual assault, including rape. ...

When detained, members of sexual minorities are often considered as a subcategory of prisoners and detained in worse conditions of detention than the larger prison population. The Special Rapporteur has received information according to which members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose. Prison guards are believed to use threats of transfer to main detention areas, where members of sexual minorities would be at high risk of sexual attack by other inmates. In particular, transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons.²⁵

The Special Rapporteur has also urged that "Countries should take effective measures to prevent prisoner-on-prisoner violence by...offering protective custody to vulnerable individuals, without marginalizing them from the prison population more than is required by the need for protection and without putting them at risk of ill-treatment."²⁶

The Basic Principles for the Treatment of Prisoners hold that "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation."²⁷ Finally, it is notable that the Special Rapporteur on

²⁴ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2005/51/Add.1, February 2, 2005.

²⁵ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2002/76, December 27, 2001

²⁶ General Recommendations of the Special Rapporteur on Torture, E/CN.4/2003/68, para. 26 (j).

²⁷ *Basic Principles for the Treatment of Prisoners*, Adopted by GA resolution 45/111, 14 December 1990, para. 9.

the Right to Health maintains that states have an “immediate obligation” to respect an “individual’s freedom to control his or her health and body...In other words, *the freedom components of sexual and reproductive health are subject to neither progressive realization nor resource availability*” (emphasis added).²⁸

8. Recommendations of Other Organizations

*Stop Prisoner Rape & the ACLU National Prison Project*²⁹

Placement

“Provid[e] thoughtful housing alternatives, including non-punitive forms of segregation to transgender inmates. To the greatest extent possible, these inmates should be given the opportunity to choose housing that feels safe and gender appropriate.”

“Avoid blanket housing policies, such as automatically putting all transgender people in segregation or automatically housing transgender people in the general population by genitalia.”

Searches

“Allow transgender people to choose the gender of corrections staff that perform strip searches.”

*Amnesty International*³⁰

Placement

“[P]rovide safe housing (detention facilities) appropriate to transgender individuals. The individual’s assessment should be central, if not necessarily determinative, as to where they should be housed.”

“[A]dministrative segregation in police custody should avoid further marginalizing LGBT people, or placing them at further risk of torture or ill-treatment.”

Searches

“If a frisk or search is necessary under governing legal standards, transgender persons should be searched by two officers of the gender(s) requested by the transgender individual, consistent with maintenance of physical integrity and human dignity of the person. If a transgender individual does not specify a preference, then the search should be conducted by officers of the same gender presentation (e.g., a transgender female expressing no preference should be searched by a female officer).”

9. Draft HRW Positions

²⁸ The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Report of the Special Rapporteur, Paul Hunt, E/CN.4/2004/49, 16 February 2004, at para. 27.

²⁹ All quotes are taken from *Still in Danger: The Ongoing Threat of Sexual Violence to Transgender Prisoners*, SPR & ACLU (2005).

³⁰ All quotes taken from *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, Amnesty USA (2005).

Authorities should consult with transgender organizations and advocates in developing policies on detention.

Prison authorities should provide safe housing facilities appropriate to transgender prisoners and detainees. The individual's own identification should be an important factor in determining where they should be housed, but should be weighed against other factors including the prisoner's own safety, the safety of other prisoners, and the detention facility's existing systems for separating prisoners by type of offense. Cases should be assessed on an individual basis rather than through a blanket policy.

Authorities should establish a clear system for assessing such cases, involving evaluation by outside experts (medical and/or psychological) where possible.

Prison authorities should ensure that forms of protective segregation for vulnerable prisoners do not deny them rights accorded other prisoners. If protective segregation involves isolating individual prisoners, or small groups of prisoners, jurisdictions should consider pooling such prisoners from different facilities into a single place of detention, so as to minimize the effects of isolation.

Transgender detainees should be subject to frisk or search only when governing legal standards would require it for any comparable prisoner. Transgender persons should ordinarily be allowed to choose the gender of the officer(s) conducting such a search.

Transgender prisoners who have begun hormone therapy should, wherever possible, be permitted to continue it.