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Handbook on

Prisoners with special needs

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Handbook on Prisoners with special needs

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Introduction

Whom the handbook is for

The present handbook forms part of a series of tools developed by The United Nations Office on Drugs and Crime to support countries in implementing the rule of law and the development of criminal justice reform. It is designed to be used by all actors involved in the criminal justice system, including policymakers, legislators, prison managers, prison staff, members of non-governmental organizations and other individuals interested or active in the field of criminal justice and prison reform. It can be used in a variety of contexts, both as a reference document and as a training tool.

The scope and limitations of the handbook

This handbook covers the special needs of eight groups of prisoners, which have a particularly vulnerable status in prisons. They are: Prisoners with mental health care needs; Prisoners with disabilities; Ethnic and racial minorities and indigenous peoples; Foreign national prisoners; Lesbian, gay, bisexual, and transgender (LGBT) prisoners; Older prisoners; Prisoners with terminal illness and Prisoners under sentence of death.

All information, guidelines and recommendations provided for these groups apply to adult male and female members of these categories of prisoners. However, female prisoners have additional care and treatment requirements, which are not covered in this handbook. For additional, exclusive guidance on the needs of female prisoners please refer to *UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment.*

The scope of the handbook does not extend to the special needs of children in conflict with the law and recommended criminal justice responses to them, as children have many additional and specific needs distinct from those of adult prisoners, and require a different approach in response to these needs. Publications on children

in conflict with the law and juvenile justice, produced by UNODC, in collaboration with UNICEF and other United Nations agencies include: *Manual for the Measurement of juvenile justice indicators* and *Protecting the rights of children in conflict with the law.* UNODC field guides, including to juvenile justice, are forthcoming.

UNODC recognizes that there are a number of other groups with special needs, which are not covered in this handbook. Guidelines on appropriate responses to the needs of individuals, including offenders and prisoners, with drug dependence are covered in other tools produced by UNODC, such as: *Investing in Drug Abuse Treatment, a Discussion Paper for Policymakers* and *Drug Abuse Treatment and Rehabilitation, a Practical Planning and Implementation Guide*. Guidelines for the management of HIV/AIDS in prisons are provided in the UNODC handbooks, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response,* prepared in cooperation with WHO and UNAIDS; *Policy Brief: Reduction of HIV Transmission in Prisons,* by WHO, UNODC and UNAIDS, as well as the forthcoming *HIV/AIDS in places of detention, a toolkit for policymakers, managers and staff,* by UNODC and WHO, which also provides guidelines for drug demand reduction and treatment in prisons.

It is hoped that further publications may be produced in the future focusing on the situation of other special categories of prisoners.

The needs of the prisoner groups covered in this handbook are extensive and the responses to these needs can vary significantly among different countries, depending on the availability of resources, the level of development of the criminal justice system, culture and traditions. Therefore, the handbook is only able to provide an overview of main needs and possible responses in line with international standards, rather than offering detailed guidance for use in a myriad of different economic and social contexts. By doing so, it aims to generate a deeper understanding of the situation of vulnerable prisoners, to encourage new thinking and the development of appropriate strategies to address their care and supervision requirements, within the framework of available resources and possibilities.

The focus of the handbook is prisoners.[1] However, it must be emphasized that the social reintegration of most offenders with special needs is much better served in the community, rather than in prisons, where their requirements can rarely be met and where their situation is likely to deteriorate. Due to their vulnerability in prisons, in many cases, the imprisonment of members of groups covered in this handbook comprises a disproportionately harsh punishment. Therefore, the handbook includes suggestions relating to possible legislative reforms and the use of community sanctions and measures, throughout, to reduce the imprisonment of vulnerable prisoners, when they do not pose a threat to public safety.

[1]The term “prisoner” is used to refer to all persons detained or imprisoned on the basis of, or allegation of, a criminal offence, including pre-trial, under-trial detainees and convicted and sentenced prisoners.

The handbook does not offer guidance on all aspects of the management of prisons, relevant to the situation of all prisoners, including those with special needs. It highlights only those areas of prison management, which have a particular impact on the situation of the groups covered.[2] Therefore it should be used in conjunction with general prison management manuals and relevant international instruments covering the treatment of all prisoners.[3]

Similarly, it must be emphasized that the two chapters, Prisoners with mental health care needs and Prisoners with terminal illness, do not provide comprehensive guidelines with regard to general health care in prisons. These chapters are meant to be read in conjunction with international instruments and manuals providing guidance on a general framework relating to the organization of medical services in prisons.

Whereas the handbook does provide recommendations relating to the use of non-custodial measures and sanctions for each group of prisoners covered, it does not provide guidelines on the principles, procedures and techniques relating to alternatives to imprisonment. Please refer to *UNODC Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* and the *UNODC Handbook on Restorative Justice Programmes* for further practical guidance.

What each chapter covers

Each chapter provides:

- A definition of the particular group covered and an overview of the situation of this group in the criminal justice system worldwide, to highlight the context in which the chapter should be read.
- An overview of the special needs and challenges encountered in responding to them, with regard to the specific group covered.
- Extracts from relevant international standards relating to the particular group.
- Comment on legislative measures and the implementation of alternatives to prison, which can reduce the imprisonment of the particular group, while protecting public safety.
- Prison management guidelines setting out ways in which to respond to the special needs of the particular group in prisons.
- A set of recommendations, summarizing the key suggestions made in the main text, addressed to policymakers, legislators and prison authorities.

[2]For example, the handbook does not provide general guidelines on staff training, safety and security in prisons, principles that apply to prisoners' contact with the outside world, constructive activities in prisons, inspection procedures, among many others.

[3]For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment (Body of Principles) and Basic Principles for the Treatment of Prisoners in particular.

Why a handbook

All prisoners are vulnerable to a certain degree. When the liberty of a group of individuals is restricted and they are placed under the authority of another group of people, and when this takes place in an environment which is to a large extent closed to public scrutiny, the abuse of power has proven to be widespread. Even where no abuse exists, prison conditions themselves in a large majority of countries worldwide are harmful to the physical and mental well-being of prisoners, due to overcrowding, violence, poor physical conditions, isolation from the community, inadequate prison activities and health care. This is why a range of international and regional instruments have been adopted by the United Nations and regional bodies to ensure that the fundamental human rights of prisoners are protected. It is also why such instruments provide for a variety of mechanisms to safeguard these rights, such as the independent oversight of prisons both by international and national bodies.

However, there are certain groups that are in a particularly vulnerable position in prisons and who therefore need additional care and protection. Some people may experience increased suffering due to inadequate facilities and lack of specialist care available to address their special needs in prison. The prison environment itself will exacerbate their existing problems. These include prisoners with mental health care needs, prisoners with disabilities and older prisoners. Some are at risk of abuse from other prisoners and prison staff, due to prejudicial attitudes and discriminatory perceptions entrenched in society itself, which are more pronounced in the closed environment of prisons. Such groups may suffer from humiliation, physical and psychological abuse and violence, due to their ethnicity, nationality, gender and sexual orientation. Those under sentence of death constitute a special category. They have particular needs relating to the anguish caused by the sentence itself and the intense psychological distress caused by the isolated conditions in which they are held, often for years or decades. Most of these prisoners are, in fact, vulnerable due to more than one reason. They suffer both due to their existing special needs, which are intensified in prisons, and due to the additional risks they confront, stemming from their particular status.

Contrary to the general perception, these groups do not constitute a small part of the prison population, and their proportion in prisons has been growing rapidly in recent years. Foreign prisoners, for example, currently make up over 20 per cent of the prison population in European Union countries and a few countries of South Asia and the Middle East. According to studies undertaken in a number of countries, 50 to 80 per cent of prisoners have some form of mental disability; racial and ethnic minorities represent over 50 per cent of the prison population in some jurisdictions. In many cases, prisoners may belong to more than one vulnerable group, which translates into a multiplicity of special needs and increased vulnerability. Their numbers are likely to rise further in the coming years, adding pressure on the resources of prison authorities, unless criminal policies are rationalized and adequate investment is made in the increased application of non-custodial sanctions and measures to ensure that those who do not need to be isolated from society are not sent to prison in the first place, and those who need medical treatment rather than

imprisonment are cared for in the community. Fortunately, it is likely that the number of prisoners on death row will decrease, with an increasing number of countries abolishing the death penalty. However, with at least 20-25,000 people worldwide currently imprisoned under sentence of death, their special needs cannot be ignored.

The high proportion of vulnerable prisoners worldwide means that their special needs cannot be considered as a marginalized component of prison management policies. Therefore, while those undertaking penal reform should, as a priority, work towards the abolition of the death penalty and the reduction of the use of imprisonment in the case of vulnerable groups, they should also aim to address the wide range of challenges relating to the supervision, care and protection of prisoners with special needs within legislation, policies and practices relating to the management of prisons. Comprehensive management strategies need to be developed, and mechanisms put in place to ensure that they are implemented, to guarantee that prisoners with special needs are treated in accordance with the requirements of international human rights standards, while their prospects of social reintegration are enhanced.

It is hoped that this handbook will provide some guidance in the development of such strategies and their implementation.

CROSS-CUTTING ISSUES

- Imprisonment should be used as a last resort for all offenders, taking into account the nature and circumstances of the offence, the risk the offenders pose to the public and the social reintegration needs of the offenders. This principle is fundamental when dealing with vulnerable groups, bearing in mind that imprisonment may represent a disproportionately harsh punishment for many of them and that their special needs are better addressed within the framework of appropriate community sanctions and measures, rather than in the harsh environment of prisons.
- Ensuring that the protection of the human rights of vulnerable prisoners is an integral part of management is not only a requirement of universally accepted standards, but is also the basis of creating an environment that is safe and healthy and a system that works efficiently on the basis of fairness and justice.
- Most groups covered in this handbook face discrimination in the criminal justice system, on the basis of their birth, nationality, ethnicity, race, descent, sex, sexual orientation, gender identity, age, disability, health condition, sentence or other status. It must therefore be emphasized that all persons are equal before the law and are entitled without discrimination to equal protection of the law,[a] and that everyone is entitled to all the rights and freedoms set forth in the Declaration of Human Rights, without distinction of any kind.[b] Similarly, the Standard Minimum Rules and the Body of Principles apply to all prisoners without discrimination.[c] However, it must also be emphasized that the principle of non-discrimination should be understood to include recognizing the special needs of some groups of prisoners, and providing for them, to ensure that they are not discriminated against in practice in the enjoyment of their human rights.
- In many cases, prisoners may belong to more than one group with special care and treatment requirements, which translates into a multiplicity of needs and increased vulnerability. Similarly, female members of the groups covered in this handbook are especially vulnerable,

both due to their gender, as well as due to their special needs as members of these groups. Thus, the multiple needs of prisoners, including the gender-specific needs of women, should be taken into account with respect to all of these groups.

- The risk assessment and a determination of prisoners' needs on entry to prison and regular reviews of that assessment are key to ensure safety in prisons and to the success of prisoners' social reintegration. All prisoners should be subject only to the minimum restrictions necessary. Overclassification is very common, in particular, in the case of prisoners with special needs, which should be avoided. Being placed in a higher security level than necessary may be particularly detrimental to the care and resettlement of vulnerable groups.
- All prisoners have a right to health, equivalent to that in the general community, as part of their basic human rights. This right should guide all jurisdictions in determining the amount and quality of health care provided in prisons. Prisoners with special needs have a right to access general and specialist health care services, which take account of special health care needs, corresponding to the individual prisoners' health assessment and background.
- A key area, neglected in most prison systems, is the need to assist and facilitate prisoners' transition from prison to the outside world, with comprehensive preparation for release and post-release support programmes. Prison authorities, probation services, social welfare agencies and the community need to increase assistance to prisoners' resettlement in order to reduce re-offending and the harmful impact of imprisonment, and especially in the case of groups covered in this handbook, due to the particular difficulties they are likely to face during this period.

[a] Universal Declaration of Human Rights, Article 7.
[b] Universal Declaration of Human Rights, Article 2.
[c] SMR, 6.1 and Body of Principles, 5.1.

KEY CROSS-CUTTING INTERNATIONAL STANDARDS

Universal Declaration of Human Rights, Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Economic, Social and Cultural Rights

Article 12 (1)

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 5 (1):

These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 6 (1)

The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1. Prisoners with mental health care needs

DEFINITION

When discussing mental health and mental disability, a complicating factor is the absence of agreement on the most appropriate terminology.[a] Moreover, some of the existing terms reflect very important and sensitive debates, such as the discussion about a "medical model" or "social model" of functioning.[b]

This handbook follows the terminology used by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[c] The umbrella term mental disability is used to include psychiatric disabilities and intellectual disabilities. Psychiatric disabilities may be major, e.g. schizophrenia and bipolar disorder; or more minor mental health problems, often referred to as psychosocial problems, e.g. mild anxiety disorders.[d] Intellectual disabilities are defined as "a condition of arrested of incomplete development of the mind characterized by impairment of skills and overall intelligence in areas such as cognition, language, and motor or social abilities".[e]

It must be emphasized, however, that the term mental disability encompasses a wide range of profoundly different conditions and notably two sets of conditions, psychiatric disabilities and intellectual disabilities, which are distinct in their causes and effects.[f] These differences have a crucial bearing on how these prisoners' right to health must be interpreted and implemented, as well as on responses to their other special needs in prisons. Where necessary, a distinction has been made in this chapter between those with intellectual disabilities and those with other mental disabilities.

Due to the range of different conditions the term mental disability encompasses and the different treatment approaches which should be adopted in response, the terms mental health care and treatment are used in this chapter to cover a range of treatment options, including psychosocial support, counselling, speech and occupational therapy, physiotherapy, behavioural therapy, psychiatric and medical treatment, among other appropriate specialized health care services.

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[a]Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Commission on Human Rights, Sixty-first Session, Economic, Social and Cultural Rights, E/CN.4/2005/51, 11 February 2005, para. 18.

[b]Ibid., para. 18.

[c]Ibid., para. 19.

[d]Ibid. para. 19.

[e]The World Health Organization, The World Health Report 2001, Mental Health: New Understanding, New Hope p. 35, in ibid., para. 78.

[f]Report of the Special Rapporteur, E/CN.4/2005/51, para. 20.

KEY MESSAGES

- In most countries there is a need to address problems relating to adequate health care in the general population and to improve access to health care services by the poor, homeless, unemployed and people with mental disabilities, as a first step towards reducing the unnecessary and harmful imprisonment of individuals with mental health care needs, thereby relieving pressure on the scarce resources of prison health services.
- Punitive sentencing policies, which lead to the increasing imprisonment of disadvantaged groups, such as offenders with mental disabilities, need to be reassessed to reverse the dramatic increase of prisoners with mental disabilities in institutions which were not designed to cater for the health care and social reintegration needs of this vulnerable group.
- The large majority of prison systems worldwide fail to provide an environment which does not harm the mental well-being of its inhabitants. Isolation from society, poor prison conditions, overcrowding and lack of safety induce distress, depression and anxiety in most prisoners, which may develop into more serious mental disabilities.
- The promotion of mental health in prisons should be a key element of prison management and health care policies. The development of comprehensive policies and strategies aiming to protect the mental well-being of all prisoners and to ensure that those with mental disabilities have timely access to suitable and individualized treatment, provided on the basis of informed consent, equivalent to that in the community, is essential to ensure the effective management of mental health care in prisons.

1. Overview

A disproportionately large number of prisoners have mental health care needs. Recent research conducted among 23,000 prisoners in 12 western countries concluded that several million prisoners worldwide probably had serious mental disabilities.[4] The World Health Organization (WHO) estimates that as many as 40 per cent of prisoners in Europe suffer from some form of mental disability, and are up to seven times more likely to commit suicide than people outside of prisons.[5] In the United States, 56 per cent of state prisoners, 64 per cent of jail inmates and 45 per cent of federal prisoners reported treatment for or symptoms of major depression, mania or psychotic disorders in 2006.[6] According to research in New South Wales, Australia, 80 per cent of prisoners have a psychiatric disability, compared to 31 per cent of the general population.[7] Studies elsewhere have revealed a similar situation.[8]

[4]Fazel S., Danesh J. (2002) Serious mental disorder among 23,000 prisoners: systematic review of 62 surveys. Lancet, 359, 545-550.

[5]Penal Reform International, Penal Reform Briefing No. 2, 2007 (2), Health in prisons: realising the right to health, p. 3.

[6]Bureau of Justice Statistics figures, reported by the Associated Press, 7 September 2006. (www.abcnews.go.com/Politics/wireStory?id=24028-49)

[7]White, P. and Whiteford, H., Prisons: mental health institutions of the 21st century? MJA 2006; 185(6); 302-303. (www.mja.com.au/public/issues/185_06180906/whi10502_fm.html)

[8]See for example, Rickford, D. and Edgar, K., Troubled Inside: Responding to the Mental Health Needs of Men in Prison, Prison Reform Trust, 2005, p. ix; Fassilard, B., Loze, J-Y., Gasquet, I., Duburc, A., de Beaurepaire, C., Fagnani and Rouillon, F., Prevalence of mental disorders in French prison for men, BMC Psychiatry 2006, 6:33, 21 August 2006 (www.biomedcentral.com/1471-244X/6/33); Dr. Wasif, S. Ali, Mental Health in a Captive Society, 19 August 2005. (www.thesouthasian.org/archives/2005/mental_health_in_a_captive_soc.html)

The high rate of mental disability among prisoners is related to many interrelated factors. All prisoners are at risk of developing a range of mental disabilities in prisons, irrespective of whether they had particular mental health care needs on entry. WHO and ICRC have specifically identified overcrowding, various forms of violence, enforced solitude or lack of privacy, lack of meaningful activity, isolation from social networks, inadequate health services, especially mental health services, among factors that have a harmful effect on the mental well-being of most prisoners.[9] Prisoners with mental disabilities are ill-equipped to survive in the often brutal and brutalizing environment of prisons, and their condition most often deteriorates in the absence of adequate health care and appropriate psychosocial support.

Other reasons for the increase of people with mental health care needs in prisons include "the widespread misconception that all people with mental disorders are a danger to the public; the general intolerance of many societies to difficult or disturbing behaviour; the failure to promote treatment, care and rehabilitation, and, above all, the lack of, or poor access to, mental health services in many countries."[10] In addition, in a number of jurisdictions there has been an increasingly punitive approach to the treatment of people who do not fit within socially accepted norms. Policies such as mandatory sentencing with harsh penalties for drug offences and restrictions on access to support systems, reflecting a punitive rather than a rehabilitative approach, has led to the criminalization of persons with mental disabilities.[11]

Sometimes persons with mental disabilities, who have committed no offence, are placed in prisons, due to the lack of suitable mental health institutions. In some jurisdictions persons acquitted of criminal offences on the basis of their mental disability at the time of the commission of such offences are still detained in prisons.[12] Both of these practices contravene a number of fundamental human rights principles, as well as Article 82 of the United Nations Standard Minimum Rules for the Treatment of Prisoners which recommends specialized treatment rather than imprisonment in such cases.

Among persons with mental disabilities those with intellectual disabilities remain among the most neglected, the most "invisible" members of our communities. As the United Nations Special Rapporteur has noted ". . . [t]heir neglect is reflected in society at large, among the health professionals, and in the human rights community."[13] This invisibility, discrimination and lack of access to timely and appropriate care and treatment are even more profound in the prison systems in many countries. Recent research in a number of jurisdictions has highlighted the large number of prisoners with intellectual disabilities and the extremely inadequate provision for their needs.[14]

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[9]WHO, ICRC Information Sheet, Mental Health and Prisons, p. 1. (www.euro.who.int/Document/MNH/WHO_ICRC_InfoSht_MNH_Prisons.pdf)

[10]WHO, ICRC Information Sheet, op. cit. p. 1.

[11]Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription, The Sentencing Project, Washington, the United States, 2002, p. 7. (www.sentencingproject.org)

[12]See for example, Boyd-Caine, T., and Chappell, D, The Forensic Patient Population in New South Wales, *Current Issues in Criminal Justice,* volume 17 (1), July 2005, pp. 5-29.

[13]E/CN.4/2005/51, op. cit. para. 77.

[14]See for example, Russell, M. and Stewart, J, Disablement, Prison and Historical Segregation, *Monthly Review*, July 15, 2002, referring to a study conducted in the U.S, which noted the prevalence of learning disabilities among young prisoners (www.zmag.org/content/Disability_Rights/0428831553429.cfm), and Loucks, N, "No one knows, offenders with leaning difficulties and learning disabilities—review of prevalence and associated needs", Prison Reform Trust, 2007. (www.prisonreformtrust.org.uk/nok)

The imprisonment of many offenders with mental disabilities could be avoided or reduced by better community resources providing treatment and other services. Many could be diverted to appropriate treatment programmes or support services, rather than being sent to prison. Whereas the majority of prisoners with mental disabilities do not present a risk of violent behaviour, the small minority who must be imprisoned, due to the violence of the offence committed and the possible danger they pose to the public, need to receive treatment and services in prison, equivalent to that in the community, in close coordination with public health services.[15] They also require specialized pre-release planning to ensure successful transition back into the community.

2. Special needs and challenges

Prisoners with mental health care needs comprise a particularly vulnerable group in prisons and have a complex set of needs relating to the protection of their human rights, including provision of appropriate mental health care.

2.1 Access to justice

In addition to the factors mentioned above which lead to the increased contact of people with mental health care needs with the criminal justice system, once detained, individuals with mental disabilities are also disadvantaged in their access to justice. They may not be sufficiently aware of their legal rights, may be unable to gain access to legal counsel without assistance, face stigmatization, discrimination and ill-treatment at the hands of law enforcement officials and even at the hands of some health professionals. Since mental disabilities are prevalent among the poor, due to the economic challenges they face in accessing treatment, as well as underlying determinants of mental health, such as adequate nutrition, sanitation and shelter, among others,[16] defendants with mental health care needs are likely to need free legal aid, which may not be offered. In the absence of qualified legal assistance, they may be coerced into confessing to an offence, much more readily than other prisoners, due to their mental disability. People with intellectual disability are particularly vulnerable. They may incriminate themselves even if they are innocent. Some studies have shown that most defendants with intellectual disabilities are more often convicted of the offence for which they were arrested, rather than a reduced charge, and plead guilty more readily.[17]

2.2 Prison environment

Prisoners' right to health is a fundamental human right recognized by numerous international instruments. The right to health encompasses the right to proper health

[15]See Standard Minimum Rules, Rule 22 (1), and Declaration on Prison Health as part of Public Health, Moscow, 24 October 2003, WHO, Europe.

[16]United Nations Commission on Human Rights (2005), Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, E/CN.4/2005/51, para. 45.

[17]Goobic, D., The Arc of New Jersey Developmentally Disabled Offenders Program. (www.arcnj.org)

care, equivalent to that in the community (see section 2.3 below), as well as the underlying right to live in an environment, which does not generate or exacerbate disease and mental disabilities.[18] Unfortunately the large majority of prison systems worldwide fail to provide an environment which promotes the physical and mental well-being of its inhabitants. In many countries of the world prisoners are accommodated in overcrowded, poorly ventilated and unsanitary prisons, in an atmosphere that is charged with the perceived or real risk of violence and abuse. Such conditions induce stress, depression and anxiety, which may develop into more serious mental disabilities, if appropriate action is not taken.

Prisoners with existing mental disabilities are at further risk of acute mental harm. They have fewer resources with which to cope in an environment lacking in privacy, often tense and sometimes violent. Depressed, sometimes psychotic and suicidal, they are at increased risk of deteriorating emotionally, with a serious risk of harming themselves, harming others, or being seriously harmed themselves.

Sometimes prisoners with mental disabilities will be housed separately, in extremely inferior conditions with even more restricted access to food, hygiene and health facilities. In some countries prisoners with mental disabilities will be physically restrained, commonly by chains, on a constant basis.

Research indicates that female prisoners with mental health care needs are at particular risk of abuse, self-harm and deteriorating mental well-being in prisons. Women without any mental health problems prior to imprisonment may develop a range of mental disabilities in prisons, where they do not feel safe, conditions are poor, dormitories overcrowded and staff not trained to deal with their gender-specific psychosocial support requirements.

2.3 Health care

Equivalence of health care is a principle that applies to all prisoners, who are entitled to receive the same quality of medical care that is available in the community. However, this right is rarely realized in prisons, where usually health care services, and especially the provision of mental health care, are extremely inadequate. Prison health services are far too often severely under-funded and understaffed and frequently rely solely on medications to manage the symptoms of mental disabilities, rather than providing the type of inter-disciplinary care and supervision which the treatment of mental disabilities requires. Beyond the principle of equivalence, the greater mental health care needs that have been described within prisons, should necessitate the provision of greater mental health care resources, but, in fact, most prisons worldwide are unable to provide any treatment for mental disabilities at all.

[18]E/CN.4/2005/51, para. 45, which states "[a]s well as an entitlement to health care, the right to health includes an entitlement to the underlying determinants of health, including adequate sanitation, safe water and adequate food and shelter".

Over-reliance on medication

"In Latin American prisons, the lack of adequate psychological treatment, together with the stereotype conception of the imprisoned woman as conflictive and emotional, leads to an excessive supply of anti-depressive and sedative drugs. This is not surprising if we take into account that throughout the years mental disturbance has been considered one of the most important causes of female crime, and so medication and psychiatric admittance was, and still in many cases is, a regular practice in the penitentiary field. This is why we should insist on an adequate and qualified psychological treatment of female inmates."[a]

A similar situation has been noted in other prison systems worldwide.

[a]Dr Maria Noel Rodriguez, Ministry of Interior, Uruguay.

Adequate screening and monitoring of mental disabilities is key to successful health treatment. Nevertheless in most systems initial screening, follow-up through the system during transfers and establishment of individual treatment plans are either inadequate or non-existent. Prisoners with existing mental disabilities are therefore not identified on entry and left untreated in an environment that is particularly harmful to their mental well-being. When prisoners with mental disabilities are transferred between prisons, their medical files may not be transferred with them, and essential treatment and medication may be discontinued until a new assessment is undertaken in the new facilities, during which time the condition of the patient can deteriorate.

Effective mental health care services, providing individualized care, require the expertise of a range of mental health professionals, including psychiatrists, psychologists, counsellors, nurses and occupational therapists. In reality, specialist staff employed in prisons receive low salaries, have a low status and work in an unpleasant working environment with inadequate support. Therefore in most prison systems there is a shortage of medical staff. Specialist staff shortages are usually accompanied by the difficulties of access to medical health staff by patients, who may need to complete written requests to see a doctor. Prisoners with mental disabilities may not be in a position to fill in such requests without assistance and when they do, it may take days or weeks before a medical consultation is actually granted.

Prisoners with intellectual disabilities are likely to be in need of special health care services, such as behavioural therapy, speech therapy, occupational therapy and physiotherapy. Studies have shown that people with intellectual disabilities face a higher prevalence of psychosocial or psychiatric disabilities than the general population[19] and they will therefore need greater access to appropriate treatment.

Many people who have both mental health care needs and substance dependency (referred to as co-occurring disorders or co-morbidity) are at particular risk of

[19]Rickford D. and Kimmett, E., Troubled Inside: Responding to the Mental Health Needs of Men in Prison, Prison Reform Trust, 2005, p. 101.

imprisonment.[20] Co-occurring disorders are associated with poor social functioning, homelessness, violence, arrest and imprisonment.[21] An overloaded system and the lack of adequate treatment resources for co-occurring mental and substance abuse disorders in the community have severely restricted many individuals' access to treatment, increasing the likelihood of offending of these individuals.[22] In prison they are likely to face severe problems in accessing specialized integrated treatment.

2.4 Discrimination and stigmatization

The discrimination and stigmatization encountered by people with mental disabilities from the general public are magnified in the closed environment of prisons. Other prisoners are often unwilling to associate with prisoners with mental disabilities, due to similar misconceptions and fears most people in society have about them. This can lead to the isolation of such prisoners, leading to the further deterioration of their mental health and further stigmatization. The same attitudes are often shared by prison staff, hindering a positive and constructive relationship to be formed between staff and prisoners with mental health care needs, thus perpetuating staff's lack of understanding of the situation of such prisoners. It is also possible that health care staff themselves may discriminate against those patients with mental disabilities as they may be perceived to be more disruptive, too demanding of time and attention, or because they may be unable to easily communicate their problems and their needs.

Discrimination is likely to impact on prisoners' access to educational and vocational training programmes and to all services provided in prisons. Prisoners with mental disabilities are often discriminated against in the application of disciplinary measures, which is a major source of concern.

2.5 Safety and security

Persons with mental disabilities are at risk of human rights violations in closed institutions, including in prisons.[23] Prisoners with mental disabilities are vulnerable to abuse, sexual assault and violence by other prisoners. They have difficulty in understanding the prison code, may be intimidated by staff into acting as informers or forced by other prisoners into performing acts that are harmful to them or that get them into trouble. Both male and female prisoners with mental disabilities often become victims of rape in the prison setting. Female prisoners are particularly vulnerable.

Despite differences, persons with all sorts of mental disabilities are vulnerable to many similar human rights abuses although, because of their varying ability to protect their own interests without assistance, persons with intellectual disabilities are often especially vulnerable.[24]

[20]The Sentencing Project, 2002, op. cit., p. 7.

[21]Ibid. p. 8.

[22]Ibid.

[23]Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, E/CN.4/2005/51, 11 February 2005, para. 8.

[24]Ibid., para. 79.

Prisoners with mental disabilities may find it extremely difficult to comply with prison rules. Some may demonstrate disruptive behaviour, aggression and violence. Others will simply refuse to follow routine orders, for no apparent reason. Disciplinary violations in prisons are subject to punishment, often in administrative segregation/isolation units. As a result, prisoners with mental disabilities, who break the rules will often be placed in these units, which is extremely harmful to their mental well-being, sometimes leading to self-harm and suicide. As has already been stated, in many jurisdictions the main way of managing prisoners with mental disabilities who are seen to be disruptive or who break the rules, is to physically restrain them for prolonged periods.

Frequent disciplinary offences and punishment lead to the accumulation of misconduct reports, which have a negative impact on the early release opportunities of prisoners with mental disabilities—the very prisoners who should benefit from parole as a priority.

2.6 Risk of suicide and self-harm

Depressive disorders, schizophrenia and suicide

"One of the particularly tragic outcomes of a depressive disorder is suicide. Around 15–20 per cent of depressive patients end their lives by committing suicide. Suicide remains one of the common and avoidable outcomes of depression."[a]

"A substantial number of individuals with schizophrenia attempt suicide at some time during the course of their illness. A recent study showed that 30 per cent of patients diagnosed with this disorder had attempted suicide at least once during their lifetime."[b]

[a]WHO (2001), p. 30.
[b]Ibid., p. 34.

International studies indicate that suicide rates in prisons significantly exceed those in the general population and have been increasing within the last decades in some countries. Long-term sentences, single-cell use, mental disabilities, substance abuse and a history of suicidal tendencies are associated with an increased suicide risk.[25] Although suicides and incidents of self-harm in prison settings are not only associated with mental disabilities, suicide, and in most cases also self-harm, are clearly associated with depression, at least, if not with more serious psychosocial or psychiatric disabilities. Research in some countries indicates that prisoners who commit suicide suffered from some form of mental disability or substance dependence (or both) on entry to prison.[26]

[25]Matsching T., Frühwald S. and Frottier P., Suicide behind bars, an international review, Klinische Abteilung für Sozialpsychiatrie und Evaluationsforschung, Universitätsklinik für Psychiatrie, AKH Wien, Österreich.

[26]See, for example, Shaw, J., Appleby L. and Baker D. (2003), Safer prisons: a national study of prison suicides 1999-2000, The National Confidential Inquiry into Suicides and Homicides by People with Mental Illness, in Rickford D. and Edgar K., Troubled Inside: Responding to the Mental Health Needs of Men in Prison, Prison Reform Trust, 2005, p. 75.

Suicide among prisoners with mental health care needs in the United States

It was reported that in 2002 suicide rates among prisoners with mental disabilities who had made previous suicide attempts were more than 100 times higher than the rate in the general population. Over 50 per cent of jail suicides were committed within the first 24 hours in jail. More than 95 per cent of those who committed suicide in prisons had a treatable psychiatric disability.[a]

[a]The Sentencing Project, 2002, p. 18.

Self-harm in prisons can also be associated with drug dependence, a history of alcoholism and with being a victim of violence,[27] all of which require therapeutic responses.

Research has also identified a higher prevalence of self-harm history among prisoners who commit suicide, compared to the general population, as well as higher levels of suicide "ideation" among self-harmers in prison.[28] Thus, prisoners who harm themselves may be considered at higher risk of attempting suicide than others.

Suicide and self-harm in Australian prisons[a]

Of the 787 deaths in Australian prisons between 1980 and 1998, 367 (46.6 per cent) were self-inflicted.

The rate of suicide in prisons is estimated to be between 2.5 and 15 times that of the general population.

It has been estimated that for every suicide there are 60 incidents of self-harming behaviour.

[a]Morag, M., et. al, Australian Institute of Criminology, 1999, p. 1.

In some jurisdictions self-harm and suicide attempts are penalized, causing further distress and leading, most certainly, to the worsening of any mental disabilities. For example, in the United States prison regimes "routinely criminalize and punish behaviour that is symptomatic of illness, such as self-harm, attempted suicide, being noisy and refusing orders."[29] The penalization of self-harm is also common in some countries of Eastern Europe and Central Asia, where in certain circumstances it may

[27]Borrill J., Burnett R., Miller S., Briggs D, Weaver T., Maden A., "Patterns of self-harm and attempted suicide among white and black/mixed race female prisoners" in *Criminal Behaviour and Mental Health*, 2003; 13(4); 229-40.

[28]McArthur, M., Camilleri, P. and Webb, H., Strategies for Managing Suicide and Self-harm in Prisons, Australian Institute of Criminology, 1999, p. 1.

[29]Penal Reform International, Penal Reform Briefing No. 2, 2007(2), Health in prisons: realising the right to health, p. 4.

even be regarded as a criminal offence. In Kazakhstan, for example, according to new legislation introduced in 2007, groups of prisoners who commit acts of self-harm may be sentenced to a term of imprisonment.[30]

2.7 Preparation for release and post-release support

Release from prison, without adequate preparation and lack of post-release support presents an additional challenge to prisoners' mental health. In many jurisdictions the cooperation between prison and civil health services is problematic, sometimes non-existent. Thus, the continuity of care, essential to the management and alleviation of many mental disabilities, becomes virtually impossible.

Many offenders with mental health problems come from poor backgrounds and will have been homeless and unemployed at the time of arrest. Thus, in addition to mental health care needs, most will have particular housing and employment support requirements. If such support is not provided on release, there is a high probability that they will re-offend.

2.8 Multiple needs

All of the groups covered in this handbook are at risk of developing mental health care needs in prisons, due to discrimination and abuse they may face, to isolation resulting from their nationality, race, ethnicity or descent, due to terminal illness, to age or to facing the death penalty. This chapter may therefore be considered as a cross-cutting chapter, relevant to some extent to all groups covered in this handbook.

Women who are admitted to prison are more likely than men to suffer from mental disabilities, drug and alcohol addiction, often as a result of domestic violence, physical and sexual abuse. Separation from their families and the community due to imprisonment has a particularly harmful effect on women, which may lead to anxiety, depression and the development of more serious mental disabilities. Please refer to *UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment* for additional guidance on the mental health care needs of female prisoners.

3. International standards

United Nations Standard Minimum Rules for the Treatment of Prisoners[a]

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

[30]If already convicted, their existing sentence is extended.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

[. . .]

82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.

(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.

(3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.

(4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.

83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

Some relevant articles from the Principles for the protection of persons with mental illness and the improvement of mental health care (Mental Illness Principles) have been cited below. However, while many of the Principles recognize important rights and standards and continue to provide guidance in the field of mental health care, others are now regarded as controversial and offer inadequate protections, notably on the issue of treatment without informed consent,[b] which is covered under Principle 11.

The Convention on the Rights of Persons with Disabilities (CRPD) reflects a more contemporary approach to informed consent, with much stricter safeguards against treatment without consent, underlining the right of persons with disabilities to supported decision making.

Principles for the protection of persons with mental illness and the improvement of mental health care[c]

Principle 1
Fundamental freedoms and basic rights

1. All persons have the right to the best available mental health care, which shall be part of the health and social care system.

2. All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.

3. All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.

4. There shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.

5. Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Principle 9
Treatment

1. Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.

2. The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.

3. Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the Principles of Medical Ethics adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.

4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

Principle 20
Criminal offenders

1. This Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness.

2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in paragraph 5 of Principle 1.

Convention on the Rights of Persons with Disabilities[d]

Article 12
Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human

rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Article 25
Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health-related rehabilitation. In particular, States Parties shall:

(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people's own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

See also:

United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 37/194 of 18 December 1982.

World Medical Association Statement on Ethical Issues Concerning Patients with Mental Illness, adopted by the 47th General Assembly Bali, Indonesia, September 1995 and Revised by the WMA General Assembly, Pilanesberg, South Africa, October 2006;

Council of Europe, Committee of Ministers, Recommendation No. Rec (2004) 10, concerning the protection of the human rights and dignity of persons with mental disorder, adopted by the Committee of Ministers on 22 September 2004 at the 896th meeting of the Ministers' Deputies.

Montreal Declaration on Intellectual Disability, adopted in Montreal, Canada, 6 October 2004.

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[a]Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[b]E/CN.4/2005/51, op. cit., para. 24.

[c]Adopted by General Assembly resolution 46/119, of 17 December 1991.

[d]Adopted on 13 December 2006. Full text at: www.un.org/disabilities/convention/conventionfull/shtml. The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. By ratifying the Convention, a country accepts its legal obligations and will adopt implementing legislation. For other States, the Convention represents an international standard that they should endeavour to respect.

4. Responding to the needs of offenders with mental health care needs

4.1 Health care policies and legislation

The immense challenges relating to the provision of equitable health care, including mental health care, in prisons, cannot be resolved by prison administrations and prison health care services alone. Offenders with mental disabilities require a comprehensive community-based treatment approach that provides essential services, ensures public safety and reduces re-offending.

- In most countries, there is an urgent need to address problems relating to adequate health care in the general population and to improve access to health care services by the poor, homeless, unemployed and people with mental disabilities, as a first step towards reducing the unnecessary, unjust and harmful imprisonment of offenders with mental health care needs, thereby relieving pressure on the scarce resources of prison health services.
- The tension between the need for security and the mental health care requirements of offenders need to be examined and a shared understanding and policy developed, with matching legislation, by policymakers of both the health and justice sectors. Punitive sentencing policies, which lead to the increasing imprisonment of disadvantaged groups, such as offenders with mental disabilities, for non-violent repeat offences, need to be reassessed to reverse the dramatic increase of offenders with mental disabilities in institutions which were not designed to cater for the social reintegration needs of this vulnerable group.
- Public health policies and strategies must include the needs of prisoners and adequate funding must be provided to prison health services to meet the needs of prisoners with mental (and physical) health care requirements.
- Prison and community health services should work in cooperation and be integrated as far as possible in order to improve prospects of equivalence of care in prisons and continuum of care both on arrival in prison and in the community following release.[31]
- Mental health legislation needs to be adopted to protect the rights of people with mental disabilities, including prisoners. The development of legal provisions that address the needs of prisoners with mental health care needs is a first step towards ensuring that their rights are protected, including the right to quality treatment and care, to refuse treatment, to appeal decisions of treatment without consent, to confidentiality, to protection from discrimination and violence, and to protection from torture and other cruel, inhuman and degrading treatment, among others.[32] Legislation should provide procedural

[31]See WHO Europe, Prison Health as part of Public Health, Declaration, Moscow, 24 October 2003 (Moscow Declaration).

[32]WHO, ICRC Information Sheet, Mental Health in Prisons, p. 4.

protections to prisoners with mental disabilities within the criminal justice system, equivalent to those granted other prisoners.[33]

- Clear lines of accountability and the same inspection and monitoring regimes which exist in the community should apply to the prison health services, including mental health services.

4.2 Diversion, non-custodial measures and sanctions

Principles for the protection of persons with mental illness and the improvement of mental health care (Mental Illness Principles) make clear that persons with mental disabilities should have the right to be treated and cared for, as far as possible, in the community in which they live.[34] WHO recommends that mental health services be based in the community and integrated as far as possible to general health services, in accordance with the vital principle of the least restrictive environment.[35] In this context, there is a need to recognize that imprisonment has a particularly harmful effect on persons with mental disabilities. The objectives of social reintegration and the prevention of re-offending can be better achieved with treatment and care, rather than punitive measures in the case of most offenders with mental disabilities, and especially those who have committed non-violent offences.

- Where possible, individuals with mental disabilities should be diverted from the criminal justice system at the first point of contact with law enforcement officers and those with severe mental disabilities should never be held in prisons.[36]
- Diversion should be possible throughout the criminal justice process—during prosecution, trial and on imprisonment. Courts should have access to information regarding mental health issues in general and the mental health care needs of the offenders in question, in particular, in order to take the appropriate decision at the earliest possible stage. Such information may be provided by mental health care professionals who may conduct assessments and screening of offenders with mental disabilities as early as possible during the criminal justice process.
- The lack of public mental health services alone should never be used to justify the imprisonment of people with mental disabilities, and should be strictly prohibited by law.[37]
- Diversion measures may necessitate the introduction of new legislation and procedures, as well as the training of law enforcement officials to recognize mental disabilities, in order to seek the assistance of mental health professionals at the first point of contact with the criminal justice system.
- Diversionary measures could also be encouraged by providing judicial officers, as well as law enforcement officers, with training concerning the parameters

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[33]Ibid., p. 4.

[34]Principles for the protection of persons with mental illness and the improvement of mental health care, Principle 7.1.

[35]Referred to in E/CN.4/2005/51, para. 14.

[36]Standard Minimum rules, 82 (1).

[37]WHO and ICRC, op. cit., p. 3.

of the mental disabilities they are likely to encounter in their criminal justice work, and the sentencing and allied options that may be available to divert such offenders into the health system for treatment.

- Sentencing alternatives should also be introduced for offenders with mental disabilities, who have committed more serious offences. Such sentences should incorporate comprehensive medical care in a suitable facility and supervision. In general it is preferable for offenders who present a danger to the public to receive treatment in secure medical facilities, rather than in prison settings which will worsen their condition.

For guidance on the development of appropriate legislation, including the provision of alternative measures and sanctions in relation to offenders with mental disabilities, please refer to *World Health Organization Resource Book on Mental Health, Human Rights and Legislation*, 2005.[38]

Please refer to *UNODC Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* and the *UNODC Handbook on Restorative Justice Programmes* for further practical guidance.

4.3 Prison management

4.3.1 Management policies and strategies

The promotion of mental health, as well as physical health and social well-being should comprise key elements of prison management and health care policies. The development of comprehensive policies and strategies aiming to protect the mental well-being of all prisoners and to ensure that those with mental disabilities have timely access to suitable treatment, equivalent to that in the community, is essential to the effective management of mental health care in prisons.

- *Protecting the mental well-being of all prisoners: improving conditions, providing a safe and positive prison environment:* Policies should ensure that prison conditions and services are designed to protect and promote the mental well-being of all prisoners.[39] They should recognize that providing the underlying determinants of health, such as adequate space, nutrition, clean drinking water, sanitation, heating, fresh air, natural and artificial light, are key to the protection of mental and physical health. The provision of purposeful activities and mental stimulation, as well as contact with the outside world is also vital in this context. Policies and strategies to address violence (including physical, sexual and psychological violence and bullying) must also be put in place. In addition, prison management policies should ensure that a careful prisoner differentiation according to risk category is undertaken on entry to prison. Issues relating to staff recruitment

[38]On non-custodial measures and sanctions, see pp. 75-80 of WHO Resource Book on Mental Health, Human Rights and Legislation (2005).

[39]See for example, WHO Regional Office for Europe, Health in Prisons Project, Consensus Statement on Mental Health Promotion in Prisons, 1998, which includes a Mental Health Promotion in Prisons management checklist, for further guidance.

and training and the creation of a positive atmosphere in prison, are also key elements of mental health policies that aim to prevent mental disabilities from developing or worsening.

- *Managing the treatment of prisoners with mental health care needs:* The care of prisoners with mental disabilities should be seen as wider than only a health issue, and should be an essential element of general management strategies, developed by the central prison administration. Improving cooperation with community mental health care services, to ensure equivalence of care and continuity of treatment, should comprise one of the key objectives of management strategies.

  The appointment of a mental health policy and strategy advisor at headquarters level, working within the prison health service, would be advisable. Where resources allow, the establishment of interdisciplinary mental health teams in each prison, or alternatively, the appointment of mental health coordinators working with medical officers would be beneficial, to coordinate with the community health service providers and probation services, in order to ensure that the complex needs of prisoners with mental disabilities are met, spanning the period from prison admittance to post-release support.

- *Awareness-raising:* Prison staff, prisoners and their families should be provided with information and educational material aiming to increase their awareness about mental disabilities, in order to reduce the stigma and discrimination associated with mental health problems, and to help them better understand the psychological consequences of imprisonment, ways in which to prevent mental health problems and how and where to seek help, when they do arise.[40]

- *Gender-specific mental health care:* Gender-specific mental health service policies and strategies need to be developed for women prisoners, taking into account their different mental health care needs (see *UNODC Handbook on Women in Prison*).

- *Monitoring and evaluation:* Independent inspection of prison facilities, including health care services, is essential, which should be complemented by internal monitoring and evaluation. Measurable standards should be developed to assess and evaluate the outcomes of prison mental health care strategies and practices. Data collection and assessments should form an integral element of management policies, enabling the improvement of strategies and their implementation.

4.3.2 Staff

A. Health care staff

Providing adequate mental health care necessitates taking into account many factors (environmental, psychosocial, medical etc.) and adopting a multidisciplinary approach to treatment. The task is particularly challenging in prisons, due to poor conditions,

[40]WHO, ICRC Information sheet, op. cit.

overcrowding, lack of resources, and the high rate of mental disabilities and co-occurring disorders. Thus, prison administrations will need to ensure that each prison has an adequate number of health care staff with specialized skills in identifying and managing mental disabilities.[41] Prison health personnel need support and training from the State (Ministry of Justice and Ministry of Health), to enable them to fulfil their responsibilities effectively.

Qualified psychologists and medical staff, who are prepared to work in prisons are often in short supply. Prison administrations should ensure that their expertise is not diverted into inappropriate tasks, for example, by providing them with appropriate auxiliary support.

The difficulties in recruiting suitably qualified health care staff to work in prison settings need to be addressed by the Ministries involved, by ensuring that the employment conditions of such staff are at least not less attractive than similarly qualified medical staff who work in the community. Prison mental health care staff should have access to in-service training and opportunities to increase their qualifications and receive at least the same salaries as those in the community health care services. Where resources allow, the particular challenges involved in working in a prison environment would justify additional benefits for prison mental health care staff.

In settings where resources are limited, an alternative to recruiting additional staff would be to ensure the regular presence of community health services within the prison. At the same time as managing individual patients, the community staff can also provide training and support to prison health care staff. The presence of community health care staff will also facilitate the continuity of care, both for those arriving in prison while under treatment in the community and for those who are released with mental disabilities.

Such support may also be supplemented by peer counselling by prisoners. This kind of support is crucial especially in low-income countries, where there is likely to be a severe shortage of qualified prison mental health care staff (see also section 4.3.5 B below).

Those working with women and children imprisoned with their mothers, require special training to manage their particular needs (see *UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment* for further guidance).

B. Other prison staff

The nature of the prison community is such that, in addition to ensuring the availability of a full range of health care services, prison administrations should also recognize that all prison staff need to have an understanding of basic mental health matters. Prison staff are in contact with prisoners on a regular basis. They come to

[41]Standard Minimum Rules, 22 (1).

recognize patterns of prisoner behavior and can sometimes detect changes in them more rapidly than health staff whose interactions with prisoners may be limited. Understanding the nature and symptoms of mental disabilities enhances the ability of prison officers to respond appropriately to prisoners with mental health care needs. Detection and intervention at an early stage, before mental distress develops into a more serious problem, are key to reducing the increase of mental disabilities in prisons, and to preventing self-harm and suicide. Staff have a fundamental role to play in this process.

Thus training on basic mental health issues should be provided to prison administrators and first line prison staff. The training should enhance staff understanding of mental disabilities, raise awareness of human rights, break down stigmatizing attitudes and encourage mental health promotion for both staff and prisoners.[42] An important element of training for all levels of staff should be the recognition and prevention of suicides[43] (see also section 4.3.5, C, below).

4.3.3 Access to justice

In order to ensure that individuals with mental health care needs who come into contact with the criminal justice system are not disadvantaged, it is vital that they have immediate and regular access to legal counsel during their whole period of arrest, detention and imprisonment. Due to the difficulties individuals with mental disabilities may face in accessing legal counsel, police and prison authorities should assist them to access legal aid, especially during the period of arrest, prosecution and pre-trial detention, but also later, for example to help prisoners with any appeals process relating to the sentence or medical treatment. Prison authorities may also collaborate with organizations of civil society and paralegal aid services, which assist prisoners, and especially those which have experience of dealing with prisoners with mental health care needs.

4.3.4 Assessment, allocation and accommodation

Poor prison conditions, overcrowding, inadequate ventilation, heat and lack of stimulation can have an adverse affect on the mental well-being of all prisoners and exacerbate existing mental disabilities. All prisoners, but especially those with mental health care needs should therefore be housed in an environment that is conducive to mental well-being.

A careful risk assessment of prisoners should be undertaken to ensure that prisoners with mental disabilities are protected from abuse and violence by other prisoners. Generally prisoners with mental health care needs should be accommodated in units under the supervision of a medical officer.

There are frequent reports from a number of countries of administrative segregation units being used to house prisoners with mental health care needs for long periods,

[42] WHO and ICRC information sheet, op, cit., p. 3.

[43] Ibid.

apparently for their own protection. This practice is unacceptable, since prolonged isolation is extremely damaging to mental well-being, and especially of those with mental disabilities. [44]

Prisoners who require acute care should preferably be temporarily transferred to psychiatric wards of general hospitals with appropriate security levels.

WHO and ICRC: On the hospitalization of prisoners with mental disabilities in psychiatric units/hospitals

There are many effective treatments for mental disabilities, but often the limited available resources are wasted in ineffective, expensive interventions and services that only reach a small proportion of those in need. The building of separate psychiatric prison hospitals in particular is not cost-effective, because they are very expensive to run, they have a limited capacity, are associated with low release rates, and they often leave the individual with a severe and persistent stigma. Many operate outside of the health departments responsible for controlling the quality of health interventions. Furthermore, there is no evidence that these expensive hospitals improve treatment outcomes. Rather, these hospitals can put prisoners at risk of human rights violations.

When prisoners require acute care they should be temporarily transferred to psychiatric wards of general hospitals with appropriate security levels. In accordance with the principles of de-institutionalization, special psychiatric prison hospitals are strongly discouraged

Source: WHO and ICRC Information Sheet, Mental Health and Prisons.

4.3.5 Mental health care services

A. Health screening

Every prisoner should undergo a medical examination on admission. The screening should include assessment to determine mental disabilities and be undertaken by qualified medical professionals.[45] The early diagnosis of any mental disabilities and the provision of timely and appropriate treatment are vital to reduce the possibilities of existing mental health problems developing into more serious disabilities.

The potential of suicide or self-harm should comprise an essential consideration during the health screening undertaken on entry to prison, which should aim to identify prisoners who may be at risk of such actions and to ensure that they receive appropriate counseling and protection.

Given the prevalence of co-occurring disorders among offenders with mental disabilities, it is advisable that all mental health assessments include screening for the presence of possible co-morbid substance disorders (and vice versa). [46] If the screen

[44]See “The Istanbul statement on the use and effects of solitary confinement”, adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul, which calls for the absolute prohibition of solitary confinement in the case of “mentally ill prisoners”.

[45]Standard Minimum Rules, Rule 24.

[46]Integrated Dual Disorders Treatment Workbook for Mental Health Clinicians, Draft 2003, Substance Abuse and Mental Health Services Administration (SAMSHA), Center for Mental Health Services. www.mentalhealth.samhsa.gov/cmhs/communitysupport/toolkits/cooccurring/

is positive, in-depth assessment of both disorders should proceed. The information about substance use and mental disabilities—and how they interact—is needed to develop an effective integrated treatment plan for persons with substance addiction and mental disabilities.

B. Treatment

Mental health care in prisons needs to be in line with principles of treatment in the community and national and international legislation relating to mental health care treatment. In prison settings treatment strategies will also need to take into account the particular challenges relating to treatment in a prison environment, usually with scarce resources.

- *Mental health promotion, prevention and early intervention:* The principle of preventing health conditions from arising should form an essential component of prison health policies. Counselling and therapy should be offered as early as possible, from the period of pre-trial detention, to those in need.
- *Equivalence of care:* The health care provided to prisoners should be of an equivalent level to that in the community. There should be no discrimination based on the patient's legal status, his or her mental disability, sex, sexual orientation, ethnicity, race, language, religion, nationality or other status. On the other hand treatment should take into account different treatment requirements depending, for example, on sex or culture.[47]
- *Confidentiality:* As with all health care providers in the community and in prisons, mental health care professionals should respect principles of confidentiality with regard to medical information.[48] Confidentiality encompasses confidentiality in requesting access to mental health care staff, during consultations and confidentiality with respect to medical records. During consultations, if the mental health specialist expressly wishes the presence of security staff, due to justified security concerns, then the consultation should take place within sight, but out of hearing of the staff member. Strict procedures relating to the confidentiality of medical records should be in place, and implemented from the outset of each prisoner's admittance to prison.
- *Access to consultations with mental health care staff:* Prisoners with mental disabilities should have easy access to suitably qualified mental health care staff in line with the principles valid for all health care in prisons. The right to confidentiality and ready access to medical staff means that prisoners should never have to fill out written requests to staff in order to see a mental health care professional.[49]
- *Informing prisoners of treatment options and consent:* Prisoners should be provided with full information about treatment options, risks and expected

[47]Mental Illness Principles, Principle 7.3; CRPD, Art. 25.

[48]Mental Illness Principles, Principles 6 and 11.

[49]Coyle, A., A Human Rights Approach to Prison Management, Handbook for prison staff, International Centre for Prison Studies (2002), p. 56.

outcomes and they should participate in treatment planning and decision making. No treatment should be undertaken without the patient's free and informed consent[50] (see section 4.3.5, D, for the exceptional administration of treatment without free and informed consent).

- *Individualized, interdisciplinary treatment:* Treatment should be individualized,[51] and interdisciplinary, including a balanced combination of psychosocial, medical (where necessary) and other support programmes as appropriate for the individual case. Exclusive reliance on medication to manage symptoms of mental distress should be avoided. For those individuals due for release, the treatment plan should also take into account the need for continuity of care by establishing links with the relevant community mental health services.

Balanced combination of interventions to respond to mental health care needs

According to WHO, the management of mental disabilities calls for the balanced combination of three fundamental ingredients: medication (or pharmacotherapy); psychotherapy; and psychosocial rehabilitation.

A balanced combination of interventions implies adherence to the following guiding principles:

- Each intervention has a specific indication according to the diagnosis, that is, should be used in specific clinical conditions;
- Each intervention should be used in a given amount, that is, the level of the intervention should be proportional to the severity of the condition;
- Each intervention should have a determined duration, that is, it should last for the time required by the nature and severity of the condition, and should be discontinued as soon as possible;
- Each intervention should be periodically monitored for adherence and expected results, as well as for adverse effects, and the recipient of the intervention should always be an active partner in this monitoring.

Source: WHO, *The World Health Report,* 2001, pp. 59-60.

- *Awareness of times of risk:* Prison authorities, health care and other staff should be aware of times when prisoners may be at risk of particular distress and anxiety, such as their first night in prison, the first period of imprisonment, and in some cases in the latter part of their sentence, if the prisoners' links with society have been disrupted, and ensure that appropriate support is provided by counsellors and mental health care professionals (see also section 4.3.5 C below for prison reception and induction).
- *Cooperation with community health care providers and NGOs:* Collaboration between prison and civil health services should be an integral component of medical care provided in prisons. Regular visits to prisons by specialists and

[50] CRPD, Article 25 *(d)*.

[51] Mental Illness Principles, Principle 9.2.

other members of the community mental health care services are essential in a large majority of prison systems worldwide to ensure that prisoners have access to adequate health care equivalent to that in the community. Prisoners requiring specialist care should be referred to specialist community mental health care providers. In some countries the only support available might come from NGOs working in the field and cooperation with them should be encouraged and facilitated.

- *Peer counselling:* Consideration may be given to providing peer counselling to prisoners with mental health care needs, by carefully selected and trained prisoners, to supplement the professional health care provided by the prison and community health services. Such a strategy might alleviate some of the challenges associated with resource constraints and recruitment of qualified staff, as well as providing a selected group of prisoners with skills which they can develop as part of their career training in the community, following release.

C. Suicide and self-harm prevention

Developing strategies to prevent suicide and self-harm and to provide appropriate psychological and, if necessary, psychiatric treatment to those at risk need to form a comprehensive element of mental health care in prisons.

The health screening undertaken on entry to prison and regular assessments are key components of self-harm and suicide prevention strategies. The prevention of such acts also depends to a large extent on proper supervision and the ability of prison staff to identify prisoners at risk and refer them to mental health specialists without delay.

The Netherlands: Special protocols for suicide prevention[a]

In Holland and a number of other countries special protocols for all members of the staff have been developed on how to prevent suicides, how to deal with completed suicides and how to deal with the after-care situation.

The policy focuses on the period before an eventual attempt of suicide or suicide; the period around a suicide incident; and the period after the incident, taking into account the situation of staff, prisoners and families.

This policy is integrated into the total communication structure of the institutions and is part of the basic education of uniformed staff.

[a]Jan van den Brand, General Governor, Coordinator of Foreign Affairs, Dutch Prison Service, Ministry of Justice, the Netherlands, UNODC Expert Group Review Meeting, Vienna 18-19 October 2007.

As suggested earlier, staff should be aware of particular times when prisoners may feel high levels of stress, anxiety and depression, which may lead to self-harm and suicide.

- **Reception**

  A number of studies have found that "the risk of suicide is particularly high in the first month a prisoner spends in a new prison, with heightened risk during the first days".[52] They recommend that "the reception area and procedures should be organized in such a way as to minimize mental distress. Wherever possible, facilities should be provided to enable prisoners to make early contact with their families. [. . ..] Procedures should ensure that all prisoners receive and understand the information given and that, so far as possible, the information is provided in accordance with their cultural traditions."[53] The United Kingdom NGO, Howard League for Penal Reform's, research shows that a dedicated wing, or unit, where all new prisoners spend their first 48 hours at the prison can prevent suicides.[54]

- **Induction**

  WHO also recommends that a well-organized induction procedure to introduce prisoners to the regime of the prison is put in place to support and optimize their ability to cope with prison life.[55]

- **Peer support programmes**

  Other means of support for prisoners have included peer support programmes, where prisoners are trained in peer support skills in order to monitor prisoners' distress, at critical times, for example, following admission to prison.[56]

GOOD PRACTICE

Australia: Peer support to prevent suicide and self-harm[a]

In South Australia's Mount Gambier prison, a specially trained and supported group of prisoners are on call 24 hours a day to listen to, and support other inmates. In Western Australia, regular meetings occur between prison administrators and peer support prisoners.

[a]McArthur, M., Camilleri, P. and Webb, H., Strategies for Managing Suicide and Self-harm in Prisons, Australian Institute of Criminology, August 1999, (www.aic.gov.au), p. 4.

[52]Møller, L., Stöver, H., Jürgens, R., Gatherer, A. and Nikogosian, H. (eds.), Health in Prisons, A WHO guide to the essentials in prison health, The World Health Organization Europe (2007), p. 142; see also The Howard League for Penal Reform, 'Care, concern and carpets': How women's prisons can use first night in custody centres to reduce distress, 2006.

[53]Health in Prisons, A WHO guide to the essentials in prison health, The World Health Organization Europe (2007), op. cit, p. 142.

[54]The Howard League for Penal Reform, 'Care, concern and carpets': How women's prisons can use first night in custody centres to reduce distress, 2006.

[55]Health in Prisons, A WHO guide to the essentials in prison health, The World Health Organization Europe (2007), op. cit., p. 142.

[56]McArthur, M., Camilleri, P. and Webb, H., Strategies for Managing Suicide and Self-harm in Prisons, Australian Institute of Criminology, August 1999, (www.aic.gov.au), p. 4.

- **All acts of self-harm or attempted suicide should be approached from a therapeutic standpoint**

  Prisoners may also use acts of self-harm as a means of protesting against poor prison conditions, and other forms of human rights violations. Under such circumstances prison managers need to address the cause of such acts of protest, rather than punishing those who take such extreme measures to draw attention to unsatisfactory conditions or worse. Criminalizing such acts in legislation or applying disciplinary measures, will only build up tension and resentment, while those suffering from mental disabilities are left untreated and their mental health deteriorates.

  Each incident of self-harm and attempted suicide should be treated as serious, rather than being regarded as "manipulative".[57] Prisoners who undertake such acts should receive immediate medical treatment for any physical injuries and be given prompt access to specialized counselling and therapy.

- **A positive prison environment**

  It must be emphasized that a fundamental element of strategies to reduce incidents of self-harm and suicide in prisons, is to create a prison environment, which is not harmful to the mental well-being of prisoners. In parallel to the identification, and supervision of "at-risk" prisoners and the individual treatment provided to them, there is a need for prison managers to take a proactive and positive approach to improve prison morale, in order to reduce incidents of self-harm and suicide.

D. Treatment without free and informed consent

Consent to treatment is one of the most important human rights issues relating to mental disability. The Mental Illness Principles recognize that no treatment shall be given without informed consent.[58] This is consistent with fundamental tenets of international human rights law and medical ethics, such as the autonomy of the individual. But this core provision in the Principles is subject to exceptions and qualifications,[59] which are abused, and are therefore increasingly being questioned. In this context, the United Nations Special Rapporteur has noted that ". . . decisions to administer treatment without consent are often driven by inappropriate considerations. For example, they sometimes occur in the context of ignorance or stigma surrounding mental disabilities, and expediency or indifference on the part of staff. This is inherently incompatible with the right to health, the prohibition of discrimination on the ground of disability, and other provisions in the Mental Illness Principles. In these circumstances, it is especially important that the procedural safeguards protecting the right to informed consent are both watertight and strictly applied." [60]

[57]McArthur M., Camilleri, P. and Webb, H., op. cit., p. 3.

[58]Mental Illness Principles, Principle. 11.1.

[59]Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, E/CN.4/2005/51, 11 February 2005, para. 88.

[60]Ibid., paras. 89-90.

The Convention on the Rights of Persons with Disabilities (CRPD), adopted on 13 December 2006, and which came into force on 3 May 2008, introduces stricter safeguards in order for health care to be provided to persons with disabilities on the basis of free and informed consent.[61] Article 12 (3) of CRPD obliges States Parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". Article 12 (4) requires States to ensure that "all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law . . ." (see section 3, International Standards, for full text). Thus, Article 12 of CRPD recognizes that some persons with disabilities require assistance to exercise their legal capacity. It obliges States Parties to support those individuals and introduce safeguards against abuse of that support. Legislation providing protections against abuse, in line with the requirements of CRPD, had been developed in some jurisdictions at the time of writing, and good practice examples were emerging.[62]

Admittedly, the implementation of supported decision-making processes is challenging in prisons, and especially where resources are scarce. On the other hand, there is particular risk of abuse in custodial settings, so adequate safeguards to protect prisoners with mental disabilities against treatment without free and informed consent are all the more vital. These realities represent additional strong arguments against imprisoning persons with mental disabilities, unless absolutely necessary.

Taking into consideration the points just mentioned, treatment without consent is generally possible when there is an imminent danger of harm to the patient or others, including the risk of suicide, and it is genuinely impossible to receive informed consent due to the person's condition and inability to communicate or make an informed decision at the given time, rather than because of his or her disability. Violent behaviour merely stemming from a refusal to treatment should never be used as justification for treatment without free and informed consent. It is also important to stress that the ability of the individual to consent to treatment may vary with time, and with the nature of treatments proposed, and must therefore be continuously re-assessed. The administration of any such treatment should be controlled by legislation and should be conducted in line with strict administrative and judicial procedures. The patient should be assisted and supported by his or her personal representative, such as a lay advocate, throughout this process. The personal representative or any interested person must retain the right to appeal to a judicial or other independent authority.[63] There must also be regular and timely reviews of the decision that are separate from the appeals process of the individual, by an independent judicial or quasi-judicial body.

The proposal to apply such treatment should be made by a suitably qualified mental health practitioner, approved by a second accredited independent practitioner, and

[61]CRPD, Article 25 *(d)*.

[62]For example, in Scotland; British Columbia in Canada and Hungary.

[63]Mental Illness Principles, Principle 11.16.

reviewed and approved by an independent authority, before treatment can take place.[64] This independent authority may be quasi-judicial or judicial.[65] The key point is that the independent authority should be different from the individual(s) proposing the treatment, and must be made up of people with the requisite skills and knowledge to approve or reject the proposal made by the mental health practitioners.

Such treatment should only take place in the hospital unit of the prison or in a general hospital, for the shortest possible period of time, under the supervision and care of specialized psychiatrists and other appropriate mental health care staff. All treatment should immediately be recorded in the patient's medical records, with an indication of whether it is with, or without, informed consent.[66]

In order to prevent situations where treatment without consent may be necessary, prison health care policies should emphasize preventive measures, ensuring that prisoners with mental disabilities are actively involved in decision-making from the outset, that where necessary support is provided to help them make free and informed decisions, and that they are motivated to participate in treatment. Treatment should always be applied in response to a recognized clinical symptom, have a therapeutic aim, and be likely to entail a real clinical benefit—and not only have an effect on the administrative, criminal, family or other situation of the patient.[67] Thus, treatment without consent to serve primarily an administrative purpose (such as sedating prisoners simply to facilitate the running of a prison) is not only unethical, but also illegal.

E. Continuity of care

Prison systems often fail to ensure continuity of medical care for those with mental health care needs (and for other patients), both when prisoners arrive in a prison already under treatment from the community, and when prisoners are transferred from one prison to another. For patients with mental health care needs on medication a break in treatment may have extremely adverse affects, leading to the rapid deterioration of mental well-being. It is therefore of utmost importance that there are close links with the community mental health services, so that the prison health staff are rapidly informed of any treatment in progress of newly admitted prisoners, and receive copies of all the relevant medical records. Similarly, all transfers to other prisons should be accompanied by full medical records and referral letters explaining the current health problems and individual treatment plan. The records should be transferred under conditions ensuring their confidentiality. Prisoners should be informed that their medical records will be transferred. Lastly, in good time in the period leading up to an individual's release from prison, direct contact and planning with the community mental health services should commence so as to ensure a smooth transition to care in the community.

[64]WHO (2005), Resource Book on Mental Health, Human Rights and Legislation, p. 54.
[65]Ibid. p. 54.
[66]Mental Illness Principles, Principle 11.10.
[67]WHO (2005), p. 54.

4.3.6 Prisoner programmes and family contact

Access to meaningful activities and social interaction, as well as other mental stimulation is fundamental to protecting prisoners' mental and physical well-being. Thus it is essential that all prisoners have access to a varied set of prisoner programmes, including work, vocational training, education, sports and recreation, among others.

Prisoners with mental disabilities should have access to all prisoner programmes, which correspond to their requirements, as set out in an individualized assessment on entry to prison. Research indicates that prolonged inactivity and isolation exacerbates existing mental disabilities and has a negative effect on treatment outcomes.

In addition special psychosocial support and therapeutic programmes for prisoners with mental disabilities should be developed, with the assistance of mental health care specialists and the involvement of NGOs assisting people with mental health care needs.

It is also fundamental that regular and meaningful contact with family members and friends can be maintained through visits, correspondence, and where appropriate, home leave.

4.3.7 Safety and security

A. Supervision

Prisoners with mental disabilities have special protection needs both from themselves and from others. Therefore careful allocation and ongoing supervision are essential to ensure the safety of prisoners with mental disabilities from violence, abuse, self-harm and suicide. Effective supervision necessitates the employment of an adequate number of suitably trained staff, as explained in section 4.3.2, B.

B. Disciplinary punishments

As mentioned in section 2.5, prisoners with mental health care needs are likely to break rules more often than others, usually due to reasons stemming from their mental disability, rather than any intention to disrupt prison discipline. Thus, placing prisoners with mental disabilities in segregation units to punish them for their behaviour cannot act as a deterrent and can dramatically worsen the prisoners' condition.

Strategies need to be developed to reduce or eliminate the use of administrative segregation or any other potentially harmful punitive measures, by emphasizing preventative approaches.

An overview of disciplinary measures relating to prisoners with mental disabilities is an urgent need in almost all prison systems. Criteria that are different to those that apply to the general prison population should be developed to respond to disciplinary offences committed by prisoners with mental disabilities, taking into account their treatment and social reintegration needs.

Disciplinary isolation should be used as a last resort, if at all, and for the shortest possible period of time.[68] When prisoners with mental disabilities violate prison rules, advice from health care staff may be sought to determine the prisoner's mental disability. Care should be taken, however, that medical staff are not involved in the decision to impose a disciplinary punishment, as this contravenes the United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, places medical personnel in a position contrary to their role of health care providers and damages the relationship between physician and patient, which should be based on mutual trust. Medical personnel's role should be limited to providing advice to prison authorities relating to prisoners' mental disability and health care needs. Prison medical staff should never be obliged to approve disciplinary punishments, such as segregation, or certify whether a prisoner is fit or not for such punishment.

However, prison medical staff, including mental health staff, should have regular access to prisoners held in disciplinary segregation to monitor their physical and mental health condition, to provide any necessary treatment and to ensure that they are immediately removed, if necessary.

United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

(a) . . .

(b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

Restraints must never be used on any prisoner as a form of punishment.[69] There may, however be instances where prisoners with mental disabilities become acutely disturbed to the point where they present a danger to themselves or to others. In such circumstances, and only under the supervision of the medical officer, it may be necessary to apply some form of physical restraint. However, the restraints should always be used as a measure of last resort for all prisoners, for the shortest possible period of time, and in accordance with approved procedures, and under the close supervision of a medical officer.[70]

[68]See the Istanbul statement on the use and effects of solitary confinement, adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.

[69]Standard Minimum Rules. Rule 33.

[70]Mental Health Principles, Principle 11.11.

The use of segregation units and any form of restraints, including why and how the decisions to segregate or use restraints were taken and the period of their use should be recorded and be subject to reviews.

C. Disciplinary hearings and complaints mechanisms

Prisoners with mental disabilities should be able to defend themselves during disciplinary hearings and all necessary assistance should be provided to ensure that this happens. Such assistance may be provided by personal advocates and/or a medical practitioner. Once again the involvement of the medical officer should not go beyond enabling an understanding of the prisoner's mental disability and assisting the prisoner to impart information relating to the disciplinary offence.

Prison authorities need to ensure that prisoners with mental disabilities have equal access to complaints procedures. If such prisoners have difficulties making complaints, due to their mental disability, suitable assistance should be provided, if necessary by personal advocates including lawyers. Complaints of discrimination and abuse by other prisoners or staff members should be carefully investigated by the prison administration, and by an independent authority (e.g. prison ombudsman, judicial authorities responsible for prison oversight) and appropriate action taken.

4.3.8 Preparation for release and post-release support

Prison and civil mental health systems need to develop comprehensive continuum of care protocols and mechanisms to break the cycle of release, re-offending and imprisonment. Prisoners with mental disabilities should be released from prison with arrangements in place to provide them with access to medication, if necessary, and mental health services.[71]

Prisoners with mental health care needs should have access to early conditional release at the earliest opportunity during their imprisonment. As already suggested, criteria for disciplinary punishments should be reassessed in order not to disadvantage prisoners with mental disabilities in fulfilling conditions of eligibility for early conditional release.

The process of cooperation with outside agencies should begin as early as possible during the preparation process. Appropriate advice on employment and housing should be provided in cooperation with such agencies and care in the community should be arranged for those in need.

Keeping prisoners with mental disabilities in prison, after the completion of their sentence, due to the lack of mental health care facilities, violates the human rights of such persons and is unacceptable according to international law. States are responsible to ensure that former prisoners with mental disabilities receive appropriate mental health care in the community, similar to any other person with mental health care needs.

[71]Standard Minimum Rules, Rule 83.

State health care services should put in place special arrangements for the care and support of former prisoners with mental health care needs, who do not have a home to return to. Cooperation with NGOs and other civil society or charitable organizations is vital, especially in countries with resource challenges.

4.3.9 Monitoring

Independent monitoring mechanisms should be in place to monitor mental health services provided in prisons. They should be carried out by civil mental health care professionals on a regular and ad hoc basis. Independent prison inspection bodies and monitoring boards should include the monitoring of the conditions in which prisoners with mental disabilities are held and their treatment. They should report to independent bodies, such as the parliament.

In parallel, in order to comply with good management practices, prison administrators should put in place mechanisms for the ongoing monitoring of prison conditions and the treatment of prisoners with mental disabilities, to evaluate the outcomes of treatment provided, identify any acts of discrimination and ill-treatment by staff or prisoners and the overuse of segregation units, and to take appropriate action.

RECOMMENDATIONS

TO LEGISLATORS AND POLICYMAKERS

- To address challenges relating to adequate health care provision in the general population and to improve access to health care services, as a first step towards reducing the unnecessary, unjust and harmful imprisonment of offenders with mental disabilities.
- To reassess punitive sentencing policies, which lead to the increasing imprisonment of disadvantaged groups, such as offenders with mental disabilities, to reverse the dramatic increase of people with mental health care needs in institutions which were not designed to cater for the social reintegration needs of this vulnerable group.
- To adopt mental health legislation to protect the rights of people with mental disabilities, including prisoners.
- To include needs of prisoners in public health policies and strategies and to provide adequate funding to the prison health services to meet the needs of prisoners with mental (and physical) health care needs.
- To develop policies and mechanisms which increase the integration of prison and civil health care services in order to improve prospects of equivalence of care in prisons and continuum of care following release and on admission to prison.
- To prohibit, in legislation, the imprisonment of people with mental disabilities due to lack of public mental health service alternatives.

Non-custodial measures and sanctions

- To introduce or increase the possibilities of diverting offenders with mental disabilities from the criminal justice system to suitable medical treatment, and to provide adequate funding for diversion schemes.
- To provide training and information to law enforcement and judicial authorities to encourage and enable diversion.
- To introduce sentencing alternatives for offenders with mental disabilities, who have committed more serious crimes, incorporating comprehensive medical care and supervision.

Inspection

- To develop independent monitoring mechanisms, reporting to independent bodies, to monitor mental health services provided in prisons.
- To ensure that independent prison inspection bodies include the monitoring of the conditions in which prisoners with mental disabilities are held, their treatment and any discrimination they are subjected to, and to initiate appropriate remedial and disciplinary/criminal procedure responses.

TO LAW ENFORCEMENT AGENCIES AND SENTENCING AUTHORITIES

- To use imprisonment as a last resort in the case of offenders with mental health care needs, giving preference to diversion from the criminal justice system or non-custodial sanctions, as far as possible.

TO PRISON AUTHORITIES, PROBATION AND/OR OTHER SOCIAL WELFARE SERVICES

Management policies and strategies

- To ensure that prison conditions and services are designed to protect and promote the mental and physical well-being of all prisoners.
- To ensure that the promotion of mental health in prisons comprises a key element of prison management and health care policies. To develop comprehensive policies and strategies relating to the management of prisoners with mental health care needs. Improving cooperation with community mental health care services should be a key objective of management strategies.
- To issue guidelines on policy and practice from the central prison administration.
- To appoint a mental health policy and strategy advisor at headquarters level. Depending on resources, to establish mental health teams in each prison or to appoint mental health coordinators working with prison medical officers, community health services and probation or welfare services.
- To raise the awareness of prison staff, prisoners and their families with information and educational materials about mental disabilities.
- To develop gender-specific mental health policies and strategies to address the needs of women prisoners with mental health care needs.
- To develop measurable standards to assess and evaluate the outcomes of such strategies and practices.

Staff

- To ensure that each prison has an adequate number of health care staff with specialized skills in identifying and managing mental disabilities.
- The difficulties in recruiting suitably qualified mental health care staff to work in prison settings need to be addressed by the Ministries involved, by ensuring that the employment conditions of such staff are at least not less attractive than similarly qualified health care staff who work in the community.
- To provide support and in-service training to specialist staff, as necessary, throughout their career.
- To ensure the regular presence of community health services within the prison, as an alternative to recruiting additional staff, especially in settings where resources are limited.
- To train administrators and first line prison staff on basic mental health issues. The training should enhance staff understanding of mental disabilities, raise awareness on human rights, challenge stigmatizing attitudes and encourage mental health promotion for both staff and prisoners.

Access to justice

- To ensure that prisoners with mental disabilities have immediate and regular access to legal counsel during their whole period of arrest, detention and imprisonment, similar to all other prisoners.
- Due to the difficulties individuals with mental disabilities may face in accessing legal counsel, to assist such persons to access legal aid, especially during the period of arrest, prosecution and pre-trial detention, but also later.

Assessment, allocation and accommodation

- To ensure that the accommodation of all prisoners, including those who are in need of mental health care, meets the requirements of United Nations Standard Minimum Rules for the Treatment of Prisoners and is conducive to mental well-being.
- To undertake a careful risk assessment of prisoners to ensure that prisoners with mental disabilities are protected from abuse and violence by other prisoners.
- To accommodate prisoners with mental disabilities in units under the supervision of a medical officer.
- To temporarily transfer prisoners who require acute care to psychiatric wards of general hospitals with appropriate security levels.
- To avoid using solitary confinement for prisoners with mental disabilities and never to use administrative segregation/isolation units to house prisoners with mental disabilities for long periods.

Mental health care services

- To ensure that the health services provided to prisoners is of an equivalent level to those in the community.
- To ensure that preventing mental health conditions from arising and early intervention comprise essential components of mental health provision.
- To ensure that every prisoner undergoes a health assessment on entry to prison. The screening should include assessment to determine mental disabilities, risk of self-harm and suicide and be undertaken by qualified mental health professionals.
- To include screening for the presence of possible co-morbid substance disorders in all mental health assessments.
- To ensure that prisoners have easy access to mental health care services, without any discrimination on the basis of mental disability or other status.
- To provide prisoners with full information about treatment options and involve them to the maximum possible extent in decision-making regarding their own treatment programme, if necessary with the application of supported decision-making procedures, and receive free and informed consent for treatment.
- To ensure that any treatment without free and informed consent is subject to stringent safeguards and is controlled by legislation, in line with Convention on the Rights of Persons with Disabilities.
- To provide individualized and multidisciplinary treatment, including a balanced combination of medical, psychosocial and other mental health support programmes, depending on individual needs.
- To respect principles of confidentiality with respect to consultations and medical information.
- To collaborate with community health services to the maximum possible extent and to consider training prisoners to provide peer counselling;
- To be aware of times of particular risk and take appropriate measures to prevent and address mental distress at these times.

Suicide and self-harm prevention

- To develop strategies and therapeutic programmes to prevent suicide and self-harm, in cooperation with community health specialists and NGOs.

- To provide a reception area for prisoners and an induction programme on arrival, to support and assist them at this time of particular risk of mental distress.
- Not to penalize prisoners for self-harm and attempted suicide.

Continuity of care

- To ensure that all transfers of prisoners are accompanied by the transfer of full medical records and referral letters explaining the current health problems and individual treatment plan.
- To commence direct contact and planning with community mental health services in good time in the period leading up to an individual's release from prison so as to ensure a smooth transition to care in the community.
- To ensure that records are transferred under conditions ensuring their confidentiality.

Prisoner programmes and family contact

- To ensure that prisoners with mental disabilities have access to all prisoner programmes, which correspond to their requirements.
- To develop special therapeutic programmes for prisoners with mental disabilities with the assistance of mental health care specialists, to address specific needs.
- To ensure regular and meaningful contact and communication with relatives and friends throughout the period of imprisonment.

Safety and security

- To ensure the safety of prisoners with mental health care needs with careful allocation and ongoing supervision.
- To reassess disciplinary measures relating to prisoners with mental health care needs. To develop different criteria to respond to disciplinary offences committed by prisoners with mental disabilities, emphasizing prevention rather than punishment.
- To use disciplinary isolation as a last resort, if at all, and for the shortest possible period of time in the case of prisoners with mental disabilities. When prisoners with mental disabilities violate prison rules, to seek advice from health care staff as to the mental disability of the prisoners.
- To ensure that prisoners with mental disabilities are able to defend themselves during disciplinary hearings and all necessary assistance is provided, by personal advocates if necessary.
- To ensure that prisoners with mental disabilities have equal access to complaints' procedures and that assistance is provided, by personal advocates if necessary.
- To ensure that medical staff are not involved in any way, in decisions to impose disciplinary punishments.

Preparation for release and post-release support

- To develop comprehensive continuum of care protocols and mechanisms with community mental health systems to break the cycle of release, re-offending and imprisonment.
- To begin the process of cooperation with outside agencies as early as possible during the preparation process. To provide appropriate advice on employment and housing in cooperation with such agencies and to arrange for care in the community for those in need.
- To put in place special arrangements for the care and support of former prisoners with mental health care needs, who do not have a home to return to. Cooperation with NGOs and other civil society or charitable organizations is vital, especially in countries with resources challenges.

Monitoring

- To put in place mechanisms for the ongoing monitoring of the treatment of prisoners with mental disabilities, in parallel to the independent inspection referred to above, and to take appropriate remedial and disciplinary action as necessary.

2. Prisoners with disabilities

DEFINITION

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[a]

This chapter includes guidance on the treatment of prisoners with physical disabilities. For the needs of prisoners with mental disabilities, see chapter 1, Prisoners with Mental Health care Needs.

[a]Convention on the Rights of Persons with Disabilities, Article 1.

KEY MESSAGES

- In order to ensure that persons with disabilities can access justice on an equal basis with others, relevant legislation and procedures need to be in place to ensure that persons with disabilities charged with or convicted of a criminal offence are not discriminated against in the criminal justice system.
- Prison sentences should be used as a last resort in all cases. This principle should be fundamental in deciding whether to imprison offenders with disabilities, and especially those who have committed non-violent offences, taking into account the level of care they are likely to receive in prisons.
- The difficulties people with disabilities face in society are magnified in prisons, given the nature of the closed and restricted environment and violence resulting from overcrowding, lack of proper prisoner differentiation and supervision, among others. Prison overcrowding accelerates the disabling process, with the neglect, psychological stress and lack of adequate medical care, characteristic of overcrowded prisons.
- In order to ensure the equal treatment of prisoners with disabilities and the protection of their human rights, prison authorities need to develop policies and strategies which address the needs of this vulnerable group in prisons. Such policies should be informed by the United Nations Convention on the Rights of Persons with Disabilities and national legislation, and address issues such as staff training, classification, accommodation, health care, access to programmes and services, safety, preparation for release, early conditional release and compassionate release, as a priority.

1. Overview

Prisoners with disabilities comprise a particularly vulnerable group, whose situation and special needs have not been the focus of much study to date. Although figures relating to the number of prisoners with disabilities worldwide are scarce, some studies indicate that, due to the growing prison population in most countries and the significant increase of older prisoners in some, there is also an increasing number of people with disabilities in prisons.

Disability can arise for a number of reasons. According to WHO in some countries up to a quarter of disabilities result from injuries and violence.[72] Disabilities can also be directly linked to poverty. For example, in many low income countries millions of people are disabled by the easily preventable disease, polio. According to UNDP, 80 per cent of people with disabilities live in developing countries.[73] As a large majority of prisoners worldwide is made up of poor and socially disadvantaged groups, it can be safely assumed that a considerable number suffer from a variety of disabilities, some apparent, some less so, impacting on their prospects of social reintegration.

The difficulties people with disabilities face in society are magnified in prisons, given the nature of the closed and restricted environment and violence resulting from overcrowding, lack of proper prisoner differentiation and supervision, among others. Prison overcrowding accelerates the disabling process, with the neglect, psychological stress and lack of adequate medical care, characteristic of overcrowded prisons.

Thus imprisonment represents a disproportionately harsh punishment for offenders with disabilities, often worsening their situation and placing a significant burden on the prison system's resources. Human rights concerns relating to the vulnerable status of prisoners with disabilities and their growing numbers, due to the increase in the older prison population in many countries, call for the development of policies and strategies to reduce the imprisonment of offenders with disabilities, while ensuring that the human rights of those in prison are protected and their special needs are addressed.

2. Special needs and challenges

The special needs of prisoners with disabilities naturally depend on the nature of their disability, though there are some key concerns that are common to all.

2.1 Access to justice

Offenders with disabilities face disadvantages at various stages of the criminal justice system. They may be indirectly discriminated against in their access to justice, if the

[72] United Nations Convention on the Rights of Persons with Disabilities, Fact sheet: Some Facts about Persons with Disabilities (www.un.org/disabilities/convention/facts.shtml).

[73] Ibid.

special assistance they need is not provided. In the absence of appropriate training and sensitization, law enforcement officials may demonstrate lack of understanding or even be actively hostile in their treatment of individuals with disabilities.

Persons with sensory disabilities, and particularly those who are affected by multiple disabilities, will face particular difficulties in understanding the charges against them, unless provided in a mode that is accessible to them. They will also have problems in communication during the criminal justice process. Thus having the assistance of qualified legal counsel and appropriate support to cater for their special needs are crucial to ensure that persons with disabilities have access to justice on an equal basis as others.

2.2 Protection needs

Due to their vulnerable physical condition, prisoners with disabilities are easy targets for abuse and violence from other prisoners and prison staff. Prison guards may, for example, confiscate from prisoners wheelchairs, crutches, braces, hearing aids, glasses and medications.[74] Prisoners who need special assistance with daily activities, such as eating, dressing and bathing, may be simply ignored. They may be left without meals and forced to urinate on themselves in the absence of bathroom assistance.[75] Prisoners with disabilities may be psychologically abused, for example, by the moving around of furniture in the cell of a visually impaired prisoner or by verbal taunts. Women prisoners with disabilities are at a particularly high risk of manipulation, violence, sexual abuse and rape.

2.3. Discrimination

People with disabilities are liable to face discrimination directly or indirectly throughout their lives, despite legislation in many countries prohibiting such discrimination. The discrimination persons with disabilities face in society are intensified in prison. Prisoners with disabilities encounter difficulties in accessing services, complying with rules and participating in prison activities that do not take account of their special needs. Due to architectural barriers, prisoners with mobility impairments may be unable to access dining areas, libraries, sanitary facilities, work, recreation and visiting rooms. Prisoners with visual disabilities cannot read their own mail unassisted or prison rules and regulations, unless they are provided in Braille. They are unable to use the library, unless taped materials or books in Braille are available. Prisoners with a hearing or speaking disability may be denied interpreters, making it impossible for them to participate in various prison activities, including counselling programmes, as well as their own parole and disciplinary hearings.[76] Prisoners with disabilities can be routinely denied participation in work programmes outside prison, sometimes significantly lengthening their periods of imprisonment.[77]

[74] Russell, M. and Stewart, J., Disablement, Prison and Historical Segregation, Monthly Review, July 15, 2002.

[75] Ibid.

[76] Ibid.

[77] Ibid.

2.4 Health care

Prisoners with disabilities may have particular health care needs related to their disability, such as physiotherapy, regular eyesight and hearing examinations and occupational therapy, some of which may be difficult to meet in prisons. They also need access to tools and services that enable them to enjoy their human rights in prisons to the fullest possible extent, such as hearing aids, wheel chairs, canes and orthotics.

Prisoners with disabilities are also likely to be in need of mental health care. Increased mental health care needs have been noted for example among prisoners who have sensory disabilities—conditions which are isolating in themselves and more so in prisons, where the special needs of such persons are rarely taken into account and where they can be victims of psychological abuse and bullying. The situation may be aggravated by the lack of access prisoners with disabilities may have to mental health care and counselling programmes, due to difficulties they have in communication. This can be the case particularly for prisoners with hearing and speaking impairments.

2.5 Multiple needs

Foreign national prisoners, ethnic and racial minorities and lesbian, gay, bisexual, and transgender prisoners with disabilities are at risk of intense discrimination, abuse, sexual assault and other forms of violence in the prison setting. In order to assess the needs and responses to these needs, this chapter should be read in conjunction with the relevant chapters in this handbook.

As disabilities are prevalent among older prisoners, please also refer to chapter 6, Older prisoners.

3. International standards

The principle of non-discrimination enshrined in the United Nations Standard Minimum Rules should be understood to cover prisoners with disabilities. More specifically the principles contained in the United Nations Convention on the Rights of Persons with Disabilities adopted on 13 December 2006, apply to all persons with disabilities, including those facing criminal prosecution, detainees and prisoners.[78]

[78]The Convention opened to signature and ratification on 30 March 2007. In accordance with its article 45, the Convention and its Optional Protocol entered into force on 3 May 2008, having been ratified by 20 countries by 4 April 2008.

United Nations Convention on the Rights of Persons with Disabilities[a]

Article 4

General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

[. . .]

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Article 13

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14

Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15

Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

See also Article 25, on the right to health, cited in Chapter 1, Prisoners with Mental Health care Needs.

Council of Europe, Committee of Ministers Recommendation No. R (98) 7, Concerning the Ethical and Organizational Aspects of Health Care in Prisons.[b]

C. Persons unsuited to continued detention: serious physical handicap, advanced age, short term fatal prognosis

50. Prisoners with serious physical handicaps and those of advanced age should be accommodated in such a way as to allow as normal a life as possible and should not be segregated from the general prison population. Structural alterations should be effected to assist the wheelchair-bound and handicapped on lines similar to those in the outside environment.

See also Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993.

[a]Adopted on 13 December 2006. Full text at: www.un.org/disabilities/convention/conventionfull/shtml
[b]Adopted by the Committee of Ministers on 8 April 1998.

4. Responding to the needs of offenders with disabilities

4.1 Non-custodial measures and sanctions

Due to reasons explained under section 2 above, the social reintegration needs of offenders with disabilities are rarely, if ever, served in prisons and their imprisonment should be avoided as far as possible, taking into account the offence committed and public safety requirements.

- Where possible, persons with disabilities should be diverted from the criminal justice system at the first point of contact with law enforcement officers, and if not, diversion should be possible throughout the criminal justice process—during prosecution, trial and on imprisonment.
- Prison sentences should be used as a last resort in all cases. This principle should be fundamental in deciding whether to imprison offenders with

disabilities, and especially those who have committed non-violent offences, taking into account the level of care they are likely to receive in prisons.

- The development of suitable non-custodial programmes for those with disabilities, combining treatment where relevant, with supervision in the community, would comprise a more humane and effective way of dealing with such persons' needs while ensuring public safety.

4.2 Prison management

4.2.1 Management policies and strategies

In order to ensure the equal treatment of prisoners with disabilities and their social reintegration, prison authorities need to take affirmative action.

The United Nations Convention on the Rights of Persons with Disabilities can help inform the development of appropriate policies for prisoners with disabilities. In many countries there will also be some form of legislation in force, such as a Disability Discrimination Act, which could be used as a basis for developing appropriate policies and strategies in prisons to address the special needs of this vulnerable group. Efforts should include the examination and amendment of existing policies, which put prisoners with disabilities at a disadvantage. Consultation with organizations and services of civil society working with persons with disabilities, and a needs assessment of prisoners with disabilities, should be essential elements of this process.

A prison service policy statement, clearly prohibiting discrimination against prisoners with disabilities and actively promoting equality of treatment should be developed and displayed prominently in all prison establishments.

Data collection and assessments should be undertaken on a regular basis, bearing in mind especially the scarcity of information and record keeping on prisoners with disabilities, to identify shortcomings and good practices, and to improve the situation of prisoners with disabilities.

4.2.2 Staff

The attitude of staff is a key element in ensuring the protection of the human rights of prisoners with disabilities and reducing discrimination in prison.

Where resources allow, the appointment in each prison of a member of staff to act as a contact point for prisoners with disabilities, as well as adviser to the prison management on policy issues and the needs of prisoners with disabilities should be considered.

Staff training needs to emphasize that prisoners with disabilities have the same human rights as all other prisoners and that they should not be treated more harshly, isolated or taunted due to their disability and difficulties arising from their condition. Appropriate techniques of dealing with prisoners with disabilities, when difficulties arise, should be included in staff training.

Staff should be trained to undertake effective supervision of prisoners with disabilities to prevent their abuse and ill-treatment by other prisoners, which should complement the allocation of prisoners with disabilities away from possible risk groups.

Staff should also be trained to detect signs of distress in prisoners with disabilities and coordinate with the prison psychologist and medical officer, as relevant, to prevent mental disabilities from arising and worsening.

4.2.3 Access to justice

In order to ensure that persons with disabilities can access justice on an equal basis with others, prisoners with disabilities should have prompt and regular access to legal counsel similar to all other prisoners, from the outset of their detention, and assistance should be provided for their communication with lawyers. Special needs relating to their disability should be provided for during the entire criminal justice process to ensure that they can participate in the procedure on the same basis as others. Staff need to be trained and sensitised to the needs of prisoners with disabilities, demonstrate sensitivity and assists them in accessing appropriate support.

4.2.4 Admittance

Prisoners with disabilities should be given an opportunity to declare any disability and provide information about their special needs on entry to prison and they should be provided with information about the prison and prison rules in a format that is understandable to them (e.g. in Braille or audio taped for prisoners who have serious visual impairments and large print for those with lesser visual disabilities).

Prisoners should be allowed to keep in their possession any form of aid relevant to their disability, such as wheelchairs and crutches, unless there is a genuinely justifiable security reason not to do so. If there is deemed to be a risk involved, suitable alternatives must be provided.

Prisoners with disabilities need to undergo an induction programme appropriate to their needs to identify their capabilities and special requirements, including especially health care and educational needs, and to determine the level of and type of support they require. They should be given information on who to contact if in need and procedures should be carefully explained.

GOOD PRACTICE
Information pack for prisoners with disabilities in the United Kingdom

The prison service has prepared an information pack for prisoners with disabilities in cooperation with the NGO, the Prison Reform Trust, which is made available to all prisoners with disabilities on reception.

4.2.5 Classification, allocation and accommodation

Like all prisoners, prisoners with disabilities should be housed in the minimum security conditions required for their safe and secure custody.

Prisoners with disabilities should be allocated to accommodation suitable to their needs. Adaptations to accommodation should be made if necessary to help them cope with their new environment. For example, handrails can be provided in their cells, steps can be painted in bright colours and marked to make them visible for those with visual disabilities, portable ramps can be used to facilitate the access of those using wheelchairs. Health care services should be easily accessible.

The risk of abuse by other prisoners should be taken into account when determining the allocation of prisoners with disabilities to ensure their protection. Female prisoners with disabilities are at increased risk of abuse. Their special need for protection should be taken into account in their allocation.

4.2.6 Health care

Prisoners with disabilities should have equal access to all health care provided to other prisoners, which should be equivalent to that in the community. They also need to have access to the same level of specialist health care available in the community. This may include physiotherapy, speech and occupational therapy, treatment for sensory disabilities, as well as access to hearing aids, wheelchairs and crutches among others. Prison authorities will need to cooperate with community health services to ensure that such needs are met to the maximum possible extent.

Due to the difficulties associated with coping in the prison environment, including bullying, taunting and sometimes violence by other prisoners, prisoners with disabilities are also likely to need specialist mental health care, as explained in section 2.4, which should be provided by specialist staff. Where prisoners with disabilities have problems with communication, (e.g. prisoners with sensory disabilities) assistance should be provided to ensure that they have equal access to counselling programmes.

4.2.7 Access to programmes and services

Prison services should take all possible measures to ensure the equal access of prisoners with disabilities to prison activities, including educational and vocational training programmes, counselling and recreation.

Given the small numbers of mobility impaired prisoners it would perhaps not be reasonable to expect all prisons to have wheelchair access to services, especially in low-income countries. However, prison authorities need to make sure that alternative means ensuring prisoners with disabilities' access to services are in place.

Cooperation with organizations of civil society should be established to design and run programmes suitable for the needs of prisoners with disabilities. Such

cooperation will ease the burden of prison staff, ensure that prisoners with disabilities are given an opportunity to participate in programmes designed for their needs and increase contact between the prisoners and the outside world, which will have a beneficial effect on their mental well-being. Where groups of prisoners with similar disabilities exist, suitable group activities can be organized, with the assistance of outside organizations.

Libraries should provide books in alternative formats to cater for the needs of prisoners with disabilities: for example, materials in Braille or audio taped books for those with visual disabilities and sign language interpreted videos for prisoners with hearing disabilities. Where access to libraries is difficult for those who have mobility impairments, books may be delivered to cells/dormitories, e.g. by library trolleys.

Information about organizations providing assistance to persons with disabilities should be displayed on the walls of the prison and provided in an information booklet/package (in an accessible format) handed to prisoners with disabilities on entry.

4.2.8 Safety and security

The need to take into account safety and security concerns during the allocation of prisoners with disabilities has been mentioned in section 4.2.5. Prisoners with disabilities should not only be held in a safe environment, but they also need to feel safe, so that their mental well-being is protected, like all other prisoners. This may require some small additional measures and considerations, such as conducting the searching of prisoners with disabilities with special sensitivity or informing prisoners with visual disabilities, when approaching them, due to the anxiety this may cause in the coercive and sometimes violent environment of prisons.

Placing prisoners with disabilities in isolation cells can have extremely harmful consequences, due to the psychological distress suffered by this group of prisoners, which is likely to be exacerbated by isolation. Therefore, such punishment should be avoided as far as possible and if unavoidable, only be used as a measure of last resort, and for the shortest possible period of time.

Prisoners with disabilities should be able to defend themselves during disciplinary hearings and all necessary assistance should be provided to ensure that this happens. (For example, sign language interpreting for those with hearing and speaking disabilities). Prison authorities need to ensure that prisoners with disabilities have equal access to complaints procedures. If they have difficulties making complaints, due to their disability, suitable assistance should be provided.

4.2.9 Preparation for release, early conditional and compassionate release

The assistance of probation services, welfare agencies and appropriate organizations of civil society should be sought in preparing prisoners with disabilities for release. The process of cooperation with outside agencies should begin as early as possible during the preparation process. Appropriate advice on employment and housing

should be provided in cooperation with such agencies and continuum of care in the community should be arranged for those in need.

Prisoners with disabilities should have equal access with others to early conditional release. The fact that they may have been unable to participate in the requisite number of prisoner programmes due to their disability should not disadvantage them in deciding early conditional release. Compassionate release should be considered for those who do not pose a threat to society and whose disability leads to serious difficulties in coping with prison conditions and thus undermining efforts of social reintegration.

RECOMMENDATIONS

TO LEGISLATORS AND POLICYMAKERS

- To put in place relevant legislation and procedures to ensure that persons with disabilities can access justice on an equal basis with others, and that persons with disabilities charged with a criminal offence are not discriminated against in the criminal justice system.

TO LAW ENFORCEMENT AND SENTENCING AUTHORITIES

- To divert offenders with disabilities from the criminal justice system, to suitable treatment and programmes as appropriate, at the earliest possible time, taking into account the offence and the risk posed by the offender.
- To use prison sentences as a last resort in the case of offenders with disabilities, taking into account the provision for their special needs if imprisoned and the risk they pose to the public.
- To develop suitable non-custodial programmes for those with disabilities, combining treatment where relevant, with supervision in the community.

TO PRISON AUTHORITIES, PROBATION SERVICES AND/OR OTHER SOCIAL WELFARE SERVICES

Management policies and strategies

- To develop a prison service policy statement, clearly prohibiting discrimination against prisoners with disabilities and actively promoting equality of treatment.
- To develop appropriate policies and strategies to address the special needs of prisoners with disabilities.
- To examine and amend existing policies, which put prisoners with disabilities at a disadvantage.
- To undertake consultation with organizations and services of civil society, working with persons with disabilities and a needs assessment of prisoners with disabilities, as an integral element of policy and strategy development.
- To undertake data collection and assessments on a regular basis to identify shortcomings and good practices in order to further reduce the disadvantages faced by prisoners with disabilities.

Staff

- Where resources allow, to appoint a member of staff in each prison to act as a contact point for prisoners with disabilities, as well as adviser to the prison management on policy issues and the needs of prisoners with disabilities.

- To include training on appropriate measures and techniques to care for and supervise prisoners with disabilities in prison staff training, emphasizing that prisoners with disabilities have the same human rights as all other prisoners and that they should not be discriminated against.
- To train staff to undertake effective supervision of prisoners with disabilities to prevent their abuse and ill-treatment by other prisoners.
- To train staff to detect signs of distress in prisoners with disabilities and coordinate with appropriate health care staff, to prevent mental disabilities from arising and worsening.

Access to justice

- To ensure that prisoners with disabilities have prompt and regular access to legal counsel similar to all other suspects, from the outset of their detention;
- To provide for their special needs relating to their disability during the entire criminal justice process to ensure that they can participate in the procedure on an equal basis with others.

Admittance

- To give prisoners with disabilities an opportunity to declare any disability on admission and provide information on their special needs on entry to prison.
- To provide prisoners with disabilities with information about the prison and prison rules in a format that is understandable to them.
- To allow prisoners with disabilities to keep in their possession any form of aid relevant to their disability, such as wheelchairs and crutches. If there is deemed to be a genuine risk involved, to provide suitable alternatives.
- To ensure that prisoners with disabilities undergo an induction programme appropriate to their needs to identify their capabilities and special requirements, and to determine the level and type of support they require.
- To provide prisoners with disabilities information on who to contact if in need and to explain procedures carefully.

Allocation and accommodation

- To allocate prisoners with disabilities to suitable accommodation and to make adjustments where necessary to provide for special needs.
- To take into account the risk of abuse by other prisoners when determining the allocation of prisoners with disabilities to ensure their protection.

Health care

- To ensure that prisoners with disabilities are not discriminated against in their access to health care. This includes the obligation to provide suitable assistance to prisoners who have problems with communication, due to their disability.
- To provide the same level of specialist health care for disabilities, available in the community.

Access to programmes and services

- To take all possible measures to ensure the equal access of prisoners with disabilities to prison activities, including educational and vocational training programmes, counselling and recreation.
- To establish cooperation with organizations of civil society to design and run programmes suitable for the needs of prisoners with disabilities.
- To organize suitable group activities where groups of prisoners with similar disabilities exist, with the assistance of outside organizations.

- To ensure that prison libraries provide books in alternative formats to cater for the needs of prisoners with disabilities. Where access to libraries is difficult for those who have mobility impairments, to deliver books to cells/dormitories.
- To provide contact details of organizations providing assistance to persons with disabilities.

Safety and security

- Not to punish prisoners with disabilities disproportionately and unfairly.
- To ensure that prisoners with disabilities feel safe, by for example, conducting the searching of prisoners with disabilities with special sensitivity, first explaining the reasons for searching and the procedure.
- To use isolation cells as a means of last resort, only when absolutely necessary, and for the shortest possible period of time.
- To provide all necessary assistance to prisoners with disabilities to enable them to defend themselves during disciplinary hearings.
- To ensure that prisoners with disabilities have equal access to complaints procedures. If prisoners with disabilities have difficulties making complaints, due to their disability, to provide suitable assistance.

Preparation for release/early conditional release/compassionate release

- To seek the assistance of probation services, welfare agencies and appropriate organizations of civil society in preparing prisoners with disabilities for release. To begin the process of cooperation with outside agencies as early as possible.
- To ensure that prisoners with disabilities have equal access with others to early conditional release.
- To consider release on compassionate grounds for those who do not pose a threat to society and whose disability leads to serious difficulties in coping with prison conditions and thus undermining efforts of social reintegration.

3. Ethnic and racial minorities and indigenous peoples

DEFINITION

A **minority group** is a sociological group that does not constitute a politically dominant plurality of the total population of a given society. A sociological minority is not necessarily a numerical minority—it may include any group that is disadvantaged with respect to a dominant group in terms of social status, education, employment, wealth and political power.[a] Minority groups generally differ from the majority due to their ethnicity, race and descent, among others, which is reflected in different ethnic, religious and cultural practices and languages.

The term **overrepresented groups** has been used in this chapter to refer to ethnic and racial minorities and indigenous peoples.

Overrepresentation in the criminal justice system refers to a situation where the proportion of a certain group of people within the control of the criminal justice system is greater than the proportion of that group within the general population.

[a] http://encyclopedia.thefreedictionary.com/Minority+groups

KEY MESSAGES

- In many countries members of ethnic, racial minorities and indigenous peoples are significantly overrepresented in the criminal justice system, often due to legislation and law enforcement strategies, which have a disparate impact on these groups.
- States need to take remedial action whenever there is an unjustifiable disparate impact of legislation and practice upon a group distinguished by race, colour, descent or ethnic origin. This principle obliges States to review their legislation, policies and practices, and take affirmative action to prevent or end policies with unjustified discriminatory impact. Such a review may cover the impact of mandatory sentencing, punitive sentencing with respect to certain drug offences and the targeting of minority groups and indigenous peoples by law enforcement officials.
- The implementation of human rights standards in prisons, which includes the equitable treatment of all prisoners, is vital to establish a positive prison environment and thereby to improve prison management. Equitable treatment encompasses eliminating all forms of discrimination, as well as taking affirmative action to ensure that the special needs of ethnic and racial minority and indigenous prisoners are met. For such a strategy to be successful the first step is for prison services to make clear their commitment to racial and ethnic equality and to transform commitment into practice, by taking specific measures and putting in place appropriate mechanisms, ideally in consultation with community representatives of ethnic and racial minorities and indigenous peoples.

1. Overview

In many countries members of ethnic, racial minorities and indigenous peoples are significantly overrepresented in the criminal statistics and in prisons. For example, in the United States, blacks are imprisoned for all offences at 7.09 times the rate of whites.[79] In Australia the rate of imprisonment of indigenous peoples was 12 times higher than the rate of non-indigenous imprisonment in 2005.[80] Aboriginals represented 18 per cent of the federal prison population, although they accounted for 3 per cent of the general Canadian population in 2006.[81] The Roma minority is overrepresented in the criminal justice system in a number of countries in Eastern Europe, though most countries in Europe do not provide prison population statistics by ethnicity and race and therefore exact proportions cannot be determined.

The reasons for overrepresentation vary in detail and multiplicity in different contexts. Nevertheless, some factors are common to most countries where overrepresentation exists. Although discrimination is illegal according to the legislation of most States, law enforcement policies and practices may lead to the disproportionate arrest and imprisonment of minority groups and indigenous peoples. For example, increased police presence in urban areas where minority groups are concentrated may create a greater likelihood of detection or police might disproportionately target members of marginalised groups for arrest. Sometimes seemingly race- or descent-neutral legislation can have a disparate impact on minorities. Harsh drug legislation, as well as mandatory sentencing policies and "three strikes laws",[82] which allow judges no or very limited discretion, have increased the likelihood of imprisonment of racial and ethnic minorities for non-violent crimes and low-level drug offences in some countries. In some cases drugs laws may directly lead to discrimination in the case of ethnic and racial minorities.[83]

Mandatory sentencing laws exist in many countries and regions, including Canada, England and Wales, South Africa, certain Asian countries, the United States and Australia, some allowing limited judicial discretion. In some countries they have increased the likelihood of imprisonment of racial and ethnic minorities and indigenous peoples. Although the concept of mandatory sentencing itself is race, ethnicity

[79]State Imprisonment Rates (per 100,000) by Race and Black-to-White imprisonment Ratio, Bureau of Justice Statistics 2005, in Reducing Racial Disparity, while Enhancing Public Safety: Key Findings and Recommendations, Council on Crime and Justice, Racial Disparity Initiative, Minnesota, p. 18. (Accessed at: www.racialdisparity.org/reports_final_report.php)

[80]Snowball, L. and Weatherburn, D., Indigenous over-representation in prison: The role of offender characteristics, Crime and Justice Bulletin, Number 99, September 2006, p. 1.

[81]Annual Report of the Office of the Correctional Investigator of Canada 2005-2006, September 2006. (Available at: www.oci-bec.gc.ca/reports)

[82]Three strikes laws require the courts to hand down a mandatory and extended period of imprisonment to persons who have been convicted of a serious criminal offence on two separate occasions.

[83]See for example, King, R. S. and Mauer, M., Sentencing with Discretion: Crack Cocaine Sentencing After Booker (January 2006), The Sentencing Project, Washington, which explains the discriminatory nature of drugs legislation in the United States, where the penalty structure for crack cocaine is far harsher than for powder cocaine. A conviction for the sale of 500 grams of powder cocaine results in a 5-year mandatory minimum sentence, while the same penalty is triggered for the sale or possession of only 5 grams of crack cocaine. Thus, the federal sentencing system applies a 100-to-1 quantity disparity when dealing with crack and powder cocaine, which are essentially the same drug. Since chemical cocaine is more expensive and tends to be a white, middle class drug, these laws have had devastating consequences for the African American community and resulted in severe sentences that many in the United States have identified as unjust.

and descent neutral, it has a disproportionate impact on minority groups, when the offences selected are likely to be those committed by the socially disadvantaged and when applied in a situation where legislation and law enforcement practices lead to significant racial and ethnic disparities in arrest and detention.

Imprisonment further excludes members of groups already facing discrimination and exacerbates their marginalization, which may lead to a cycle of incarceration, affecting their families and communities, while perpetuating existing racial and ethnic stereotyping. Discrimination against members of ethnic, racial and indigenous minorities in the closed and coercive environment of prisons can lead to violence against such groups by other prisoners and their harsher treatment by prison staff. They may also have less access to services and programmes in prisons.

Understanding the reasons for overrepresentation helps recognize the fact that the higher ratio of imprisonment of ethnic and racial minorities and indigenous peoples does not reflect a proportionately higher rate of criminal activity among these groups. This is an essential step towards breaking down prejudices held by the community and criminal justice agencies with respect to the risk posed to society by members of such groups. The discriminatory attitudes and practices confronted in prisons typically constitute a reflection and continuation of what ethnic and racial minorities and indigenous peoples have experienced prior to imprisonment, in their dealings with the criminal justice system in particular, and in all other elements of their lives in general.

2. Special needs and challenges

Ethnic and racial minorities and indigenous peoples comprise a vulnerable group in the criminal justice system and have special needs based on culture, traditions, religion, language and ethnicity, which prison systems often fail to address. Some of the needs are common to all. Others vary depending on the culture and background of the prisoner.

2.1 Access to justice

As explained above, ethnic and racial minorities and indigenous peoples are disadvantaged in the criminal justice system, due to certain harsh legislation, as well as law enforcement strategies which directly or indirectly target such groups. Once detained, members of such groups continue to be discriminated against and may also face linguistic barriers in accessing justice.

Inadequate interpretation services for minority groups and indigenous peoples, who do not speak the majority population language sufficiently to understand their legal position and court proceedings, disadvantage them during the trial process.[84] In some

[84]See for example, Cace, S., et al., op. cit. p. 15 and Aboriginal Customary Laws Discussion Paper, op. cit., p. 102.

countries legal representation offered is often of inadequate quality, or not responsive to the special needs of the offender.[85] Sometimes, although free legal representation is supposed to be provided by the State, in practice this provision is not adequately implemented in the case of minority groups.[86]

In addition, such groups may receive disproportionately severe sentences. Due to a biased perception that members of such groups represent a greater risk to public safety, alternatives may not be considered as often as they are for the majority population.

Other concerns reported have included the inability of overrepresented groups to afford the surety required for release on bail, the unequal application of diversion from prosecution and poorer quality pre-sentence reports prepared by the probation services, affecting sentencing.

2.2 Discrimination

- *Physical and verbal abuse:* Discrimination in prison can be reflected in physical and verbal abuse by prison staff or other prisoners. Members of minority groups may be subjected to beating, humiliating treatment, hate speech, individual and collective harassment.

However, more often discrimination is less visible, reflected in various practices, procedures and access to services.

- *Classification:* Members of overrepresented groups may be systematically over-classified and placed in higher security institutions than necessary.
- *Accommodation:* Discrimination may also be reflected in the quality of accommodation, with unofficial segregation of certain ethnic groups and their allocation to dormitories or cells with less favourable conditions.
- *Disciplinary punishments:* The ratio of disciplinary punishments imposed on overrepresented groups can be an indicator of disparate treatment.
- *Searching procedures:* Staff may apply different searching procedures depending on the race and ethnicity of the prisoner.
- *Education, health care and prisoner programmes:* Access to education, health care and prisoner programmes may be affected by ethnicity, race and descent, with a detrimental effect on the social reintegration needs of overrepresented groups, increasing the risks of re-offending after release.
- *Work:* Overrepresented groups may be offered less attractive jobs or not to be given any work at all, despite having the requisite skills.
- *Temporary release, home leave and parole decisions:* Decisions may be indirectly discriminatory, due to over-classification in the first instance, the high level of

[85]Cace, S., et al, op. cit., p. 15 and Aboriginal Customary Laws Discussion Paper, op. cit. p. 101.

[86]See for example, Alternative Report to the Report Submitted by Bulgaria pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, Bulgarian Helsinki Committee, Sofia, November 2003, p. 7.

> disciplinary punishments or for not having completed the requisite amount of prisoner programmes (see section 2.6 below). They may also be directly discriminatory. Minority group or indigenous offenders may be less likely to be granted temporary absences and parole, be granted parole later in their sentence or be more likely to have their parole suspended or revoked.[87]

Many other forms of subtle discrimination may exist in attitudes of prisoners and staff.

2.3 Family and community links

Due to the isolation experienced by overrepresented groups in prisons, links with family and the community can acquire an added significance, in reducing the harmful and de-socializing effects of imprisonment. In addition, imprisonment can cause particular difficulties to some indigenous peoples because of their separation from traditional lands, family, community and culture. The family is central to the fabric of some indigenous societies and critical to the well-being of the individuals. The breaking of family and community ties and the impossibility to fulfil certain familial obligations can have a particularly detrimental effect on members of indigenous groups, especially women, which may not be taken into account during their allocation to prison.

Indigenous women and family links in Mexico

"In Mexico indigenous women are unlikely to receive either family visits or phone calls because of the prohibitive costs these impose on impoverished communities living at great distance from the prison. Researchers found that 24 per cent of indigenous women were visited by their family just once a year, and concluded that this abandonment impedes rehabilitation".[a]

[a]Bastick, M., Women in Prison, A commentary on the Standard Minimum Rules for the Treatment of Prisoners, Quaker United Nations Office, p. 73, citing Taylor, R., Women in prison and children of imprisoned mothers (Quaker United Nations Office, Geneva), p. 19.

2.4 Language barriers

The linguistic requirements of minority groups and indigenous peoples may be neglected, which can exacerbate their sense of isolation severely. For example, there may not be copies of prison rules and regulations in a language that they understand, they may not be provided adequate interpretation during disciplinary hearings, translation provided during prison activities/rehabilitation programmes may be inadequate or non-existent, and they may not be provided with reading materials in a language that they can understand.

2.5 Religion

Minority groups and indigenous peoples are likely to have different religious and spiritual needs and the observance of the tenets of their religion will require

[87]See for example, Annual Report of the Office of the Correctional Investigator of Canada 2005-2006, September 2006. (Available at: www.oci-bec.gc.ca/reports)

cooperation from the prison administration, which may not be forthcoming, perpetuating the existing resentment felt as a result of discrimination.

2.6 Prisoner programmes

The lack of attention and resource allocation to the special needs of minority groups and indigenous peoples can be reflected in the poor range of rehabilitation programmes addressing the specific requirements of such groups.

The lack of equal access to prisoner programmes or the lack of appropriate programmes for minority groups and indigenous peoples may lead to further disadvantages. Since the review and reduction of security levels take account of programmes completed, prisoners from these groups can be disadvantaged and held in a higher security level than necessary for longer periods. Women are doubly disadvantaged, since programmes suitable for their specific needs, taking into account both their gender, as well as their culture and traditions as members of ethnic and racial minority groups or indigenous peoples, are rarely offered. Thus such women may have to participate either in mainstream programmes for women or special programmes designed for the indigenous or minority male prison population, neither of which is likely to be entirely suitable to their needs.[88]

A parole board in one country observed that often the only way for an indigenous prisoner to access programmes was to transfer to another prison, sometimes long distances from the offender's community. This added to cultural and community dislocation. The extent to which a prisoner had engaged in programmes while in prison was a consideration for the parole board in its determinations. The lack of indigenous-specific programmes and services in prisons could cause delays in being released on parole.[89]

2.7 Health care

Members of overrepresented groups are also likely to have special health care needs related to their socio-economic marginalization in society. They are generally likely to have received inadequate medical care prior to imprisonment, and they may be at higher risk of some conditions, such as STDs and health problems relating to substance abuse. Ethnic and racial minorities often face discrimination in access to, and treatment in, mental health care and support services. Indigenous populations are frequently ignored, with no specialist development of psychiatric and support services despite acute needs that are manifest in increasing suicide rates and overrepresentation in high-security mental health facilities.[90]

[88]For example, an Australian inquiry observed that Aboriginal women had to use either services for indigenous men or mainstream services for women, neither of which were appropriate (see Bastick, M., op. cit. p. 73, citing Jonas, W., Social Justice Report, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2002, p. 168).

[89]Aboriginal Customary Laws Discussion Paper, Project 94, Law Reform Commission of Western Australia, December 2005, p. 261.

[90]E/CN.4.2/2005/51, op. cit. para. 12.

In most countries, imprisonment is likely to make these conditions worse, unless treatment is provided. Once again, women are doubly disadvantaged, due, firstly, to the lack of gender-specific health care in the large majority of prison systems, and secondly, to their position of being at higher risk of most of the conditions listed above (see *UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment* for further guidance on gender sensitive health care).

2.8 Preparation for release and post-release support

Ethnic, racial minority and indigenous offenders are likely to need particular assistance after release, due to their disadvantaged socio-economical status. Mainstream post-release support, where it exists, may not take into account the special cultural needs of overrepresented groups during this difficult period of reintegration. Discriminatory attitudes and treatment may be prevalent in social welfare, housing and employment agencies, as well as in probation services. Stigmatization of indigenous women may be particularly marked following their release and they may be rejected or ignored by their communities,[91] which increases their likelihood of re-offending.

2.9 Multiple needs

Ethnic and racial minorities and indigenous peoples are particularly likely to have multiple needs, due to their overrepresentation in most prison systems, their socio-economic marginalization in most societies and the consequences of discrimination.

They are likely to be overrepresented especially among those who are in need of mental health care, due to discrimination in the community and poverty, hindering their access to support services, putting them at higher risk of acquiring addictions, and in the case of indigenous female offenders, their higher likelihood of being victims of domestic violence in some societies[92] (see chapter 1, Prisoners with mental health care needs).

They may also be overrepresented among prisoners under sentence of death, due to discrimination and lack of equal access to legal counsel, hindering the exercise of their rights to appeal against their sentence, to seek pardon or commutation on an equal basis with the majority prison population (see chapter 8, Prisoners under sentence of death).

They may be foreign nationals, which intensifies many of the problems outlined above, as well as adding additional challenges (see chapter 4, Foreign national prisoners).

[91]Noted, for example, in Canada. See Arbour, L., Commission of Inquiry into certain events at the Prison for Women in Kingston, Public Works and Government Services Canada, 1996, p. 199.

[92]For example according to a survey conducted in Canada among female prisoners, abuse was found to be more widespread in the lives of Aboriginal women: overall, 90 per cent reported physical abuse and 61 per cent identified sexual abuse (see Corrections and Conditional Release Act, 5 Year Review, Women Offenders February 1998, citing a survey conducted in 1990).

3. International standards

International Covenant on Civil and Political Rights, Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, with entry into force on 4 January 1969, in accordance with Article 19

[Extracts]

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

[. . .]

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

CERD General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system[a]

[Extracts]

Strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system

5. States parties should pursue national strategies the objectives of which include the following:

(a) To eliminate laws that have an impact in terms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by persons belonging to such groups, or laws that apply only to non-nationals without legitimate grounds or which do not respect the principle of proportionality;

(b) To develop, through appropriate education programmes, training in respect for human rights, tolerance and friendship among racial or ethnic groups, as well as sensitization to intercultural relations, for law enforcement officials: police personnel, persons working in the system of justice, prison institutions, psychiatric establishments, social and medical services, etc.;

(c) To foster dialogue and cooperation between the police and judicial authorities and the representatives of the various groups referred to in the last paragraph of the preamble, in order to combat prejudice and create a relationship of trust;

(d) To promote proper representation of persons belonging to racial and ethnic groups in the police and the system of justice;

(e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;

(f) To make the necessary changes to the prison regime for prisoners belonging to the groups referred to in the last paragraph of the preamble, so as to take into account their cultural and religious practices.

Pre-trial detention

26. Bearing in mind statistics which show that persons held awaiting trial include an excessively high number of non-nationals and persons belonging to the groups referred to in the last paragraph of the preamble, States parties should ensure:

(a) That the mere fact of belonging to a racial or ethnic group or one of the aforementioned groups is not a sufficient reason, de jure or de facto, to place a person in pretrial detention. Such pretrial detention can be justified only on objective grounds stipulated in the law, such as the risk of flight, the risk that the person might destroy evidence or influence witnesses, or the risk of a serious disturbance of public order;

Guarantee of fair punishment

34. In this regard, States should ensure that the courts do not apply harsher punishments solely because of an accused person's membership of a specific racial or ethnic group;

35. Special attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences and to capital punishment in countries which have not abolished it, bearing in mind reports that this punishment is imposed and carried out more frequently against persons belonging to specific racial or ethnic groups.

36. In the case of persons belonging to indigenous peoples, States parties should give preference to alternatives to imprisonment and to other forms of punishment that are better adapted to their legal system, bearing in mind in particular International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

Execution of sentences

38. When persons belonging to the groups referred to in the last paragraph of the preamble are serving prison terms, the States parties should:

(a) Guarantee such persons the enjoyment of all the rights to which prisoners are entitled under the relevant international norms, in particular rights specially adapted to their situation: the right to respect for their religious and cultural practices, the right to respect for their customs as regards food, the right to relations with their families, the right to the assistance of an interpreter, the right to basic welfare benefits and, where appropriate, the right to consular assistance. The medical, psychological or social services offered to prisoners should take their cultural background into account;

(b) Guarantee to all prisoners whose rights have been violated the right to an effective remedy before an independent and impartial authority.

United Nations Standard Minimum Rules for the Treatment of Prisoners

Discipline and punishment

30. (3) Where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.

Religion

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

See also United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of 18 December 1992; United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution A/61/L.67 of 13 September 2007; Convention (No. 169) concerning Indigenous and Tribal Peoples, Adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session.

[a]A/60/18, pp. 98-108.

4. Responding to the needs of ethnic and racial minorities and indigenous peoples

4.1 Sentencing policies and non-custodial measures and sanctions

The International Convention on the Elimination of all Forms of Racial Discrimination (CERD) defines racial discrimination as conduct that has the purpose or effect of restricting rights on the basis of race. It requires remedial action whenever there is an unjustifiable disparate impact of legislation and practice upon a group distinguished by race, colour, descent or ethnic origin. This principle obliges States parties to review their legislation, policies and practices, and take affirmative action to prevent or end policies with unjustified discriminatory impact.

The Human Rights Committee of the United Nations has also expressed specific concern that mandatory sentencing can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various articles of the ICCPR.[93] In addition, many studies have found that mandatory sentences are not an effective sentencing tool: that is, they constrain judicial discretion without offering any increased crime prevention benefits.

- In view of the concerns expressed above and in line with ICCPR and CERD, article 2 *(c)*, mandatory sentencing laws that result in overrepresentation need to be reassessed. Offenders who differ in terms of conduct, danger to the community and culpability should not be treated identically. Judges should be given an opportunity to use their judgment and discretion in identifying suitable and proportionate sentences in each case.
- Law enforcement strategies need to be reviewed to identify ways to make them more racially equitable.

[93]Concluding observations of the Human Rights Committee : Australia. 24/07/2000. A/55/40, paras. 498-528. (Concluding Observations/Comments)

Other affirmative policies that may prevent the unnecessary and unjust imprisonment of ethnic and racial minorities and indigenous peoples, while ensuring public safety, may include:

- Revising sentencing guidelines to take into account socio-economic disadvantages and the especially harmful impact of imprisonment on people from certain cultures, leading to a punishment disproportionate to the offence committed.[94]
- Increasing the range of non-custodial sanctions available in legislation. As conviction from drug offences has had an enormous impact on overrepresentation of ethnic and racial minorities in a number of countries, consideration should be given to increasing the availability of alternative sanctions for non-violent drug offenders and ensuring that ethnic and racial minorities are not discriminated against in consideration for such sanctions.
- Developing community-based problem solving mechanisms, particularly for low-level offences in some targeted areas, to prevent over-reliance on the criminal justice system.[95]
- By working with representatives of different minority groups and indigenous peoples, programmes that are suitable to address the needs of offenders from different groups may be designed, in order to increase the chances of such groups to enjoy the same rights as the majority population in the consideration for alternatives to prison.

GOOD PRACTICES

Recognizing the special circumstances of indigenous peoples in Canada[a]

In 1996 the Canadian Criminal Code was amended to provide that all available sanctions other than imprisonment should be considered for all offenders, with particular reference to the circumstances of indigenous offenders. The provision was designed to reduce the level of indigenous overrepresentation in Canada, recognizing that the circumstances of indigenous offenders are different to those of non-indigenous offenders.

Aboriginal courts in Australia[b]

Aboriginal courts, which have been in existence throughout Australia since the 1990s, involve Aboriginal elders in court proceedings. The courts operate within the Australian legal system at magistrates' court level (courts of first instance). The role of elders is primarily to advise the court and in some cases speak to the accused in a culturally appropriate manner. Aboriginal courts encourage better communication between the judicial officer, the offender and other parties involved in the process. Proceedings are informal and the use of legal jargon is discouraged. The presence of elders or respected persons in court can be effective in imparting a positive and constructive notion of shame and elders provide valuable information to the judicial officer about the offender and relevant cultural matters. Aboriginal courts are not considered to be in the same category as problem solving courts, such as drug courts. Rather they are seen as a way of

[94]In compliance with CERD General recommendations XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, Rec. 36.

[95]As recommended in Reducing Racial Disparity, while Enhancing Public Safety: Key Findings and Recommendations, Council on Crime and Justice, Racial Disparity Initiative, the United States, p. 12. (www.racial-disparity.org)

readjusting the balance of unfair treatment of indigenous people within the criminal justice system, by accommodating their needs.

Although too early to judge the effectiveness of Aboriginal courts, in terms of repeat offending, it appears that these courts have achieved significant gains in terms of justice outcomes for Aboriginal people. There have also been substantial improvements in court attendance rates.

Improving the effectiveness of alternative sanctions for the Roma minority in the Czech Republic[c]

In the Czech Republic, a programme has been developed by the Czech Probation and Mediation Service to ensure that the Roma minority receives equal access to services during the implementation of alternative sentences. Another special scheme, Roma Mentor, focuses on the needs of juvenile members of the Roma minority, who have received non-custodial sanctions. At the time of writing the programme was being implemented in partnership witih the Atinganoi Roma Citizens Association. Mentors are selected from the Roma minority and are trained by the Czech Probation and Mediation Service to work with clients from the Roma community sentenced to alternative sanctions. The activities of the mentors help decrease the barriers between the Roma community and the criminal justice system.

[a]Discussion Paper Overview, Aboriginal Customary Laws, Project 94, (February 2006), Law Reform Commission of Western Australia, p. 39.

[b]Ibid., pp. 24, 25.

[c]Case Study Book, Juvenile Justice, Examples of Good Practice (2006), Association for Probation and Mediation Justice (SPJ), Prague, Czech Republic, pp. 52-53. (Available at: www.best.spj.cz).

4.2 Prison management

4.2.1 Management policies and strategies

The implementation of human rights standards in prisons, which includes the equitable treatment of all prisoners, is vital to establish a positive prison environment and thereby to improve prison management. Equitable treatment encompasses eliminating all forms of discrimination, as well as taking affirmative action to ensure that the special needs of overrepresented groups are met. For such a strategy to be successful the first step is for prison services to make clear their commitment to racial and ethnic equality and to transform commitment into practice, by putting in place appropriate mechanisms.

The policy of non-discrimination should be made visible, be displayed on the walls of the prison establishment and comprise an integral part of prison staff training.

The establishment of a multidisciplinary and multicultural team, representing the major services may be considered to advise management, devise strategy, ensure that policies are implemented and monitor outcomes.

Consultation with representatives of minority groups and indigenous peoples on a formal basis during the formulation of policies against discrimination on the basis of race, ethnicity or descent, and preparation of regulations reflecting such policies, have been proven to be useful to ensure that account is taken of the specific concerns and recommendations of overrepresented groups in the prison environment.

4.2.2 Staff

Staff selection and training are key to the effective implementation of non-discrimination policies.

Every effort should be made to recruit staff from ethnic and racial minorities and indigenous peoples overrepresented in prisons. This will help ensure a better understanding among staff about different cultures, establish a fairer attitude towards prisoners from minority groups and indigenous peoples, and help foster trust between prisoners and staff. Personnel from overrepresented groups need to be represented at different levels—in management, as well as in the direct supervision of prisoners.

Staff training should include training on cross-cultural issues and understanding of the special needs of minority groups and indigenous peoples, and should be clear that discrimination will not be tolerated.

Prison management should also adopt policies and measures that ensure there is no discrimination among members of staff. In some countries ethnicity or race may determine the position of staff in the hierarchy which is as equally unacceptable as discrimination towards prisoners from minority groups.

GOOD PRACTICE
Policy of non-discrimination in the Dutch prison service[a]

The special needs of minorities and non-discrimination is a fundamental part of the basic education of the uniformed staff in the Netherlands. Non-discrimination is integrated into the "integrity policy" of the prison system. A national code of conduct has been developed for this purpose and each institution has been obliged to develop a local code of conduct integrating a local integrity policy and implementation strategy. Parts of this policy are also integrated into recruitment procedures, the basic education of uniformed staff, the local communication structure and sanctions policy.

[a]Jan van den Brand, General Governor, Coordinator of Foreign Affairs, Dutch Prison Service, Ministry of Justice, the Netherlands, UNODC Expert Group Review Meeting, 18-19 October 2007, Vienna.

4.2.3 Access to justice

Overrepresented groups generally need special assistance to enable them to access justice on an equal basis with the majority prison population. Prison authorities should be aware of this need, provide information regarding their legal rights in a language that they understand, and facilitate access to legal aid. Providing information on NGOs and paralegal services that assist such groups and facilitating contact between them may be an important means of assistance, especially in countries where state legal aid services are inadequate.

GOOD PRACTICE
Staff assist minorities in their access to justice in South Africa[a]

In the South African prison service members of staff who speak the language of minorities represented in prisons have been appointed to deal with issues relating to minorities' access to justice.

[a]Judge N.C. Erasmus, Judge of the High Court of the Republic of South Africa, UNODC Expert Group Meeting, Vienna, 18-19 October 2007.

4.2.4 Allocation and accommodation

A. Protection needs

The allocation of prisoners within the prison should take into account the need to protect members of overrepresented groups from racial abuse and violence. This does not mean segregating minorities from the general population, but ensuring that placement is based on the risk assessment of all offenders, and, for example, not accommodating those suspected of racial bias or convicted of violent racial offences with members of minority groups. There have been tragic cases of violence in some countries due to the lack of care taken in this respect.

Segregation of minority and indigenous prisoners from others is not good practice, since integration and mutual understanding among prisoners should be encouraged. However, consideration should be given to placing members of overrepresented groups in prisons, and accommodation within prisons, where they can establish relations with other people from a similar background. Such a practice is based on the principle of equal treatment, rather than discrimination, as it entails providing members of ethnic and racial minorities and indigenous peoples the same opportunities as the majority population, to associate with persons from their own cultures.

B. Equality, recognizing different needs

The accommodation provided should be of equal quality, with no discrimination made based on race, ethnicity, religion or descent. However, the understanding of equality should encompass the consideration of different needs, as far as possible. For example, for members of some cultures, which emphasize the community, accommodation in single cells may have a traumatic effect. The establishment of appropriately sized dormitories or large shared cells may be considered to accommodate such offenders.

GOOD PRACTICE
Responding to special accommodation needs in Australia

A variety of accommodation strategies are employed within Australian prisons as part of the management of prisoners at risk of self-harm and suicide. Dormitory and shared cell accommodation has been made available in many states. Accommodation in dormitories has been producing positive results in reducing distress among Aboriginal prisoners.[a]

[a]McArthur, M., Camilleri, P. and Webb, H., "Strategies for Managing Suicide and Self Harm in Prisons", Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice, August 1999, p. 3. (available at: www.aic.gov.au).

See also section 4.2.10 for security level of allocations.

4.2.5 Contact with the outside world

Maintaining family and community links is important for the social integration of all prisoners and effort must be made to place prisoners as close as possible to their

homes. As explained in section 2.3, the maintenance of contact with their families and communities acquires particular significance for ethnic and racial minority and indigenous prisoners, in terms of counterbalancing the isolation experienced in prison.

Making every effort to place members of ethnic and racial minorities and indigenous peoples as close as possible to their homes is an important step to ensure that family contact and community support continues.

In addition, prison authorities should ensure that visitors from such groups are not discriminated against by prison staff, for example, by disrespectful language or attitudes and searching procedures which are stricter than the norm.

Where visits from families are difficult due to the placement of an offender far away from home, prison authorities should allow longer visiting hours to compensate for less frequent visits and permit additional telephone calls. Often the cost of telephone calls prohibits economically disadvantaged prisoners to maintain contact with their homes. Where resources allow, the cost of calls should be covered by the State.

Effort should also be made to assist with the transport of family members of overrepresented groups who live at long distances and who cannot afford the cost of travel. Prison authorities can also establish links with community organizations to encourage them to visit and provide support to prisoners belonging to overrepresented groups.

GOOD PRACTICE
Community liaison, Mexico[a]

State social workers observe prisoners' relationship with the outside world in order to help them with imprisonment and reintegration. For example, when a prisoner's family no longer visits, the social worker will visit the prisoner's community to find out the reasons. This helps reassure indigenous persons and assist in maintaining and improving social relationships within the detention centre.

[a]Human Rights and Vulnerable Prisoners, Penal Reform International—Training Manual No. 1 (2003), p.117.

4.2.6 Linguistic needs

Prisoners who do not speak the language most commonly spoken in prison should be provided with written copies of prison rules and regulations in a language they understand. Irrespective of whether translations of prison rules are available, they should also be carefully explained to ensure that all points are understood, including by those who are illiterate. Similarly, during all activities in prison, care should be taken that overrepresented groups are provided with translations and explanations, in order to prevent their exclusion and isolation from prisoner programmes.

Prison authorities should make efforts to ensure that reading materials in languages spoken in the prison are available in the prison library. Ethnic and racial minorities and indigenous peoples should be allowed to use their own language and should

never be punished for this reason. They should be allowed to speak in their own language during visits and use their own language for correspondence.

Where security considerations apply in relation to particular prisoners, permitting them to use their own language will not prevent selective monitoring of correspondence.

4.2.7 Religious and spiritual needs

Providing possibilities for ethnic and racial minorities and indigenous peoples to fulfil the requirements of their religious or spiritual beliefs is important to ensure that they do not feel further isolated from their own culture and traditions, and that they find spiritual support during their imprisonment. Prison authorities should ensure that such groups are able to observe the tenets of their religion, similar to the majority prison population. This includes having access to a minister of their own religion, being able to undertake communal worship, being provided with special diets and being able to fulfil special hygiene requirements.

4.2.8 Health care

Like all prisoners, when minority and indigenous prisoners are first admitted to prison, they should undergo a health screening and any existing conditions treated. They should be given equal access to all health care services, without discrimination, which means that health care services offered in prison should take account of the cultural background of the prisoners, as required by CERD.[96] Mental health care and support services for ethnic and racial minorities and indigenous peoples must be respectful of their cultures and traditions.[97]

Studies have found that the special needs of some minority groups and indigenous peoples include programmes to treat drug and alcohol abuse. Due to the close links between substance abuse and crime, the effective treatment of drug and alcohol addiction is vital to help prevent re-offending.

Prison authorities should work with community groups to design appropriate drug and alcohol abuse programmes for different minority groups and indigenous peoples to increase their effectiveness, and to facilitate continuum of care after release.

4.2.9 Prisoner programmes

A. Work, vocational training and education

Most minority and indigenous prisoners are likely to have been disadvantaged in terms of work experience and education. Many will have been unemployed at the

[96]See CERD General recommendations XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, Rec. 38 (a).

[97]Mental Illness Principles, Principle 7.3.

time of arrest. Therefore providing members of overrepresented groups with an opportunity to gain job skills and education should be considered a key component of their social reintegration requirements.

Minority and indigenous prisoners should be offered the same quality of work as other prisoners, be expected to work for the same number of hours, receive equal remuneration and enjoy the same health and safety precautions, taking into account their skills and interest.

As far as possible, the training and work provided should correspond to the employment opportunities in the community to which they intend to return.

B. Special programmes and involving the community

Involving community organizations in programme design and delivery is valuable in maintaining links between prisoners and the outside world, easing resource pressures and improving prison atmosphere. In the case of minority groups and indigenous peoples, continuing contacts with the community is likely to be of particular importance, due to their sense of alienation and isolation within the system, and the higher level of distress experienced as a result of breaking ties with the community in some cultures. In addition, community organizations can provide the specialized culturally relevant programmes addressing the needs of prisoners belonging to their ethnicity, race or descent.

The provision of culturally relevant programmes is important both in itself and to ensure that overrepresented groups are not indirectly discriminated against in their consideration for early conditional release in some jurisdictions, due their failure to having fulfilled a requisite number of prisoner programmes, because of the unavailability of appropriate programmes.

As explained earlier, programmes that address both the gender-specific needs of female members of minority groups or indigenous peoples, as well as their cultural, spiritual and religious requirements, are lacking in the large majority of prison systems. Prison authorities should work together with indigenous and minority community groups who work with women to develop programmes suitable to the needs of female minority or indigenous offenders.

4.2.10 Safety and security

A common practice which discriminates against members of overrepresented groups is their over-classification and unnecessary placement in high-security institutions, with a detrimental impact on their social reintegration and at great cost to the State. Prison authorities should ensure that the risk assessment tools used to classify prisoners are in no way discriminatory either in intent or in impact.

Overrepresented groups should be housed in prisons with the least restrictive security arrangement necessary, similar to all other prisoners.

The need for the special protection of members of minority groups and indigenous peoples and their careful allocation within prisons, taking account of this requirement, has been mentioned in section 4.2.4. In addition prison staff should supervise living areas regularly to prevent any abuse of minority groups and indigenous peoples by other prisoners.

The overuse of disciplinary punishments with respect to minority groups and indigenous peoples is a common indicator of discrimination within a prison. In some systems, administrative segregation may be used as a disciplinary punishment for members of such groups disproportionately and prisoners may additionally be verbally humiliated during this period. This kind of practice is unacceptable and procedures should ensure that disciplinary procedures and punishment decisions are fair and transparent. Where necessary, interpretation should be provided during disciplinary hearings.

Complaints of racial and ethnic discrimination, harassment and abuse by staff members or other prisoners should be carefully investigated by the prison administration, and by an independent authority (e.g. prison ombudsman, judicial authorities responsible for prison oversight) and appropriate action taken.

Physical restraints should always be used as a measure of last resort for all prisoners, a rule that applies equally to minority groups and indigenous peoples. Clear procedures should be in place and understood by all staff regarding the use of physical restraints. Records should be kept of the use of physical restraints, including the reasons for application.

4.2.11 Preparation for release and post-release support

Released minority and indigenous offenders are likely to need help with housing, social welfare, employment and health care. Therefore, it is vital that prison authorities coordinate with social services in the community with respect to preparation for release and post-release support.

Prison authorities should try to ensure that any treatment undertaken for health problems, such as substance abuse or mental health, is continued and/or monitored after release. Where probation services exist they will have an important role to play in assisting in all these areas.

It is particularly advisable to cooperate with organizations of civil society providing support to minority groups and indigenous peoples to facilitate culture-sensitive assistance to be provided to released prisoners during the difficult period of transition from prison to liberty.

GOOD PRACTICE
Culture-sensitive post-release support in Canada[a]

Following prisoners' release into the community, an employment coordinator interviews them and assists them with job placement. Prairie Region employment coordinators have been trained in an Aboriginal specific employment assessment technique developed by the Aboriginal Human Resources Development Council. The technique is widely used in the Aboriginal community by schools, community employment counsellors and persons seeking employment. Two of the four community employment coordinators are members of the Aboriginal employment committees in their parole districts. This provides access to a strong network of agencies where offenders can be streamed into programmes to assist with their re-entry into the community.

[a]Boone, T., Aboriginal Employment Training Initiatives, Let's Talk, August 2006, Vol. 31, No. 1, Correctional Service of Canada, p. 12.

4.2.12 Monitoring

Prison authorities should put in place mechanisms for the ongoing monitoring of discrimination based on ethnicity, race and descent. Monitoring and analysis need to cover allocation to accommodation, work, vocational training, education, disciplinary measures, use of sports facilities, libraries and religious chapels, temporary release and parole decisions. Any significant racial or ethnic imbalances should be examined and any direct or indirect discrimination identified. Prison authorities should take action based on the data, to ensure that disparate treatment of prisoners is eliminated.

RECOMMENDATIONS

TO LEGISLATORS AND POLICYMAKERS

- To review legislation which has a disparate impact on ethnic and racial minorities and indigenous peoples and take action to correct the balance, while taking account of public safety goals.
- To reassess the costs and benefits of relying heavily on penal sanctions to address certain offences, such as drug use and trafficking, which have had a disparate impact on the imprisonment of ethnic and racial minorities in some countries. To ensure that there are considerable distinctions between sentences foreseen for non-violent drug offenders, drug use, small players in the drugs trade and major traffickers in narcotics.
- To reassess mandatory sentencing laws which result in the overrepresentation of disadvantaged groups, including minority groups and indigenous peoples in prisons. To ensure that offenders who differ in terms of conduct, danger to the community and culpability are not treated identically, and to revise sentencing guidelines accordingly.
- To reassess law enforcement strategies to identify ways to make them more racially equitable.
- To initiate training programmes for the police, prosecutors and other law enforcement bodies, to sensitize them to the situation and needs of overrepresented groups and to eliminate racial bias.

- To ensure that ethnic and racial minorities and indigenous peoples are not discriminated against in consideration for non-custodial sanctions and measures.
- To work with representatives of minority groups and indigenous peoples to design community programmes suitable to address the needs of offenders from different ethnic, racial and indigenous groups, in order to increase their chances to enjoy the same rights as the majority population in the consideration for alternatives to prison.

TO PRISON AUTHORITIES, PROBATION AND/OR OTHER SOCIAL WELFARE SERVICES

Prison management

- To make clear their commitment to racial and ethnic equality, to make this an integral component of prison management policies and to display a statement to this effect prominently in prison establishments.
- To establish mechanisms, such as forming multidisciplinary and multicultural teams representing major services, and formalizing cooperation with representatives of minority groups and indigenous peoples in the community, to advise on the introduction of appropriate policy and regulations to eradicate discrimination and improve social reintegration initiatives in prisons.
- To put in place mechanisms for the ongoing monitoring of discrimination based on ethnicity, race and descent and to ensure that disparate treatment of prisoners, based on race, ethnicity and descent, is eliminated.

Staff

- To increase the ratio of overrepresented groups in the prison workforce and appoint staff from overrepresented groups to positions at all levels of the administrative hierarchy. To take measures to ensure that there is no discrimination between members of staff based on their race, ethnicity and descent.
- To make cross-cultural training an integral part of staff training curricula, to help staff understand the special needs of minority groups and indigenous peoples, and the policy of no-tolerance for racial and ethnic discrimination.

Allocation and accommodation

- Not to over-classify prisoners from overrepresented groups, thereby to reduce the unnecessary use and cost of maximum security prisons, and overrepresentation in these institutions.
- To ensure that minority and indigenous prisoners are accommodated in cells/dormitories that offer protection from high risk offenders, and that their accommodation is of equal quality to that of the majority prison population.

Contact with the outside world

- To make every effort to place offenders from minority groups and indigenous peoples as close as possible to their homes to increase chances of continued links with their families and their communities;
- To ensure that the visitors of minority groups and indigenous peoples are treated respectfully. To establish links with community organizations to encourage visits and support to prisoners of these groups;
- Where visits from families are difficult due to the placement of an offender far away from home, to allow longer visiting hours to compensate for less frequent visits; to permit additional telephone calls and, where resources allow, to cover the cost of calls;
- Where resources are available, to assist with the transport of family members of minority groups and indigenous peoples who live at a long distance and who cannot afford the cost of travel.

- To establish links with community organizations to encourage them to visit and provide support to minority and indigenous prisoners.

Language

- To ensure that the linguistic requirements of minority groups and indigenous peoples are provided for, including the translation of prison rules and regulations, interpretation during disciplinary hearings and prisoner programmes, as well as the provision of reading materials in minority languages. Prison rules should be explained verbally, notwithstanding whether they have been provided in written form or not.
- Not to penalize members of minority groups and indigenous peoples for using their own language in prison and correspondence.

Religion

- To ensure that the spiritual/religious needs of minority and indigenous prisoners are provided for, including access to ministers of their own faith, places for worship, special diets and hygiene arrangements, as relevant.

Prisoner programmes

- To provide minority and indigenous prisoners equal access to all services and rehabilitative programmes as the majority group population, thereby giving them equal chances of social reintegration and the reduction in their security classification.
- To consider vocational training, work and education as key components of the social reintegration of overrepresented groups, taking into account their disadvantaged socio-economic situation.
- Take affirmative action by providing members of minority groups and indigenous peoples with special programmes designed to address their offending behaviour in a way that is relevant to their culture and traditions, including programmes specific to the needs of female minority and indigenous prisoners.
- To work with the community to design and deliver such programmes.

Health care

- To provide equal access to health care for minority and indigenous prisoners, taking into account, their particularly high risk status with regard to certain health conditions, such as drug and alcohol dependency.
- To ensure that the health care offered in prison takes account of the cultural background of prisoners.

Safety and security

- To house ethnic and racial minorities and indigenous peoples with the least restrictive security arrangement necessary, similar to all other prisoners.
- To ensure that staff supervise living areas regularly to prevent any abuse of ethnic and racial minorities and indigenous peoples by other inmates.
- To establish clear procedures with regard to the use of disciplinary measures, including the use of administrative segregation, to ensure that disciplinary punishments are not used disproportionately for members of minority groups and indigenous peoples.
- To carefully investigate complaints of discrimination based on ethnicity, race and descent and harassment and abuse by staff members or other prisoners, and take appropriate disciplinary action.

Preparation for release

- To put in place measures that ensure that overrepresented groups can benefit from temporary and early release schemes on an equal basis as other prisoners. To remove all obstacles that lead to a disparate outcome in this respect, such as lack of equal access to rehabilitation programmes and discrimination in disciplinary punishments.
- To coordinate with social services in the community with respect to preparation for release and post-release support, to ensure that housing, social welfare, employment and health care requirements of minority groups and indigenous peoples are addressed.
- To work with representatives of minority groups and indigenous peoples in the community and organizations of civil society offering support to minority groups, to facilitate culture-sensitive assistance during re-entry into society.

4. Foreign national prisoners

DEFINITION

The term, foreign national prisoners, refers to prisoners who do not carry the passport of the country in which they are imprisoned. This term therefore covers prisoners who have lived for extended periods in the country of imprisonment, but who have not been naturalized, as well as those who have recently arrived.

This chapter does not cover issues relating to asylum seekers, who under international law, should not be detained unless exceptional circumstances are present. They should never be detained in prisons alongside prisoners charged with or convicted of criminal offences. For guidance please refer to UNHCR Guidelines on Detention of Asylum Seekers (1995) and revised guidelines, *UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (1999).

Irregular immigration status on its own should also not be used as a reason for detention, unless there are well-founded safety and security reasons that justify such detention. According to international law persons who are detained solely on the grounds of their immigration status (referred to in this chapter as immigration detainees), should not be held with prisoners who have committed criminal offences. This chapter does not specifically focus on the circumstances and needs of immigration detainees, which are particular to their situation. However, since in some countries, people can be convicted of and imprisoned for immigration-related offences, alongside prisoners who have been convicted of criminal offences, the needs and responses suggested in this chapter apply also to such persons.

Reference is also made to immigration detainees due to the term's relevance to the status of some former prisoners.

KEY MESSAGES

- Foreign nationals are often disadvantaged in the criminal justice system due to increasingly punitive measures applied to foreign national offenders in many countries, to discrimination, limited awareness of legal rights, lack of access to legal counsel, lack of social networks and economic marginalization. There is a need, therefore, for States to examine their criminal justice policies and law enforcement practices to identify shortcomings and to take steps to improve foreigners' access to justice throughout the criminal justice process.

- In this context, there is a need to develop suitable and effective non-custodial measures and sanctions and corresponding sentencing guidelines, to avoid the discrimination of foreigners in their consideration for alternatives to prison.
- Despite the high proportion of foreigners in prisons worldwide, and their special needs, in the majority of countries there are no policies or strategies in place to deal with foreign national prisoners. Taking into account the growing trend in foreign national prisoner numbers in many prison systems, there are urgent ethical and practical reasons to establish strategies that address the special needs of this group of prisoners: firstly to ameliorate the harmful effects of imprisonment in a foreign country and assist with resettlement, and secondly, to improve prison management.

1. Overview

The number of foreign prisoners is on the rise in many countries, as a result of globalization, migration, trafficking and transnational crime.[98] The size of the foreign prisoner population in Europe is particularly noteworthy and increasing at a rapid pace. In September 2006 it was estimated that more than 103,000 foreign prisoners were detained in European Union (EU) countries, representing around 21 per cent of the total prison population.[99] In some countries the ratio is much higher, representing over 40 and even 70 per cent of the prison population.[100]

Although the ratio of foreign prisoners is in general lower in other regions, in a few countries in Asia, they comprise around 20-30 per cent of the prison population.[101] A rapid rise in the number of foreign prisoners has also been noted in this region. The number of foreign inmates in Japan doubled between 1997 and 2005 and a 127 per cent rise has been noted in Korea.[102] In the Middle East as well, foreign nationals are overrepresented in some countries' penitentiary institutions, with, for example, 50.9 per cent in Saudi Arabia, 55.6 per cent in Qatar, 36.1 per cent in Lebanon and 24.9 per cent in Israel.[103] In Africa, the numbers are relatively low, though with a few exceptions, with for example, 66.7 per cent in Gambia.[104] A significant increase in the number of foreign national prisoners has been noted in South Africa.[105] In Latin America, the figures are much lower, generally well below 10 per cent.

Foreigners are vastly overrepresented in the criminal justice system of countries which have a large migrant labour force, and the alarming rise can partly be attributed to

[98]It should be noted that a strictly correct comparison between the number of foreign national prisoners in different countries cannot be made, as some countries include immigration detainees in the figures, others do not.

[99]EU Foreign Prisoners Project (www.foreignersinprison.eu/).

[100]World Prison Brief (www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html) and www.nationmaster.com/graph/cri_pri_for_pri-crime-prisoners-foreign.

[101]World Prison Brief (www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html)

[102]25th APPCA Conference Report, (Seoul, Republic of Korea), September 2005. www.apcca.org/main-publications/publications.html

[103]www.nationmaster.com/graph/cri_pri_for_pri-crime-prisoners-foreign

[104]International Centre for Prison Studies, World Prison Brief.

[105]Dissel A. and Kollapen, J., "Racisim and Disrimination in the South African Penal System", Centre for the Study of Violence and Reconciliation and Penal Reform International, p. 62.

the increasingly punitive measures being adopted against foreign nationals in many countries. Similar to the targeting of ethnic minorities for arrest and prosecution in a number of countries covered in chapter 3, foreigners are also frequently targeted by the police, receive differential treatment by the courts, are disadvantaged in the application of certain neutral criteria, such as the precondition to have legal employment for eligibility for bail and are often denied the right to alternatives to prison. Research has shown, for example, that in some countries of Europe the probability of receiving an unsuspended prison sentence is systematically higher for the same offence, when the person convicted is of foreign origin.[106] The toughening of sentences for property crimes and drug offences in a number of countries of Europe has led to an overall rise in the prison population, which has indirectly targeted the socially and economically disadvantaged, such as minority groups and foreigners.[107] In some countries of Europe persons sentenced for the violation of immigration statutes are among those held in prisons, making up a high percentage of the foreign prison population.

Punitive immigration laws in some countries in Asia and the Gulf States have led to the imprisonment of trafficked or migrant workers whose status is illegal, including persons trying to escape abusive situations.

Despite the high proportion of foreigners in prisons worldwide, and their special needs, in the vast majority of countries there are no policies or strategies in place to deal with foreign national prisoners. There are urgent ethical and practical reasons to establish strategies that address the special needs of foreign national prisoners: firstly to ameliorate the harmful effects of imprisonment in a foreign country and assist with their resettlement, and secondly, to improve prison management, reduce tension and create a climate in prisons that is conducive to the rehabilitation, not only of foreign nationals but also of others who share the same environment.

2. Special needs and challenges

There are three main categories of foreign prisoners. The first category is made up of those who have travelled from one country to another with the specific aim of committing an offence, such as drug smuggling or trafficking in human beings. The second category comprises long-term residents in a country, who may even have been born there, but who have not been granted citizenship for various reasons. The third category is made up of those who are staying legally in the country of residence for a short period (e.g. as migrant workers) who commit an offence. In practice there is also a fourth category in some countries where illegal immigration is a criminal offence and illegal immigrants can be convicted and imprisoned alongside prisoners convicted of internationally recognized criminal offences.

[106] Wacquant, L., Penalization, Depoliticization, Racialization: On the Over-incarceration of Immigrants in the European Union, in Sarah Armstrong and Lesley McAra (eds.), Contexts of Control: New Perspectives on Punishment and Society, Oxford, Clarendon Press, 2006, pp. 89, 90. (www.sociology.berkeley.edu/faculty/wacquant/wacquant_pdf/PENALIZDEPOLITIZRACIALIZATION.pdf)

[107] Wacquant, L., op. cit., p. 90.

Foreign national prisoners suffer from particular problems of isolation and have distinct needs, some of which are similar to those of ethnic and racial minorities, some of which are particular to their situation. In addition, each category of foreign national prisoner has specific needs, arising from his or her status.

Female foreign national prisoners comprise a particularly vulnerable group, due to the extremely adverse impact of separation from their families and the community, isolation and fear of abuse in pre-trial detention and prisons. (Please also refer to *UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment*.)

2.1 Access to justice

Foreigners are disadvantaged in the criminal justice system, since they have difficulty understanding the way in which the system operates due to language barriers. They usually experience severe problems in accessing legal counsel on an equal basis as other prisoners, due to lack of awareness of their legal rights, socio-economic disadvantages, discrimination and lack of social networks.

In some countries, where imprisonment is based on confessions, they may be forced to sign confessions during interrogation, the contents of which they do not understand. Discrimination and disadvantages faced during the criminal justice process is an important factor contributing to the overrepresentation of foreign nationals in some prison systems.

2.2 Isolation

Foreign national prisoners who were not resident in the country of imprisonment are usually cut off from their families and communities, and therefore lack the contact and support that is vital to reduce the harmful effects of imprisonment and assist with social reintegration. Foreign nationals are entitled to have contact with the diplomatic representatives of their own country, but often they are unaware of this right or it may not be granted to them. Sometimes they may themselves not wish contact. In any case, the support provided by consular representatives is not always adequate and cannot replace that which families can provide.

Many foreign nationals serve long sentences for drug trafficking and the lack of contact over many years can have a very harmful effect on the mental condition of such prisoners. Women are likely to have children outside prison and lack of contact with them will cause extreme anguish. In the United Kingdom, for example, foreign national women make up close to 20 per cent of the female prison population and 80 per cent of them were held for drug offences in 2005.[108] They serve sentences ranging from 10 to 15 years. The large majority have children, and the inability to

[108]Prison Reform Trust , Factfile, April 2006, p. 15.

provide for the needs of their children will generally have been the reason for taking the risk of smuggling drugs.

2.3 Language barriers

Language barriers represent one of the root causes for foreign national prisoners' sense of isolation. The absence of a common language hinders foreign prisoners' communication with other prisoners and prison staff, leading to mutual misunderstandings. Language barriers also prevent foreigners' equitable participation in prison activities, since most programmes will require communication in the language spoken by the majority in the prison.

Prison rules and regulations are often not available in the languages spoken by foreign nationals. Therefore, they may neither understand their rights nor know their obligations.[109] This may lead to the unintended breaking of prison rules, leading to disciplinary punishments.

In many prisons, prisoners have to make requests in writing to access services, to see the director, to see a doctor, which foreign nationals may not be able to do, without assistance from others. If access to a doctor or psychologist is received, the foreign national will depend on interpretation, often not available in his or her language. Other prisoners may help which is undesirable given the confidentiality necessary for medical and psychological treatment.

The reaction may be to retreat into isolation, in fear of breaking rules and unable to seek rights or frustration may be reflected in aggressive behaviour.

2.4 Immigration status

Foreign national prisoners who do not have a legal permit to reside in the country of arrest or those who lose their legal permit to reside as a result of the offence face two penalties: firstly, imprisonment and secondly, deportation to their country of origin, often against their will.[110] In some countries, even long-term residents will be deported at the end of their sentences. Long-term residents may have no ties in the country to which they are to be deported and may not even speak the language of that country. Sometimes the home country will not want to take the prisoner back, which will lead to the prolonged detention of the person concerned in an uncertain state. Some prisoners apply for asylum while in prison. Many face indefinite detention awaiting a decision by the immigration authorities, after the sentence has been served.

[109]Some prisons may hold over a hundred different nationalities; for example Belgium (see EU Foreign Prisoners Project, Conference Paper, p. 17), and the United Kingdom where 172 different nationalities are represented in prisons (see HM Inspectorate of Prisons, Foreign national prisoners: a thematic review, the United Kingdom, July 2006, p. 3).

[110]Although expulsion or deportation is "legally" an administrative measure its effect is most often punitive.

A prisoner due for deportation after the completion of the prison sentence

"Biggest problem by far is deportation threat– haven't lived in Nigeria for 17 years—no family members live there now, no links there—very worried at prospect—affecting my health too—worried I shall not survive sentence."[a]

[a]HM Inspectorate of Prisons, Foreign national prisoners: a thematic review, the United Kingdom, July 2006, p. 44.

All such prisoners are in need of information about immigration laws and the appeals procedures, but legal assistance to them is most often lacking. Cooperation between immigration authorities and prison administrations is inadequate in many countries. Prison staff are not trained to assist with immigration issues and cannot respond to the needs of such prisoners. The anguish caused by their uncertain situation, together with the general isolation they experience due to language barriers and discriminatory attitudes, put foreign prisoners at particular risk of mental distress.

2.5 Discrimination

Similar to ethnic and racial minorities, foreign nationals may be subjected to discrimination and disrespectful attitudes due to their nationality. If they are both foreign and of a racial or ethnic minority group, their situation is likely to be worse.

Discrimination may be reflected in actual physical or verbal abuse, but will often be less visible and more subtle, reflected in the security level to which foreign nationals are allocated, the accommodation they are given, the number of disciplinary punishments they receive in comparison to others, the searching procedures and methods they are subjected to and the type of work they are given, if at all (see chapter 3, section 2.2, for similar concerns that relate to ethnic and racial minorities and indigenous peoples).

Education, vocational training and prisoner programmes: Of particular importance is foreign nationals' highly disadvantaged position in terms of their access to prisoner programmes, vocational training and education, due to language barriers. Foreigners may miss out on attending offending behaviour programes, which may assist them to address the underlying reasons leading to their crime, may not receive any educational assistance, unless language classes are offered and will not be able to participate in vocational training programmes, unless interpretation is available. Foreign prisoners typically have limited opportunities to receive financial support from friends and relatives. Therefore they rely on earnings in prison more than most other prisoners. Exclusion from programmes training and work will exacerbate the isolation experienced by foreign national prisoners.

Temporary release, open prisons and parole decisions: In most countries foreign nationals are not considered for home leave or parole, due to fears that they may try to escape and flee the country, even though foreign national prisoners usually enjoy the same

rights as other prisoners by law. This is especially the case if they have no secure address or are due to be expelled following the completion of their sentence. Where they are given such opportunities, they will often be indirectly disadvantaged in practice, if they have not been able to complete the requisite number of prisoner programmes, which make them eligible for parole. The same discrimination usually applies to decisions to place them in open prisons with more relaxed regimes and lower security levels.

Brazil: parole and progression of regime for foreign national prisoners

"There is no impediment in the penal legislation for a judge to allow foreign nationals to exercise the same rights secured in law for the Brazilian prisoners. Thus, foreign nationals may, in practice, be granted parole or the progression of regime (moving from a closed to a semi-open or open prison where working and studying outside the prison walls is permitted). In practice foreign nationals end up not being granted these legal benefits for fear of an escape but a few judges in a few states in the country, especially the State of Paraná, have insisted that this is absolutely illegal and have granted both parole and progression of regimes for these men and women."[a]

[a]Dr Julita Lemgruber, Director, Centre for Studies on Public Security and Citizenship, Universidade Candido Mendes, UNODC Expert Group Review Meeting, Vienna 18-19 October 2007.

2.6 Culture and religion

Foreign national prisoners are likely to have particular needs such as facilities for worship, special diets and hygiene requirements, due to their religion, which may be different to those of the majority prison population. They may also simply be used to a different diet and the culture from which they come may be entirely different to the culture of the country of imprisonment—for example, from a communitarian culture in Africa or Asia to an individualistic one in Europe. Psychological support provided is likely to be inadequate; with psychologists working in prisons having little or no knowledge about the particular cultural context and needs relating to their patients.

Some of these requirements can be provided with the cooperation of the prison administration, NGOs and community groups, but others can only be partially addressed.

2.7 Preparation for release and post-release support

Foreign national prisoners are likely to be ill-prepared for release, since language barriers will have prevented their participation in preparation for release programmes, where they exist, and lack of contact with their families will have suspended their links with the community. Foreign nationals are often not eligible for welfare and probation services or they are a low priority.

If the prisoners are to be deported, they are often not selected for participation in any preparation for release programmes. Those who are deported are typically given

little time to prepare and to inform relatives in their home country. Communication and collaboration between the authorities of the country of imprisonment and home country for the purposes of post-release support is usually non-existent.

2.8 Multiple needs

Foreign national prisoners are particularly likely to have multiple special needs, due to their overrepresentation in many prison systems and due to their economic and social marginalization in most societies.

Foreign national prisoners are especially likely to belong to an ethnic or racial minority group, which means that the discrimination and isolation they experience in prisons and their special needs will be intensified. Please refer to chapter 3, Ethnic and racial minorities and indigenous peoples.

Foreign national prisoners are overrepresented among those under sentence of death in some countries, due to lack of access to consular representatives, to legal counsel, unfair trials and discrimination, hindering the exercise of their right to appeal against their sentence, to seek pardon or commutation on an equal basis as the majority prison population. Women migrant workers are particularly vulnerable. Please refer to chapter 8, Prisoners under sentence of death.

Foreign national prisoners are also at particular risk of developing mental health care needs in prison, due to isolation, discrimination and the anguish caused by their legal status. Please refer to chapter 1, Prisoners with mental health care needs.

3. International standards

United Nations Standard Minimum Rules for the Treatment of Prisoners

Discipline and punishment

30. (3) Where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.

Religion

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

Contact with the outside world

38. (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.

(2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

Vienna Convention on Consular Relations

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Council of Europe, Committee of Ministers, Recommendation No. R (84) 12 Concerning Foreign Prisoners[a]

13. Foreign prisoners, who in practice do not enjoy all the facilities accorded to nationals and whose conditions of detention are generally more difficult, should be treated in such a manner as to counterbalance, so far as may be possible, these disadvantages.

Model agreement on the transfer of foreign prisoners and recommendations for the treatment of foreign prisoners[b]

Annex II

Recommendations on the treatment of foreign prisoners

1. The allocation of a foreign prisoner to a prison establishment should not be effected on the grounds of his nationality alone.

2. Foreign prisoners should have the same access as national prisoners to education, work and vocational training.

3. Foreign prisoners should be eligible for measures alternative to imprisonment, as well as for prison leave and other authorised exits from prison according to the same principle as nationals.

4. Foreign prisoners should be informed promptly after reception into a prison, in a language which they understand and generally in writing, of the main features of the prison regime, including relevant rules and regulations.

5. The religious precepts and customs of foreign prisoners should be respected, with reference, above all, to food and working hours.

6. Foreign prisoners should be informed without delay of their right to request contacts with their consular authorities, as well as of any other relevant information regarding their status. If a foreign prisoner wishes to receive assistance from a diplomatic or consular authority, the latter should be contacted promptly.

7. Foreign prisoners should be given proper assistance, in a language they can understand, when dealing with medical or programme staff and in such matters as complaints, special accommodations, special diets and religious representation and counselling.

8. Contacts of foreign prisoners with families and community agencies should be facilitated, by providing all necessary opportunities for visits and correspondence, with the consent of the prisoner. Humanitarian international organizations, such as the International Committee of the Red Cross, should be given the opportunity to assist foreign prisoners.

9. The conclusions of bilateral and multilateral agreements on supervision of and assistance to offenders given suspended sentences or granted parole could further contribute to the solution of the problem faced by foreign offenders.

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[a]Adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers' Deputies.

[b]Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6 September 1985, A/CONF. 121/10, 25 April 1985.

4. Responding to the needs of foreign national offenders

4.1 Non-custodial measures and sanctions

In addition to the concerns mentioned in section 1, in relation to the increasingly punitive measures being adopted against foreign nationals in many countries, foreign nationals are also at a disadvantage following detention.

One of the reasons for the rapid rise in the foreign prison population is that they are not considered for non-custodial measures and sanctions, either at pre-trial or at the sentencing stage due to fears that they may abscond. They may also not be considered for bail on an equal basis as nationals of the country, due to eligibility preconditions such as having legal employment. Their access to justice may be further restricted when detained pre-trial, due to lack of social networks to assist with accessing and facilitating contact with lawyers and their lack of awareness of their legal rights.

Given that imprisonment represents a particularly severe punishment for most foreign national prisoners, as outlined in section 2, and in order to put into practice the principle of non-discrimination in the criminal justice system, there is a need to develop effective alternative responses to prison and corresponding sentencing guidelines, to avoid the discrimination of foreigners in their consideration for community sanctions and measures. Each case needs to be treated individually and general assumptions regarding foreign nationals' eligibility for non-custodial measures and sanctions should be avoided.

These may include the requirement to report to criminal justice authorities at regular intervals, restrictions on movement, surrendering passports/identity documents, electronic monitoring and supervision in the community, among others.

See *UNODC Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment,* for guidance.

4.2 Transfer of foreign national prisoners

Model agreement on the transfer of foreign prisoners and recommendations for the treatment of foreign prisoners[a]

[Extracts]

Annex I

I. General principles

1. The social resettlement of offenders should be prompted by facilitating the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence at the earliest possible stage. In accordance with the above, States should afford each other the widest measure of co-operation;

[. . .]

7. A transfer, to either the country of nationality or of residence, should be effected only with the expressed free will of the prisoner.

[. . .]

13. The person transferred for the enforcement of a sentence passed in the sentencing State may not be tried again in the administering State for the same act upon which the sentence to be executed is based.

II. Procedural regulations

[. . .]

18. The period of deprivation of liberty already served by the sentenced person in either State shall be fully deducted from the final sentence.

19. A transfer shall in no case lead to an aggravation of the situation of the prisoner.

[a]Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6 September 1985, A/CONF. 121/10, 25 April 1985.

Where possible, and if the prisoner so wishes, a foreign national prisoner should be given the opportunity to be transferred to his home country to serve his or her prison sentence. It should be noted that "transfer" is completely different to "deportation", the former aiming to assist with the social reintegration of offenders and reduce the harmful effects of imprisonment, whereas the latter is experienced as a punitive measure undertaken in addition to the prison sentence and most often against the will of the prisoner concerned.

The transfer of prisoners is possible when both countries have signed the relevant prisoner transfer treaty. There are two different types of treaties or conventions which form the basis of the international transfer of prisoners. Multilateral treaties are legal agreements between a number of nations, such as the Council of Europe Convention on the Transfer of Sentenced Persons. This convention has been signed by some 44 nations, including Canada. Other multilateral treaties are the Commonwealth of Nations Scheme for the Transfer of Convicted Offenders, signed by seven nations, and the Inter-American Convention on Serving Criminal Sentences Abroad, signed by six nations.[111] In contrast, bilateral treaties are agreements between two nations and may incorporate special conditions to meet particular needs.[112]

In order for a transfer to take place and for it to serve the purposes of social reintegration, the prisoner must express a desire to serve the sentence in his or her home country.[113] The requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners or as a means of disguised extradition.[114]

One of the most important conditions of transfer is that there should be no risk of double jeopardy—that is, there must be no question of the prisoner being tried and sentenced again for the same offence. In addition the administering State is bound by the facts as they derive explicitly or implicitly from the foreign judgment. The penal situation of the prisoner may not be aggravated either by the length of sentence or the kind of punishment to be enforced (e.g., forced labour). The receiving state may however reduce the imposed sanction.[115] (Model agreement, provision 13).

A transfer will obviously alleviate all the additional difficulties foreign nationals face in prison, outlined under section 2, and assist with their social reintegration. Transferring prisoners to serve their sentences in their own countries, if they so wish, should be considered as early as possible after a sentence has been passed. Prisoners should be given clear and full information about their right to request a transfer and

[111]Foreign Prisoners and International Transfers, 21st APPCA Conference of Correctional Administrators. (www.apcca.org/Pubs/21st/agenda2.htm)

[112]Ibid.

[113]On 15 February 2007, the EU justice and home affairs ministers agreed to allow transferring convicted EU prisoners to serve their sentences in their home countries, without their consent, contravening this principle. (The Guardian, 16 February 2007, "EU to allow states to send prisoners to jail in home country". (www.guardian.co.uk/guardianpolitics/story/0,,2014546,00.html)

[114]Explanatory notes on the model agreement on the transfer of foreign prisoners, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6 September 1985, A/CONF. 121/10, 25 April 2985, note 14.

[115]Ibid., note 26.

the legal consequences of a transfer, to enable them to make an informed decision about their situation (Model agreement, provision 6).

4.3 Prison management

4.3.1 Management policies and strategies

Taking into account the large percentage and rapid increase of foreign national prisoners in many countries worldwide and their very specific requirements outlined above, there is a need for prison authorities to develop policies and strategies that ensure that the social reintegration of this vulnerable group is facilitated in an effective and sustainable manner. Although assistance provided by NGOs and ad hoc projects developed by individual prison administrations are valuable, their effect is limited and unsustainable, unless part of a general management strategy.

The care of foreign prisoners should be an essential element of general management strategies, developed at prison headquarters. Guidelines on policy and practice should be issued by the central prison administration.[116]

Consideration should be given to appointing a foreign national policy and strategy advisor at headquarters level and foreign national coordinators in individual prisons, where the number of foreign national prisoners justifies such an appointment.[117]

Consideration should be given to forming foreign national support groups in prisons, to enable peer support and to channel requests from foreign national prisoners to the prison administration.[118] The groups could work closely with the foreign nationals coordinator.

Consultation with community representatives of foreign nationals, corresponding to the majority foreign national prisoner population, should be considered in the formulation of policies and strategies.

Prison managers should be motivated and encouraged to develop programmes, based on the guidelines, that address the needs of foreign national prisoners.

Measurable standards should be developed to assess and evaluate the outcomes of such strategies and practices. Data collection and assessments should form an integral element of the foreign prisoner management policies, enabling the improvement of strategies and their implementation.

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[116]Based on recommendations made by Bhui, H. S. in “Going the Distance: Developing Effective Policy and Practice with Foreign National Prisoners”, Prison Reform Trust, 2004 and the good example of practices in Wandsworth prison, the United Kingdom.

[117]Ibid.

[118]Recommendation based on the good example of Wandsworth prison in the United Kingdom, where the development of regular foreign national groups was an essential element of a foreign national prisoners strategy implemented in that prison during 2000 to 2003. Evaluations conducted each year between 2000 and 2003 reflected strong support for the groups and appreciation of the assistance provided (see Bhui, H. S., Going the Distance: Developing Effective Policy and Practice with Foreign National Prisoners”, Prison Reform Trust, 2004, p. 15.)

4.3.2 Staff

Strategies and practices relating to the selection and training of staff should be essential elements of management policies aiming to address the needs of foreign national prisoners.

The lack of adequate training provided for staff in dealing with foreign national prisoners has been noted in a number of studies.[119] Lack of training leads to misunderstandings between staff and prisoners, inability of staff to respond to the special needs of foreign nationals, and the generation of distrust and frustration.

Staff training should include issues relating to the management of foreign national prisoners, encouraging understanding, methods of response to specific needs and methods of cooperation with other agencies, in particular, immigration authorities.

4.3.3 Access to justice

Prison authorities should provide information to foreign national prisoners about their legal rights in a language that they understand, as well as information and contact details of organizations that assist foreign prisoners with their access to justice. Prison authorities should provide facilities for foreign national prisoners to meet with members of organizations providing legal aid or with their lawyers, and provide interpretation, if necessary, during such meetings.

GOOD PRACTICE
Legal information sessions for foreign national prisoners in Belgium[a]

In order to provide prisoners with more insight about legal proceedings some Belgian prisons organize "foreign prisoners' information sessions" by lawyers.

[a]Femke Hofstee-van der Meulen, information based on EU Foreign Prisoners Project. www.foreignersin-prison.eu

4.3.4 Classification and alocation

Over-classification needs to be avoided. Foreign national prisoners should be classified and allocated to an appropriate security level based on a risk assessment to be undertaken on entry to prison, similar to all other prisoners.

The allocation of foreign prisoners to prison establishments should not be made on the grounds of their nationality alone, but account should be taken of the special needs of foreign prisoners during this process. If the prisoners' allocation to a particular prison would alleviate their sense of isolation, due, for example, to possibilities

[119]For example, Bhui, H. S., op. cit and EU Foreign Prisoners Project, Results Presentation and Recommendations to Combat Social Exclusion of Foreign Prisoners in European Penitentiary Institutions, Conference 13 September 2006, European Parliament, Brussels, Conference Paper.

to communicate with others of the same nationality, religion or culture, consideration should be given to placing them in that establishment to bring conditions of detention closer to that of all prisoners.

Consideration needs also to be given to the allocation of foreign national prisoners in the capital city or close by to facilitate easy contact with consular representatives and to ease the transport of visiting family members and relatives from abroad.[120]

GOOD PRACTICE
Placing foreign national prisoners close to their homes in Poland[a]

In Poland nationals from Eastern European countries are placed in prisons situated close to the east border to facilitate visits from families

[a]Femke Hofstee-van der Meulen, information based on EU Foreign Prisoners Project.

4.3.5 Contact with the outside world

Contact with the outside world is an essential element of social reintegration for all prisoners. In the case of foreign nationals communication with family and friends is of particular importance in alleviating the impact of isolation in prison in a foreign country.

Immediately on admission to prison, foreigners should be informed of their right to contact their diplomatic representatives. Prison authorities should enable contact without delay, unless the prisoner expressly opposes such action, and facilities should be provided for communication.

If the prisoners' regular communication with their family and relatives is difficult due to their residence in another country, prison authorities should provide additional means to compensate for this disadvantage. These may include increasing foreign nationals' rights to use the telephone, enabling them to call at hours that take into account time differences, allowing for longer visits, to compensate for infrequency. Where resources allow, financial assistance to cover travel and telephone costs should be considered.

NGOs supporting foreign national prisoners should be encouraged to visit prisons and implement appropriate programmes. The contact details of such organizations should be made available to prisoners. The support of community organizations will be extremely beneficial to prison administrations, which are usually not in a position to address all the needs of foreign national prisoners.

[120]As per recommendation (15) of the EU Foreign Prisoners Project, www.foreignersinprison.eu

4.3.6 Linguistic needs

The inability to communicate in the language most commonly spoken in a prison poses the most severe barrier to foreign nationals' ability to cope with their situation, representing the root cause for many problems, such as isolation, lack of access to services, inadequate understanding of prison rules and regulations, among others. Therefore it is vital that prison administrations make every effort to reduce to a minimum disadvantages caused by language barriers.

Prison rules and regulations should be made available in written form in a number of languages corresponding to the nationalities most commonly represented in prisons. Foreign national prisoners should be provided with a copy of the prison rules on admission and additional copies should be held in the library. Notwithstanding whether written rules and regulations in foreign languages are available, they should be explained carefully to each prisoner in a language he or she understands, immediately after admission to prison and subsequently, as necessary.

Prison libraries should hold an adequate number of books, periodicals and newspapers in a variety of foreign languages and prisoners should be informed of their availability in a language that they understand. Prison authorities may seek the assistance of consular services and civil society organizations to supplement prison libraries.

As far as possible, prisoners of the same nationality and who speak the same language should be accommodated close to each other, taking into account security concerns and the wishes of the prisoners themselves. They should also be allowed to work and spend leisure time together. Although this policy does entail the risk of forming prisoner sub-groups and emphasizing differences, such risks can be alleviated by an inclusive management approach and by actively facilitating the equal participation of all prisoners in programmes and activities.

All foreign prisoners, but especially those sentenced to long prison terms, should be given the opportunity to learn the language spoken in the country of imprisonment, and such classes should be encouraged with appropriate rewards and privileges. Classes may be conducted by other prisoners, provided that they have the requisite teaching skills.

Legal assistance, counselling and medical services, disciplinary hearings and complaints mechanisms should all take into account the language requirements of foreign national prisoners, and interpretation provided as necessary.

Where resources are limited, carefully selected foreign prisoners may be appointed to provide interpreting for others of the same nationality, provided that the prisoner in need of interpreting services gives his or her consent.

Prisoners should be allowed to use their own language during prison visits and communications by letter and telephone.

4.3.7 Culture and religion

Foreign prisoners are likely to have special needs arising from their religious beliefs and culture, which can be accommodated without significant additional resources. It is essential to cater for such needs, not only because they are important in themselves, but because it will signal a positive attitude which recognizes and respects diversity, while alleviating to some extent the feelings of isolation and alienation.

Prisoners should be given access to ministers of their religion, if they so wish, and assistance should be provided for them to fulfill the tenets of their religion, such as by the allocation of prayer rooms and provision to fulfill special hygiene requirements.

Prisoners' dietary requirements should be catered for by the prison administration. In addition foreign prisoners can be allocated jobs in the kitchen, to prepare their national dishes. Prisoners with catering skills may be encouraged to teach others, as part of a vocational training programme, which will encourage positive communication between members of different nationalities.

4.3.8 Prisoner programmes

Foreign national prisoners and prison authorities should be informed as early as possible as to whether a prisoner will be deported or not following release, in order to enable the planning of suitable rehabilitation and preparation for release programmes.

Prison authorities should make every effort to ensure that foreigners have equal opportunities as others to participate in education, vocational training and other prisoner programmes, which will entail taking affirmative action, such as introducing interpreting, translation of materials and language classes for foreigners.

Most work in prisons does not require language skills, being relatively menial and repetitive. Foreign prisoners should have equal access to work places in prisons. Some positive discrimination in the allocation of work may be justified to compensate for any disadvantages experienced by foreign nationals in their access to other prisoner programmes, taking into account their special need for financial income.

Consideration should be given to introducing special programmes to address the needs of foreign national prisoners, in consultation with foreign national community groups or NGOs supporting foreign prisoners, and taking into account the countries and settings to which foreign nationals will return.

Prison authorities should also develop special programmes to assist with the integration of foreign national prisoners who have been transferred to their "home" country to serve their sentences.

GOOD PRACTICE
Developing special programmes for foreign national prisoners in the United Kingdom[a]

In one prison in the United Kingdom, Hibiscus, a national charity, has been providing regular service to foreign national prisoners. A member of the prison team attended the Hibiscus international conference on working with foreign national prisoners. A number of strategies were developed and adapted as a result. For example, the prison provided small holding and small business management courses in response to the need to help women develop skills that would be of immediate use in their home countries. Specific training was available in running a chicken farm and animal husbandry. They also ran six drug importers' courses a year, with 60-70 women going through the programme each year.

[a]HM Inspectorate of Prisons, Foreign national prisoners: a thematic review, the United Kingdom, July 2006, p. 52.

4.3.9 Preparation for release and post-release support

There is a need for different strategies to be adopted for the three distinct groups of foreign prisoners, in preparing them for release: *(a)* those who will be deported to their home country; *(b)* those who will remain in the country of imprisonment; *(c)* those who have immigration decisions still pending.

Foreign national coordinators, recommended under section 4.3.1, should take an active role in the resettlement of foreign nationals.

In most countries there is a need to improve cooperation and information exchange between immigration and prison authorities, so that foreign prisoners can be kept informed about their status. As mentioned in the previous section, they should receive a decision as to whether they will be deported or not as early as possible during their prison sentence, in order to enable the planning of appropriate rehabilitative programmes and preparation for release. This would entail the development of a joint strategy and coordination mechanisms between the immigration agencies and prison authorities.

Information sessions for foreign nationals should be organized focusing on the particular issues they face on release: both if they are to be deported and if they are to remain in the country of imprisonment. Cooperation with NGOs and immigration advice services should be sought.

Prison authorities should ensure that decisions to grant home leave and early conditional release are not influenced by the nationality of prisoners or their status as potential deportees. The assessment of the escape risk of foreign prisoners should be made on the merits of each individual case. Alternative measures can be undertaken to supervise individuals in the community.

GOOD PRACTICE
NGO support to assist with the prison leave of foreign national prisoners in Spain

In Spain some non-governmental organizations provide secure shelters and dormitories in order to make prison leave possible for foreign prisoners.[a]

[a]See EU Foreign Prisoners Project, www.foreignersinprison.eu, Recommendation (35).

Deportation following release: Where prisoners are to be deported, prison authorities should make every effort to assist with obtaining necessary documents, with travel arrangements, and to facilitate communication between prisoners and relatives in the home country to the maximum possible extent. Assistance from Consular representatives is vital. Organizations of civil society can also provide valuable assistance during this process, aiding contact between prisoners and distant family members, helping resolve a myriad of problems and explaining procedures.

In cases where a prisoner is to be expelled to his or her "home" country, the language of which he or she does not speak, consideration should be given to providing language courses in preparation.

Foreign nationals should never be sent back to a country where they may be in danger of torture or ill-treatment.

Detention following release: If following the completion of his or her sentence the status of a foreign national prisoner has not been clarified due to pending immigration issues, detention should not be prolonged as a general rule. Decisions should be based on individual risk assessments. Preference should be given to alternative measures of supervision.

If prisoners are to be detained after the completion of their sentences, due to pending immigration issues, they should be transferred to separate facilities established to house immigration detainees, designed for this purpose, offering material conditions and a regime appropriate to the detainees' legal situation and staffed by suitably-qualified and specially trained personnel.[121] Care should be taken that the accommodation, regime and atmosphere in immigration detention centres do not create the impression of a prison environment. Immigration detainees should be provided with the maximum possibility to communicate with their legal representatives and immigration services. Information about contact details of legal advisers, agencies providing support and state immigration services should be readily available in multiple languages. There should be adequate interpreting services.

Foreigners remaining in the country of imprisonment: Foreign prisoners who are to remain in the country of residence should be given equal access to services, such as probation,

[121]7th General Report [CPT/Inf (97) 10], para. 29.

welfare, housing and employment agencies and contact between these agencies and prisoners should be facilitated by the prison authorities. Foreign prisoners should be made aware of the availability of such services early on during their imprisonment, in a language that they understand. Where a probation service exists, it should provide specific assistance to address the distinct needs of foreign national prisoners. Appointing probation officers of the same nationality to assist foreign national prisoners has proven to be beneficial in some systems.

GOOD PRACTICES
Preparation for release

Denmark[a]

In Danish prisons a mentor programme for young foreign prisoners was introduced in 2000. The mentor is an adult who is not part of the prison system and whose task is to support the released person just before and just after release. This programme received the 'International Community Justice Award' in 2004.

The Netherlands[b]

The Foreign Liaison Office of the Dutch Probation Service is part of the Dutch Probation Service. With the goal to reduce recidivism, the Liaison Office aims to prevent unnecessary damage inflicted on Dutch nationals detained abroad and aims to make a proper return into Dutch society possible. A team of nine coordinators offer assistance to a total of 2,500 detainees abroad (June 2006). Since the start in 1975, the Foreign Liaison Office works together intensively with the Ministry of Foreign Affairs and its embassies. Funding is received from both the Foreign Ministry and the Ministry of Justice. The Liaison Office can provide a number of following services. Firstly, the Liaison Office guides a network of 275 Dutch volunteers living abroad who visit the detainees on a regular basis. Secondly, the office can deliver social enquiry reports and provide counselling and guidance during imprisonment. Thirdly, the International Office contributes to a proper preparation for release of the inmate and assists, within limits, in the after-care.

[a]Femke Hofstee-van der Meulen, information based on EU Foreign Prisoners Project. www.foreignersinprison.eu

[b]EU Foreign Prisoners Project (www.foreignersinprison.eu/).

RECOMMENDATIONS

TO SENTENCING AUTHORITIES

- To ensure that foreign nationals are not disadvantaged in consideration for alternatives to prison, both at pre-trial and sentencing stage.

TO PRISON AUTHORITIES, PROBATION AND/OR OTHER SOCIAL WELFARE SERVICES

Transfer of prisoners

- To give clear and full information about convicted prisoners' right to request a transfer to their own country to serve their imprisonment and the legal consequences of a transfer, to enable them to make an informed decision about their situation.
- To assist in the transfer of foreign national prisoners, if they apply for a transfer, by coordinating with all criminal justice agencies involved in the process, abroad and at home.

Prison management

- To include the care of foreign prisoners in the general management strategies, developed at prison headquarters and to issue guidelines to all prisons to fulfil the requirements of such strategies.
- To consider appointing a foreign national policy and strategy advisor at headquarters level and foreign national coordinators in individual prisons, where the number of foreign national prisoners justifies such an appointment.
- To consider forming foreign national support groups in prisons, to enable peer support and to channel requests from foreign national prisoners to the prison administration.
- To undertake consultation with community representatives of foreign nationals, corresponding to the majority foreign national prisoner population, in the formulation of policies and strategies.
- To motivate and encourage prison managers to develop programmes based on the guidelines.
- To develop measurable standards to assess and evaluate the outcomes of such strategies and practices, enabling the improvement of strategies and their implementation.

Staff

- To include issues relating to the management of foreign national prisoners in regular staff trainings.

Access to justice

- To inform foreign national prisoners of their legal rights in a language they understand, as well as assist and facilitate their access to justice in cooperation with organizations of civil society providing legal assistance to prisoners.

Classification and allocation

- Not to over-classify foreign nationals. To classify foreign national prisoners and allocate them to an appropriate security level based on a risk assessment to be undertaken on entry to prison, similar to all other prisoners.
- To take account of the special needs of foreign prisoners during this process, for example, by placing them in an establishment where possibilities to communicate with others of the same nationality, religion or culture exist.
- To consider the allocation of foreign national prisoners in the capital city or close by to facilitate easy contact with consular representatives and to ease the transport of visiting family members and relatives from abroad.

Contact with the outside world

- To inform foreigners of their right to contact their diplomatic representatives immediately on admission to prison, to enable contact if the prisoner so wishes, and to provide facilities for communication.
- To compensate for foreign prisoners' lack of adequate communication with their family and relatives, by allowing flexible telephone rights, extending visiting hours and subsidizing the travel of family members, where possible.
- To encourage NGOs supporting foreign national prisoners to visit prisons and implement appropriate programmes.

Linguistic needs

- To ensure that prison rules and regulations are available in written form in a number of languages corresponding to the nationalities most commonly represented in prisons and to provide foreign national prisoners with a copy on admission. To make available additional copies in the library. To explain them carefully to each prisoner in a language he or she understands, immediately after admission to prison and subsequently, as necessary.
- To ensure that prison libraries hold an adequate number of books, periodicals and newspapers in a variety of foreign languages.
- To facilitate communication between prisoners of the same nationality, taking into account security considerations and the wishes of the prisoners themselves.
- To provide the opportunity for foreign prisoners to learn the language spoken in the country of imprisonment.
- To ensure that interpreting is available during legal counselling, health care provision, disciplinary hearings and complaints procedures.
- To allow prisoners to use their own language during prison visits and communications by letter and telephone.

Culture and religion

- To ensure that prisoners have access to the ministers of their religion, if they so wish, and adequate facilities to fulfill the tenets of their religion.
- To cater for foreign prisoners' dietary requirements.

Prisoner programmes

- To ensure that foreigners have equal opportunities as others to participate in education, vocational training and other prisoner programmes, which will entail taking affirmative action, such as introducing interpreting, translation of materials and language classes for foreigners.
- To ensure that foreign prisoners have equal access to work places in prisons. Some positive discrimination in the allocation of work may be justified to compensate for any disadvantages experienced by foreign nationals in their access to other prisoner programmes, taking into account their special need for financial income.
- To consider introducing special programmes to address the needs of foreign national prisoners, in consultation with foreign national community groups or NGOs.
- To develop special programmes to assist with the integration of foreign national prisoners who have been transferred to their "home" country to serve their sentences.

Preparation for release and post-release support

- To develop a joint strategy and coordination mechanisms with immigration authorities to improve the flow of information and assistance provided to foreign national prisoners with outstanding immigration issues.
- To inform foreign national prisoners and prison authorities as early as possible during the sentence as to whether a prisoner will be deported or not following release, in order to enable the planning of suitable rehabilitation and preparation for release programmes.
- To ensure that foreign nationals are given equal access to services, such as probation, welfare, housing and employment agencies and to facilitate contact between these agencies and prisoners.
- To introduce information sessions for foreign nationals focusing on the particular issues they face on release.

- To ensure that foreign prisoners' right to temporary and early release is respected and that decisions to grant home leave and early conditional release are not influenced by the nationality of prisoners or their status as potential deportees.
- Where prisoners are to be deported, to make every effort to assist with obtaining necessary documents, with travel arrangements, and to facilitate communication between prisoners and relatives in the home country to the maximum possible extent. To encourage consular authorities and NGOs to provide assistance in this respect.
- To consider providing language classes to prisoners who are to be deported to a country, the language of which they do not speak.
- Where an immigration decision is still pending at the time a foreign national prisoner completes his or her prison sentence, not to continue detention as a general rule, but to take the decision on the basis of an individual risk assessment, giving preference to alternative methods of supervision as far as possible.
- When former prisoners have to be detained while awaiting a decision on their immigration status, to transfer them to separate facilities designed to hold immigration detainees, offering material conditions and a regime appropriate to the detainees' legal situation and staffed by suitably qualified and specially trained personnel.
- Not to deport foreign national offenders to countries where they may be in danger of torture or ill-treatment.
- To provide practical assistance to prisoners who are deported to their "home" countries following release, immediately on return, in areas such as obtaining necessary official documents, seeking employment, receiving social welfare assistance, among others.

TO CONSULAR AUTHORITIES

- To assist their detained nationals by regularly visiting them and by offering assistance with their access to justice and social rehabilitation, by facilitating contact with lawyers, family members and community groups.
- To consider the production of information leaflets with contact details of consular authorities, assistance offered and transfer arrangements, to be made available to foreign national prisoners on entry to prison.

5. Lesbian, gay, bisexual and transgender (LGBT) prisoners

DEFINITIONS

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.[a]

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[b]

The term gay refers to all persons with a same-sex sexual orientation, although it is usually used to refer to males.

The term lesbian refers to females with a same-sex sexual orientation.

The term bisexual refers to individuals who may feel attraction to and sexual interest in other individuals of both their own and the opposite sex.[c]

Transgender is a general term applied to a variety of individuals, behaviours, and groups involving tendencies that diverge from the normative gender role (man or woman) commonly, but not always, assigned at birth, as well as the role traditionally held by society. Transgender is the state of one's gender identity. It does not imply any specific form of sexual orientation.[d] It is an umbrella term which is often used to describe a wide range of identities and experiences, including: female to male transsexuals, male to female transsexuals, cross-dressers and many more. Because transgender is an umbrella term, it is imprecise and does not adequately describe the particulars of specific identities and experiences.[e] For example, this term includes those who undergo medical treatment to bring their physical appearance into conformity with their internal gender identity, those who live in accordance with their gender identity without seeking any medical treatment, and those who seek medical treatment and are in the process of transitioning between sexes to bring their physical appearance into conformity with their internal gender identity.

[a]The Yogyakarta Principles, endnote 1. (www.yogyakartaprinciples.org/index.php?item=25)

[b]The Yogyakarta Principles, endnote 2.

[c]Bisexuality. (2008). In Encyclopædia Britannica. Retrieved September 17, 2008, from Encyclopædia Britannica Online: http://search.eb.com/eb/article-9015403

[d]http://encyclopedia.thefreedictionary.com/transgender

[e]www.ftmguide.org/terminology.html

KEY MESSAGES

- The significant vulnerability of LGBT persons in the criminal justice system in many counties calls for the formulation of policies to address the needs of this group and the development and implementation of strategies that ensure that they are not discriminated against in their access to justice and victimized in the criminal justice system, due to their sexual orientation or gender identity.
- International human rights instruments oblige States to protect all prisoners under their supervision and care, as well as to assist with their social reintegration. Taking into account the large number of reports relating to the discrimination, humiliation, sexual abuse and rape of LGBT persons in the prison setting, prison authorities need to develop policies and strategies that ensure the maximum possible protection of such groups, while facilitating their social reintegration in an effective manner.

1. Overview

Lesbian gay, bisexual and transgender (LGBT) persons comprise a particularly vulnerable group in the criminal justice system and in prisons. To date relatively little has been written about their special needs, while information on the discrimination and abuse suffered by this group in criminal justice systems worldwide is increasing.

In many countries same sex relationships between consenting adults are criminalized under sodomy laws or under the abuse of morality laws.[122] Whether or not same sex relationships are criminalized, the prejudices with which society responds to LGBT persons in the community and the myths that surround these populations are intensified in the criminal justice system. Discriminatory attitudes to LGBT persons can mean that they are perceived as less credible by law enforcement agencies or not fully entitled to an equal standard of protection, including protection against violence carried out by non-State agents.[123] In prisons such groups may often be discriminated against, and suffer humiliation, violence and sexual abuse. In countries where same sex sexual relationships are criminalized, violence against persons who are convicted of this offence can even be perceived to be justified. Most jurisdictions have no policy to guide prison management and prison personnel in relation to the special needs of LGBT prisoners.

International human rights instruments oblige States to protect all prisoners under their supervision and care, as well as to assist with their social reintegration. The extreme vulnerability of LGBT persons in the criminal justice system, necessitates the formulation of policies to address the needs of this group and the development and implementation of strategies that ensure that they are not re-victimized in prisons, while their particular social reintegration requirements are provided for.

[122]International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity, International Commission of Jurists, Geneva, October 2006, p. 6.

[123]Ibid.

2. Special needs and challenges

2.1 Access to justice

LGBT persons, when arrested for an alleged offence or when lodging a complaint of harassment by third parties, may be subjected to further victimization by the police, including verbal, physical and sexual assault and rape.[124] If such offenders wish to complain about their treatment by law enforcement officials, their complaints may go unheeded, or they may even face retaliation, which would discourage them from seeking justice, unless assisted by suitable legal counsel. Discriminatory attitudes may affect decisions relating to pre-trial detention and prison sentences. If held in pre-trial detention or prison, their access to lawyers and legal aid may be problematic in many systems due to the unwillingness of prison staff to assist, based on deeply rooted prejudices.

2.2 Protection needs

The main and most important need of LGBT prisoners is protection from sexual abuse and rape, generally perpetrated by other prisoners.

Myths persist in many prison systems about “predatory homosexuals”, implying that people with a same-sex sexual orientation are themselves the perpetrators of sexual abuse and rape.[125] This is a misconception. LGBT prisoners are much more likely to be victims of sexual assault and rape than they are to be perpetrators of such acts.[126] In prison settings it is common for men who never would have engaged in sexual contact with other men prior to imprisonment to end up in a non-consensual sexual relationships with men. Since prisoner-on-prisoner rape in such cases involves persons of the same sex, its perpetrators are unthinkingly labelled as homosexuals. In fact, the majority of prison rapists see themselves as heterosexual and the victim as substituting for a woman.[127] Such relationships do not only involve sex. They include the forced submission of a person perceived to be weaker by an aggressor, often to prove and strengthen a male hierarchical position in the prison subculture. Victims may be given women’s names, which may then be used by other prisoners, as well as prison staff. They may be forced into submissive roles, required to do the cleaning and other menial tasks for their aggressors. While all men perceived to be weaker, and particularly those who are weaker physically, may be subjected to such violence and humiliation, LGBT persons are highly overrepresented as victims of such sexual crimes. One study in the United States, for example, found that 41 per cent of gay and bisexual men were sexually assaulted in prisons, as opposed to 9 per cent of heterosexual men.[128]

[124] Ibid.

[125] Human Rights Watch, No Escape: Male Rape in United States Prisons, 2001, p. 70.

[126] Ibid.

[127] Ibid.

[128] United States National Prison Rape Elimination Commission, Hearing: At Risk: Sexual Abuse and Vulnerable Groups Behind Bars—August 19, 2005, Statement of Jody Marksamer (www.nprec.us/proceedings_sf.htm).

Imprisonment of LGBT persons may comprise a particularly harsh punishment

"We serve two sentences here: the one imposed by the judge, and the one imposed by the prisoners. We have no value to them. Nobody pays any attention to the word of a homosexual. They let us talk to them only up to a certain point. None of them would ever drink out of my cup."[a]

[a]Gay prisoner in Brazil, quoted in Human Rights Watch: Behind Bars in Brazil, 1998. (www.hrw.org/reports98/brazil/Brazil-08.htm).

Sometimes prison staff themselves facilitate sexual violence in return for bribes. There are reports of prison guards having LGBT prisoners beaten up or allowing other prisoners to rape them, and of prison staff placing LGBT prisoners in cells with known sexual predators. There are also reports of prison staff running prostitution rings, where all transgender prisoners are forced to participate.

Most often the only route open to LGBT prisoners is to receive the protection of a prisoner "husband", powerful enough in the hierarchy to keep other prisoners away. In this way, the prisoner concerned undertakes to become the slave of the protector prisoner, fulfilling all sexual requests and looking after all his needs. Reports indicate, however, that protector prisoners may hire out the sexual services of their victims to other prisoners, thereby exacerbating the suffering of the victim as a forced prostitute.

According to Human Rights Watch, actual or perceived sexual orientation is one of the categories that make female prisoners a more likely target for sexual abuse in prisons. One study conducted found that a quarter of female prisoners who were raped in three United States prisons were bisexual or lesbian.[129] There are reports of lesbian and bisexual prisoners being placed in administrative segregation or placed in cells with men if they refuse to have sex with prison staff. Lesbian women may be placed in men's units and made constantly visible to male prisoners and guards, including while using showers and toilets.

In some prison systems prisoners who have been victims of rape are regarded and labelled as "homosexuals" and treated as the lowest group in the prison hierarchy, both by the prison administration and by other prisoners.[130] It has been reported that in some countries they are made to be identifiable by a special label or mark placed in their prison files, medical files, on their clothes, tables in dining areas, prison cells and prison badges. They may routinely be held in separate dormitories and eat at a separate table in the prison dining rooms. They may be used to undertake the most menial tasks in prisons, both by prison staff and other prisoners and are at risk of being victims of sexual assault and rape. Although this group of prisoners does not in reality have a different sexual orientation than heterosexual (at least, not

[129]United States National Prison Rape Elimination Commission, Hearing: At Risk: Sexual Abuse and Vulnerable Groups Behind Bars—August 19, 2005, Statement of Jody Marksamer (www.nprec.us/proceedings_sf.htm).

[130]Also referred to as "obizhennye" (untouchables).

necessarily), the fact that they are perceived as such means that they face many of the problems LGBT prisoners face in prisons and have similar needs.

Other types of sexual abuse suffered by LGBT, and especially transgender prisoners, include frequent strip searches, often the precursors to aggressive or sexual violence.

2.3 Complaints procedures

In many prison systems complaints about sexual abuse and rape in general receive no or little response from prison administrations, and especially if such complaints are made by LGBT prisoners. It has been reported, for example, that when complaints of rape are made by gay prisoners, staff often allege that the act was consensual, implying that gay prisoners invite sex.[131]

In addition, prisoners themselves are very reluctant to complain due to fears of retaliation, often as a result of open threats by the perpetrators against reporting. When complaints are acted upon, and for example the prisoner separated from the aggressor and/or the aggressor punished, the stigma of having been raped remains with the prisoner and the information spreads rapidly in the prison system. The victim is therefore at risk of further victimization, unless he or she is provided with adequate and constant protection.

Since perpetrators are aware that complaints most often go unheeded, sexual assault and rape continues with impunity, and as mentioned above, often with the complicity of prison staff.

2.4 Health care

LGBT offenders are more likely to suffer from STDs, including HIV/AIDS, problems associated with drug abuse and other health conditions, since often they will have been forced into a lifestyle that includes risk behaviours, because of prejudices relating to their sexual orientation or gender identity. LGBT persons are often rejected by their families and are unable to find employment due to their sexual orientation or gender identity. Thus they are likely to be homeless and unemployed. LGBT persons may resort to prostitution to provide for themselves and acquire substance addictions to tolerate their situation, with a high risk of acquiring STDs, HIV/AIDS as a result of unprotected sex and injecting drug use.

Prison rape is also responsible for the rapid spread of HIV/AIDS. With LGBT prisoners being the most likely victims of rape, they are at high risk of acquiring HIV/AIDS in prisons.

[131] Human Rights Watch, No Escape, 2001, p. 152.

LGBT persons who have been raped in prisons may receive inadequate or no medical treatment for the injuries resulting from the sexual violence, on grounds of their sexual orientation or gender identity.

As regards other medical treatment, prisoners with gender dysphoria[132], once detained, are often said to be denied medical treatment for gender dysphoria, such as hormone therapy.[133]

LGBT prisoners are likely to be in need of psychological support and mental health care, particularly if they have been sexually abused, whether prior to imprisonment or in prison. Even if not sexually abused, the discriminatory attitudes and humiliation they are likely to be subjected to in prisons, will require particular psychological support and programmes to treat the mental distress suffered as a result. LGBT prisoners who have been victims of rape may be at risk of self-harm or suicide, for which they will require special supervision and care.

2.5 Allocation, accommodation and prisoner programmes

LGBT prisoners may be placed in conditions which are inferior to that of the majority population.

Worse, in prison systems where no proper classification exits, and where overcrowding is the norm, LGBT prisoners may be placed in dormitories or cells together with prisoners with a violent background, including with a history of sexual abuse. There are many reports of sexual violence suffered by LGBT prisoners by other prisoners, due to lack of care taken in their placement, and sometimes because of deliberate placement together with prisoners who pose a risk. There are reports of victims resorting to breaking prison rules on a regular basis in order to be put in administrative segregation for prolonged periods, purely to escape from the sexual abuse and rape suffered in dormitories or cells, underlining prisoners' need for protection as a priority, even if this means isolation.

Where transgender prisoners are accommodated according to their birth gender, especially when male to female transgender prisoners are placed with men, due to their birth gender being male, this paves the way to sexual abuse and rape.[134]

LGBT prisoners may be discriminated against in receiving access to activities, or they might themselves not want to participate in prisoner activities, due to the risk of violence from other prisoners.

[132]A term used by psychologists and medical doctors that refers to the state of discomfort felt by some transgender people caused by the incongruity between one's physical sex and one's gender identity. (www.ftmguide.org/terminology.html)

[133]A/56/156, p. 6.

[134]A concern expressed in a number of reports, including in International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity, International Commission of Jurists, Geneva, October 2006, p. 9.

Allocating transgender prisoners according to birth gender

"One source of this violence is how transgender prisoners are placed in correctional facilities. The Sylvia Rivera Law Project (SRLP) has served 77 clients in the last three years from across the country who were incarcerated during the time they were our clients, and 76 of these clients were placed according to their birth gender in the facilities that they were in. So the majority who reached out to us for help are transgender women, people who are identified as male at birth and live as women. But then when they are locked up, they are placed in men's facilities. In these facilities, they face extensive sexual violence and assault, both at the hands of inmates and corrections officers."[a]

[a]United States National Prison Rape Elimination Commission, Hearing: At Risk: Sexual Abuse and Vulnerable Groups Behind Bars—August 19, 2005, Statement of Dean Spade (www.nprec.us/proceedings_sf.htm).

2.6 Family links

LGBT, and especially transgender prisoners, are likely to have very limited or no contacts with parents and other family members due to their sexual orientation or gender identity. As same sex marriages are against the law in the large majority of countries around the world, they are also unlikely to have a lawfully wedded spouse, which would exclude the possibility of receiving visits from their partners, in many prison systems. In some systems, where conjugal visits are allowed to unwedded partners, LGBT prisoners do not enjoy the same rights. Thus in many jurisdictions LGBT prisoners' contact with their families and partners may be extremely limited, exacerbating the sense of isolation in prison, impacting on their mental health condition and social reintegration prospects.

2.7 Preparation for release and post-release support

LGBT prisoners are likely to have special needs in preparing for release and support during the post-release period, due to the lack of family contact, possible traumatic experiences in prison and lack of adequate support mechanisms for such groups in the community, particularly for those who have a criminal record.

Probation services, where they exist, or welfare services, may discriminate against the members of such groups. Finding housing and employment is likely to be particularly difficult for a LGBT former prisoner, given the prejudices that exist in society, coupled with legislation that places restrictions on all people with a criminal record in some countries.

3. International standards

Although there are no special rules that apply to LGBT prisoners, all provisions included in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, United Nations Standard

Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment apply to all detainees and prisoners without discrimination. In addition, the principle of equal treatment enshrined in these instruments requires positive action to be taken to eliminate any form of discrimination or risks faced by vulnerable groups, including LGBT persons.

In 2006, a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity were developed by the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, in order to bring greater clarity and coherence to States' human rights obligations. Following an experts' meeting held in Yogyakarta, Indonesia from 6 to 9 November 2006, experts from 25 countries unanimously adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. [135]

The relevant international standards relating to the treatment of LGBT persons in prisons are summarized in principle 9 of the Yogyakarta Principles, which have been cited in the box below.

Universal Declaration of Human Rights

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

PRINCIPLE 9

THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

[135]Accessed at: www.yogyakartaprinciples.org/index.php?item=25#_Toc161634693

STATES SHALL:

A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organizations including organizations working in the spheres of sexual orientation and gender identity;

G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

4. Responding to the needs of LGBT offenders

4.1 Legislation

Human rights law experts agree that laws which imprison individuals for consensual same-sex relations in private violate fundamental human rights, including the rights to privacy and to freedom from discrimination, which are protected in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[136] Treaty bodies, the former Commission on Human Rights[137] and special procedures have repeatedly expressed concern at the criminalization of consensual same-sex relations, called on States to refrain from such criminalization and where such laws exist to repeal them, urging all States that maintain the death penalty not to impose it for sexual relations between same-sex consenting adults.[138]

[136]See Yogyakarta Principles, Principle 4, The Right to Life and Principle 6, The Right to Privacy.

[137]In June 2006, the newly established United Nations Human Rights Council took over all mandates, mechanisms, functions and responsibilities of the former Commission on Human Rights.

[138]International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity, International Commission of Jurists, October 2006, p. 6, including footnote 19, referring to a series of Human Rights Committee, Concluding observations.

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity have called, among other things, for States to repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity. Until such provisions are repealed, The Yogyakarta Principles urge that States never impose the death penalty on any person convicted under them, to remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent. The Commission on Human Rights has called upon all States that still maintain the death penalty, "to ensure that the notion of most serious crimes does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as . . . sexual relations between consenting adults . . ."[139]

The United Nations Human Rights Commission has repeatedly called on States to decriminalize sexual acts between consenting adults of the same sex in line with articles 17 and 26 of ICCPR and take all necessary actions to protect homosexuals from harassment, discrimination and violence.

United Nations Human Rights Committee says that laws criminalizing same sex relations between consenting adults violate ICCPR and holds that the anti-discrimination provisions in the Covenant should be understood to include discrimination based on sexual orientation

In its decision on the case of Toonen v Australia, in 1994, the United Nations Human Rights Committee—which monitors states' compliance with the International Covenant on Civil and Political Rights (ICCPR)—held that laws criminalizing consensual homosexual conduct violate protections for privacy (article 17) and against discrimination (articles 2 and 26) in the ICCPR. In particular, it held that the anti-discrimination provisions in the covenant should be understood to include discrimination based on sexual orientation.[a]

The Human Rights Committee reaffirmed its jurisprudence that the prohibition against discrimination under Article 26 of ICCPR comprises also discrimination based on sexual orientation in a number of communications relating to specific cases.

[a]Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System, International Commission of Jurists, Geneva, Third updated edition, 2007, pp. 29-30.

In addition, vulnerability to HIV infection is dramatically increased where same sex sexual relationships are criminalized, excluding many members of LGBT persons from HIV prevention programmes, commodities and treatment.[140] With HIV epidemics threatening the health of societies in many countries worldwide, including and especially in prisons, there is an urgent need to take this factor into consideration in reforming legislation relating to same sex relationships.

[139]See Commission on Human Rights Resolutions, E/CN.4/RES/2005/59, 20 April 2005; E/CN.4/RES/2004/67, 21 April 2004; E/CN.4/RES/2003/67, 25 April 2003.

[140]UNAIDS, Report on the Global AIDS Epidemic 2006, p. 112.

GOOD PRACTICE
Legal protection against discrimination based on sexual orientation in South Africa

South Africa in 1996 became the first country to enshrine protections against discrimination based on sexual orientation in its constitution; this provision has led to sweeping legal decisions affirming gay and lesbian equality and advancing same-sex partners' rights.

In 1998, the Constitutional Court of South Africa, acting on the Equality Clause of South Africa's 1996 constitution unanimously overturned "sodomy laws" in the country. In a sweeping decision, it held that laws criminalizing consensual homosexual conduct violated not only privacy protections but the principles of equality and dignity.

4.2 Non-custodial measures and sanctions

LGBT offenders should never be discriminated against in decisions relating to alternatives to pre-trial detention and prison sentences. It could further be argued that the extremely vulnerable status of LGBT persons in almost all prison systems may amount to their sentence being transformed into a much harsher punishment than that handed down by the courts, thereby justifying a degree of positive discrimination during sentencing, taking into account the safety and security requirements of the public, as well as the offender.

GOOD PRACTICE
Alternative sentencing and advocacy in the United States.[a]

One of the programmes run by the Transgender, Gender Variant and Intersex,[b] Justice Project (TGIJP) in California, United States relates to promoting alternative sentencing for offenders of these groups.

Recognizing that transgender and intersex (TGI) people experience extreme physical, sexual and emotional abuse and brutality while imprisoned, this programme seeks to reduce the overall number of such people going into jail or prison by diverting them out of the system early. Specifically, TGIJP assists TGI people in the San Francisco Bay Area awaiting sentencing to petition their judges to divert them into plans that would connect them to needed health, social and economic services, rather than sentencing them to jail or prison. These alternative plans can connect clients to services and opportunities that address the underlying conditions that lead to arrest in the first place. TGIJP also advocates for the human rights and dignity of TGI people currently in prison.

[a]For further information, see www.tgjip.org

[b]An intersex person is an individual whose internal and/or external sexual morphology has characteristics not specific to just one of the official sexes, but rather a combination of what is considered "normal" for "female" or "male". (Organization Intersex International. www.intersexualite.org/Index.html)

4.3 Prison management

4.3.1 Management policies and strategies

Taking into account the large number of reports relating to the discrimination, humiliation, sexual abuse and rape of LGBT persons in the prison setting, prison authorities need to develop policies and strategies that ensure the maximum possible protection of such groups and which facilitate their social reintegration in an effective manner.

The care and protection of LGBT prisoners should be included in general management strategies, developed at prison headquarters.

Management guidelines need to challenge the existing homophobic prison culture in the large majority of societies and make absolutely clear that discrimination on the basis of actual or perceived sexual orientation or gender identity will not be tolerated. They should emphasize prisoners' right to confidentiality as regards their sexual orientation and gender identity and include clear instructions on procedures to follow in cases of sexual assault or fear of sexual assault.

Management should assume responsibility for taking all necessary steps to ensure the safety of inmates, recognizing that even with effective complaints mechanisms it cannot be assumed that LGBT prisoners will not risk further victimization by coming forward. Management policies and practices need to be unequivocal that staff complicity in sexual or other violence or harassment, or a failure by staff to respond to fears or incidents of violence or harassment, will result in disciplinary action.

Consultation with community representatives of LGBT groups and organizations should be considered in formulation of appropriate policies and strategies for the protection and social reintegration of LGBT prisoners.

Measurable standards should be developed to assess and evaluate the outcomes of such strategies and practices. Data collection and assessment should form an essential element of policies relating to the protection of LGBT persons, enabling the revision of such strategies as necessary.

4.3.2 Staff

It is essential to have an adequate number of well-trained staff to ensure the security and protection of LGBT prisoners and to address their special needs in prisons.

Staff training should include awareness-raising regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.[141] The prohibition of discrimination based on sexual orientation and gender identity, and the special needs of LGBT prisoners should be included in training. Staff should also be trained to implement specific procedures in cases of sexual assault, to detect signs of fear and distress among LGBT prisoners and ensure that they receive immediate protection and assistance where necessary. Staff should be willing to listen to the concerns and complaints by members of such groups and be instructed to take these complaints seriously. They should also be trained to detect signs of suicidal tendencies, and refer such prisoners to psychological support services as necessary.

Prison administrations should pursue a policy where staff represent different sexual orientations. As with racial and ethnic minority group prisoners, who feel more

[141]Yogyakarta Principles, Principle 9 G.

comfortable in approaching staff of similar ethnic or racial groups, LGBT persons will also feel much more able to communicate with staff members who have a different sexual orientation to the majority. The recruitment of members of LGBT staff also gives a strong message to other staff about non-discrimination. Non-discrimination policies should be in place with regard to LGBT staff to underline this principle and to prevent the harassment of LGBT staff members.

4.3.3 Access to justice

LGBT prisoners should be assisted in accessing legal counsel, legal aid and paralegal aid services from the outset of their detention. Where they exist, names and contact details of organizations specializing in assisting LGBT persons in the criminal justice system should be made available.

In jurisdictions where same sex relationships are criminalized immediate and regular access to legal assistance is especially vital in ensuring that defendants receive a fair trial and victims of sexual abuse and rape are not treated as perpetrators.

4.3.4. Allocation and accommodation

An essential principle of classification and allocation should be to house LGBT prisoners in whichever environment will best ensure their safety.[142]

LGBT prisoners should never be placed in dormitories or cells together with prisoners who may pose a risk to their safety. Reports indicate that LGBT prisoners who have self identified, prefer to be housed together with other LGBT prisoners, rather than in the general population, if they feel that they may be at risk of sexual abuse or rape among other prisoners. Even when protection may amount to isolation, members of such groups may prefer isolation, rather then facing the constant risks of sexual abuse. Prisoners' own concerns and views should be taken into account when making placements.[143]

The allocation of transgender prisoners can only be done in consultation with the prisoner concerned on a case-by-case basis. Allocating prisoners according to their birth sex—and especially housing male to female transgender prisoners among male prisoners—actively facilitates the sexual abuse and rape of such offenders, irrespective of whether they have undergone sex reassignment surgery or not.

It must be emphasized that it is impossible to provide categorical guidance on allocation, since many transgender people are transitioning from one sex to another, some pass indistinguishably in their reassigned gender, while others are more readily identifiable, and the issue will not always be resolved based on factors such as whether the individual has undergone sex reassignment surgery or not. In some cases, someone who is transitioning may not be identifiable as transgender as long as they have

[142] See Yogyakarta Principles, Principle 9 A.
[143] Yogyakarta Principles, Principle 9 C.

access to hormonal therapy treatments, but may encounter victimization if such treatments are interrupted. Thus it is crucial that decisions on allocation are taken on a case-by-case basis, with safety considerations and the wishes of the individual being paramount.

There also need to be effective policies in place to allow LGBT prisoners to access protective segregation when they need it. When prisoners themselves ask for protective segregation, this should be provided immediately, and investigation take place on the risks faced by the prisoner, while he or she is held in safety (see also section 4.3.8, Safety and Security).

There should be no discrimination in the quality of accommodation provided for LGBT prisoners.

4.3.5 Contact with the outside world

Due to the likelihood of limited contact with family and relatives, and in some cases impossibility to receive visits from same sex partners, prison authorities may need to make special efforts to facilitate their contact with the outside world.

Where penal legislation does not allow visits from unwedded partners, consideration should be given to changing the rules, in order to prevent disrupting such prisoners' links with the outside world and means of support, thereby exacerbating the isolation they most often face in prisons and harming their prospects for post-release support. The rules should apply to all prisoners, whatever their sexual orientation. In jurisdictions where conjugal visits are permitted for heterosexual couples, but not to LGBT prisoners, consideration should be given to revising the rules to ensure that all prisoners enjoy the same rights, irrespective of their sexual orientation.

GOOD PRACTICE
Ending discrimination based on sexual orientation for conjugal visits of prisoners in Mexico[a]

In July 2007 the National Human Rights Commission of Mexico announced that the city's prison system had allowed the first conjugal visit to a prisoner with a sexual orientation other than heterosexual, in line with the Commission's recommendations.

In Mexican prisons prisoners are allowed to receive conjugal visits and most do not require the visitor to be married to the inmate.

[a] "Mexico City prison system allows first gay conjugal visit", 30 July 2007. www.usatoday.com/news/world/2007-07-29-mexico-gay-conjugal-visit_N.hrm

4.3.6 Health care

As with all prisoners, LGBT prisoners should undergo a full health screening on entry to prison and they should receive medical care equivalent to that in the community and to that which other prisoners receive.

The special health care needs of LGBT prisoners may include treatment for STDs, including HIV, drug abuse therapy, counselling for mental disabilities associated with victimization by sexual violence and rape, among others. In addition, programmes on HIV/AIDS prevention with information booklets on modes of transmission and methods of prevention should be made available to all prisoners, including LGBT prisoners.

Prisoners with gender dysphoria should be provided with treatment available in the community, such as hormone therapy, as well as psychological support, if required. Transgender prisoners may already be on hormone therapy on entry to prison, in which case access to such therapy should be continued. If sex reassignment surgery is available in the community, it should also be available to prisoners.

4.3.7 Prisoner programmes

Prison authorities should ensure that LGBT prisoners have access to all prison activities without discrimination and that they are protected during activities from violence and abuse.

The establishment of special programmes that are dedicated to prison rape prevention, which include an orientation for incoming prisoners to protect themselves from rape and sexual assault should be considered. Such programmes should include specific components to protect prisoners who are or are perceived to be LGBT.

Special counselling programmes for LGBT prisoners should be established. Such counselling should address the full range of integration, safety, health and related concerns, and in particular ensure appropriate support to those who have been victims of humiliation, sexual abuse and rape in prison or prior to imprisonment.

NGOs and other organizations of civil society working on the rights and needs of LGBT persons should be encouraged to visit prisons and to implement special programmes addressing the needs of this group of prisoners. Such organizations may also be engaged to deliver programmes for the majority population to raise awareness among other prisoners, as well as staff on issues relating to LGBT people and break down stereotypical perceptions associated with diversity of sexual orientation and gender identity.

4.3.8 Safety and security

As has been emphasized throughout this chapter, safety and security are the first and foremost needs of LGBT prisoners.

LGBT prisoners can be protected by: a clear management policy and strategy that ensures the non-discrimination and protection of LGBT persons (section 4.3.1); careful staff recruitment and training (section 4.3.2); a classification system that recognizes the risks faced by LGBT prisoners and ensures that members of such groups are not placed together with potential perpetrators (section 4.3.4) and proper supervision by staff.

A. Complaints procedures

Another key component of measures to ensure safety and security in prisons is the availability of an effective, accessible and confidential complaints mechanism. Similar to all prisoners, LGBT prisoners should be able to make complaints about abuse or fear of abuse, without risking retaliation by staff or other prisoners. Their complaints should receive rapid and effective response. Victims or potential victims of abuse should immediately be placed in a position where their safety can be protected and if the abuse has already taken place, the prisoner should receive whatever medical care may be needed. A more progressive approach, adopted in some prison systems, is to ensure the protection of victims by targeting the aggressors, rather than the victims, for example by segregation, while the investigation is taking place.

Where rape is being alleged, physical evidence of rape should immediately be collected, which is crucial for criminal prosecution. Depending on the violence committed, an internal disciplinary procedure or an external criminal prosecution should take place, involving the collection of physical evidence, interviews with witnesses and interrogation of suspects. Perpetrators should be brought to justice, as required by international human rights law and in most countries, national legislation.

Demonstrating that complaints by LGBT prisoners or others, about sexual abuse, violence and rape in prisons, are taken seriously and that perpetrators are penalized accordingly, will send a strong message to all potential perpetrators that such acts constitute crimes and will not be tolerated.

B. Disciplinary punishments

The overuse of disciplinary punishments with respect to LGBT prisoners may be an indicator of discrimination within a prison. In some systems, administrative segregation may be used as a disciplinary punishment for LGBT prisoners disproportionately or LGBT prisoners who have been victims of abuse may be placed in administrative segregation, ostensibly for their own protection, while the perpetrator receives no punishment. These kinds of practices violate the principle of non-discrimination enshrined in a range of international human rights instruments, including the Standard Minimum Rules for the Treatment of Prisoners. There should be clear procedures in place that staff need to follow before taking a decision regarding the use of administrative segregation. Records should be kept of the use of all disciplinary punishments.

C. Strip searches

Frequent and unnecessary strip searches of LGBT prisoners should be prohibited and records kept of the number of times each prisoner is strip searched to identify any discrimination. There should always be adequate justification for intimate body searches. Should a strip search be deemed necessary, transgender prisoners should be provided with a choice regarding the gender of the person conducting the search, to ensure that the search is conducted by a person of the appropriate gender with minimum interference with personal dignity.

4.3.9 Preparation for release and post-release support

Since most LGBT prisoners, and especially transgender prisoners, are likely to have lost contact with their families as a result of their sexual orientation or gender identity, prison authorities should try to ensure that support that is lacking from family and relatives is provided by alternative means. These may include establishing contacts with relevant civil society organizations and agencies that provide assistance to LGBT people in general and prisoners and former prisoners in particular, as well as establishing cooperation with probation services or other welfare agencies, to facilitate their assistance with finding housing and employment for LGBT persons, without discrimination.

If the prisoners are undergoing treatment for any health condition, including hormone therapy and substance abuse treatment programmes, among others, prison authorities should ensure that coordination is established with health services in the community and treatment continued without break.

4.3.10 Monitoring

Mechanisms should be in place for the ongoing independent monitoring of sexual violence in general, and discrimination based on sexual orientation and sexual abuse and violence perpetrated against LGBT persons, in particular. Prison authorities should take action based on the data, to ensure that disparate treatment of LGBT prisoners, sexual abuse and rape of all prisoners, including LGBT prisoners are prevented.

RECOMMENDATIONS

TO LEGISLATORS

- To review criminal legislation relating to same sex relationships between consenting adults in light of the requirements of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment with a view to repealing laws which criminalize such acts; and, in the meantime, not to impose the death penalty or corporal punishment on persons who are convicted of such acts.

TO SENTENCING AUTHORITIES

- To ensure that LGBT persons are not discriminated against in consideration for non-custodial measures and sanctions on the basis of their sexual orientation and gender identity.
- As with all offenders, LGBT offenders who have committed non-violent offences and who do not pose a risk to society should benefit from non-custodial sanctions and measures, better suited to their social reintegration. In this context, sentencing authorities should be made aware of the extreme vulnerability of LGBT persons in prisons.

TO PRISON AUTHORITIES, PROBATION AND/OR OTHER SOCIAL WELFARE SERVICES

Management policies and strategies

- To develop policies and strategies that ensure the maximum possible protection of LGBT prisoners, which prohibit discrimination on the basis of sexual orientation and gender identity,

ensure disciplinary action of staff who fail to respect such principles, recognize prisoners' right to privacy with respect to their sexual orientation and gender identity, and which facilitate their social reintegration in an effective manner.

- To consult with community representatives of LGBT groups and organizations in formulation of appropriate policies and strategies.
- To develop measurable standards to assess and evaluate the outcomes of such strategies and practices.

Staff

- To employ an adequate number of staff responsible for supervision.
- To ensure that staff training includes awareness-raising regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identify. To include training on the prohibition of discrimination against LGBT prisoners, and the special needs and protection of LGBT prisoners in staff training curricula.
- Not to discriminate against LGBT staff and to make efforts to ensure that staff represent different sexual orientations, as far as possible.

Access to justice

- To assist LGBT prisoners in accessing legal counsel, legal aid and paralegal aid services from the outset of their detention, without discrimination.
- To provide names and contact details of organizations that assist LGBT persons in the criminal justice system.

Classification and accommodation

- To apply a classification system that recognizes the special protection needs of LGBT persons.
- To take into account the wishes and concerns of prisoners themselves during allocation.
- Not to place LGBT prisoners in dormitories or cells together with prisoners who may pose a risk to their safety.
- Not to assume that it is appropriate to house transgender prisoners according to their birth sex, but instead consult with prisoners concerned and take into account the different accommodation needs of those who have not undertaken sex reassignment surgery and those who have, as well as whether they are male to female or female to male transgender persons, or are in a process of transition.
- To ensure that there is no discrimination in the quality of accommodation provided for LGBT groups.

Contact with the outside world

- Where penal legislation does not allow visits from unwedded partners, to consider amending the rules, in order to prevent disrupting prisoners' links with the outside world and exacerbating their isolation, while harming their prospects for post-release support, and to provide the same rights to all prisoners, whatever their sexual orientation.
- In jurisdictions where conjugal visits are allowed, to ensure that the same right is enjoyed by all prisoners, irrespective of sexual orientation.

Health care

- To ensure that LGBT prisoners undergo a full health screening on entry to prison as with all prisoners, and that they receive medical care equivalent to that in the community and to that which other prisoners receive.

- To meet the special health care needs of LGBT prisoners, including treatment available in the community for gender dysphoria, such as hormone therapy, as well as sex reassignment surgery, if available in the community.
- To provide programmes on HIV prevention and information booklets on transmission of HIV/AIDS and means of protection to all prisoners, including LGBT prisoners.

Prisoner programmes

- To ensure that LGBT prisoners access all prison activities without discrimination and that they are protected during activities from violence and abuse.
- To establish special programmes that are dedicated to prison rape prevention, which include an orientation for incoming prisoners to protect themselves from rape and sexual assault.
- To provide special counselling programmes for LGBT prisoners, particularly those who have been victims of humiliation, sexual abuse and rape in prison or prior to imprisonment.
- To encourage NGOs and other organizations of civil society working on the rights and needs of LGBT prisoners to visit prisons and to implement special programmes in prisons addressing the needs of this group of prisoners.

Safety and security

- To include training in supervision and procedures to follow in cases of sexual assault in the training curriculum of staff, to enable them to detect and prevent sexual abuse and violence against all prisoners, including LGBT prisoners, effectively.
- To establish an effective, accessible and confidential complaints mechanism. To ensure that LGBT prisoners are not discriminated against in the complaints process, that they are accorded full protection following complaints of sexual abuse, rape or fear of such acts, and that perpetrators of sexual abuse or other forms of violence are brought to justice.
- Not to discriminate against LGBT prisoners in the use of disciplinary punishments, including administrative segregation in particular.
- To ensure that strip searches of LGBT prisoners are not conducted arbitrarily and unnecessarily. To ensure that intimate body searches are conducted only when there is genuine justification, as with all prisoners, and to respect the wishes of transgender prisoners regarding the appropriate gender of the person conducting the search.
- To put in place effective policies to allow LGBT prisoners to access protective segregation when they need it.

Preparation for release and post-release support

- To establish contact with relevant civil society organizations and agencies that provide assistance to LGBT prisoners and former prisoners.
- To establish cooperation with probation services or other welfare agencies to ensure their assistance with finding housing and employment for LGBT persons, without discrimination.
- To ensure that coordination is established with health services in the community and any medical treatment received by LGBT prisoners, is continued without break.

Monitoring

- To put in place mechanisms for the independent monitoring of sexual violence in general, and discrimination based on sexual orientation and sexual abuse and violence perpetrated against LGBT prisoners, in particular. Prison authorities should take action based on the data, to ensure that disparate treatment of LGBT prisoners, sexual abuse and rape of all prisoners, including LGBT prisoners, are prevented.

6. Older prisoners

DEFINITION

In demographic analysis, age 60 is typically taken as the dividing line between older and younger cohorts of the population. On the other hand, many people, especially in the developed countries, think of 65 as the cut-off point because it is at this age that many people become eligible for full pension and social security benefits for older persons; but such a cut-off point does not apply everywhere else. Old age, therefore, cannot be defined exactly because the concept does not have the same meaning in all societies. Nor, with the steady expansion of life expectancy, does it correspond to a specific time span.[a]

Similarly the age at which a prisoner is defined as elderly[b] or older is arbitrary and varies between countries and studies. For example, in the United States and Australia, prisoners above the age of 50 are generally considered as elderly.[c] In the United Kingdom those above 60 or 65 are considered to fall within this category, according to different studies.[d] In Canada older prisoners are defined as those between 50 to 64 years of age, elderly prisoners as those who are 65 or older, though the term "older" is used to cover both these categories.[e]

The low threshold is said to be justified by the likelihood that prisoners have an individual[f] age 10 years in advance of their counterparts in the community, due to chronic health problems, unhealthy lifestyles, alcohol and substance abuse, as well as the stress and harmful effects of imprisonment itself.

[a]World Economic and Social Survey 2007, Development in an Ageing World, Department of Economic and Social Affairs, United Nations, 2007, E/2007/50/Rev.1 ST/ESA/314, p. 1.

[b]The United Nations Principles for Older Persons (1991) and the Madrid International Plan of Action on Ageing (2002) do not use the term "elderly", for older persons, but it is used here to correspond to the usage of the term in some prison systems, for the sake of clarity and accuracy.

[c]Dr Morton, Joann, B., An Administrative Overview of the Older Inmate, Washington DC, United States Department of Justice, National Institute of Corrections, August 1992, p. 5; Grant A, Elderly Inmates: Issues for Australia, Australian Institute of Criminology, May 1999, p. 1.

[d]Howse, K., Growing Old in Prison: A scoping study on older prisoners, Centre for Policy and Ageing and Prison Reform Trust, United Kingdom, 2003 p. 2.

[e]Uzoaba, J., Managing Older Offenders: Where do we Stand? Correctional Service of Canada, 1998, p. 3.

[f]Sometimes referred to as "biological" though the term is controversial in the science of ageing.

KEY MESSAGES

- The increase of general life expectancy in some countries, as well as the trend towards increasing the length of sentences and the introduction of harsh sentences, such as life without parole, have influenced the growth of the older prison population, in many countries worldwide.
- Prisons are designed for younger offenders, which comprise the majority of the prison population. Prisoner programmes are also developed with the needs of younger prisoners in mind. The quite different physical capabilities and programming needs of older prisoners are rarely taken into account.
- Most older prisoners have a variety of health care needs which most prison systems are unable to provide for to the fullest possible extent, and which place a significant burden on the resources of prison health care services.
- Taking account of the fact that most older prisoners can be better cared for in the community, within the framework of suitable non-custodial sanctions and measures, the age of offenders, their mental and physical health, prospects of receiving adequate care in prison should be taken into account by sentencing authorities, to ensure that the sentence does not comprise a disproportionately harsh punishment.
- The growth rate of older prisoners, the prospects for further increase, and human rights concerns relating to their treatment and care in prisons justify the development of special policies and strategies by prison services to address the special needs of this vulnerable group of prisoners.

1. Overview

The number of older prisoners is on the rise, especially in developed countries, where general life expectancy is increasing. The growth of the older prison population is equally a consequence of a hardening of sentencing practices, the increased use of imprisonment and reduced mechanisms for early release in some countries. The number of offenders serving life sentences, in particular, has increased considerably in recent years.[144] Toughening of sentencing practices has meant that life imprisonment is increasingly being used for less serious and non-violent offences,[145] and longer prison terms are being handed down by the courts under mandatory sentencing laws. It has also resulted in the increased use of life imprisonment without the possibility of parole, currently applied in countries of all regions of the world.[146] In some societies it is reported that the breaking down of traditional family and community ties has led to older persons turning to crime due to poverty and isolation.[147] Unfortunately these factors lead to the expectation of a continued growth in the older prison population in many countries worldwide.

Currently there are relatively few studies relating to older prisoners, and those that are available focus mainly on prisoners in the United States, Canada, the United Kingdom and Australia. According to research conducted in these countries, the size

[144]Penal Reform International, Newsletter No. 57, 2007 (1), p. 5.

[145]Ibid.

[146]Ibid.

[147]E.g. in Japan. See "Elderly inmates find amenities in Japan's prisons", by Norimitsu Onishi, 2 November 2007. (www.iht.com/articles/2007/11/02/asia/japan.php)

of the older prison population has been growing faster than the general rate of increase of all prisoners. For example, in the United Kingdom the total sentenced prison population grew by 51 per cent between 1990 and 2000, the sentenced older prison population, age group 50-59, grew by 111 per cent, and the sentenced older prison population, over 60 years, grew by 216 per cent.[148] In the United States the number of prisoners aged 55 and over more than doubled between 1981 and 1990.[149] In Canada, the older prison population (over 50) grew from 9.3 per cent in 1996 to 15.8 per cent in 2005.[150] In Japan, it is reported that the number of prisoners of 65 and over have increased by 160 per cent between 2000 and 2006, mostly for non-violent offences, such as shoplifting and petty theft.[151]

Prisons are designed for younger offenders, which comprise the majority of the prison population worldwide. Prisoner programmes are also developed with the needs of younger prisoners in mind. With the growth of the prison population and acute overcrowding, most prison services find it difficult to provide even for the needs of younger prisoners and have few resources to allocate to the care of older prisoners. Therefore the quite different physical capabilities and programming needs of older prisoners are rarely taken into account. Victimization is a serious problem for older prisoners, which increases in severity in overpopulated prisons. Consequently older prisoners suffer not only from the impact of imprisonment, but also from the consequences of overcrowding and lack of resources, which prevent prison services catering for their specific and very varied needs.

Recognizing that the increase in the number of older prisoners is expected to continue in the coming years it is essential that prison services develop policies and strategies to address the needs of this vulnerable group, and particularly in those countries where the increase in the ratio of older prisoners is significant.

2. Special needs and challenges

2.1 Access to justice

Older persons are likely to need particular assistance in their access to legal counsel on arrest, in pre-trial detention and prison, to assist them during the trial and any appeals process, as well as later on, to help them gain early conditional or compassionate release. If they are an older offender at the time they commit the offence, they may not have a family, or ties may have been disrupted, and they may additionally have multiple needs, due to poor mental or physical health or disabilities. Prisoners who have grown old in prison are likely to have lost contact with family and friends and be in need of assistance to gain access to legal counsel, to help them with decisions relating to early conditional and compassionate release, among others.

[148]Howse, K., op. cit. p. 38.

[149]Dr Morton, J. B., op. cit. p. 2.

[150]Based on Uzoaba, J., op. cit. p. 12 and Correction Service of Canada website. (www.csc-scc.gc.ca/text/pblct/guideorateur/sec6_e.shtml)

[151]"Elderly inmates find amenities in Japan's prisons", by Norimitsu Onishi, 2 November 2007. (www.iht.com/articles/2007/11/02/asia/japan.php)

2.2 Assessment

Older people are more diverse than others and have different needs, depending on their socio-economic and health backgrounds. It has been noted that "in general older people are more heterogeneous than any age group. This places an additional burden on prison systems because more attention to individualized assessment, programming, planning and monitoring is required".[152] In addition to their differences, arising from age and background, there are also significant differences in older prisoners' crime history and consequent adjustment to prison life and prospects for resettlement on release. Therefore it is critical that prison authorities do not generalize the needs of older prisoners and stereotype them.

Studies identify three main categories of older prisoners:

- The first group consists of those who were sentenced to long prison terms while young and have grown old in prison. For the majority of this group the offence will have been a first offence, the crime committed, a violent crime. It has been noted that such offenders make good institutional adjustments and are in fact often model inmates. However, due to their long period of institutionalization and loss of community links and limited work history, this group experiences the most difficulties in social reintegration following release.
- The second group is made up of habitual offenders, who have been in and out of prison throughout their lives. They adjust reasonably well to prison life, though often have chronic health problems, including particularly, a history of substance abuse. Their community ties are limited and their employment history sporadic. They also encounter difficulties in resettlement.
- The third group consists of those who have been convicted of a crime in later life. Their crimes are usually serious. This group experiences the most severe adjustment problems in prison and are likely to be victimized by other prisoners. Included in this group are those who have been sentenced retrospectively, often as a result of improvements in DNA testing. Many of such offenders who face imprisonment for the first time in later life are sexual offenders.

All these groups have different programming needs and individuals in each group have varying health problems, addictions and disabilities, which need to be assessed on entry to prison and suitable programmes developed, matching individual requirements.

2.3 Accommodation

Deciding on suitable accommodation for older prisoners poses a further challenge. There are potential difficulties associated with the prison layout and conditions for older persons. These include stairs, difficulties in accessing sanitary facilities,

[152] Dr Morton, J. B., op. cit. p. 1.

overcrowding, excessive heat or cold, as well as many architectural features that may hinder those with physical disabilities from satisfying their most basic needs.

In some systems, such as the United States, older prisoners are sometimes placed in separate, protected units, where the layout corresponds to their needs and where they can receive specialist care. In others, older prisoners are placed in the general prison, though sometimes in separate accommodation. Arguments have been offered in favour and against both options.

Arguments in favour of special units:

- Older prisoners can be protected from victimization and fear less for their safety as a result;
- Special units provide the opportunity to develop special programmes for older prisoners, using specialist staff and resources;
- Age segregation contributes to positive mental health, encourages a sense of identification with peers and stimulates social interaction;
- Meeting the nutritional and medical requirements of older prisoners is easier.

Arguments for placing older prisoners with the general population (mainstreaming):

- Since it is not financially viable to have special units in each prison, older prisoners may have to be placed far away from their homes, whereas if they are placed with other prisoners, it is easier for them to maintain family ties;
- Older prisoners are perceived to have a calming effect on other prisoners;
- Mainstreaming enables the allocation of older prisoners to appropriate security levels, including to minimum security conditions, based on the individual's risk assessment.
- Mainstreaming enables older prisoners to have equal access to all programmes, not only those designed specifically for them, which may not meet their needs.
- Living in the general prison population resembles life outside prison, and thereby provides a more normal environment for older prisoners.

In deciding the best course of action to take there are some fundamental questions to be asked in relation to the rationale of keeping persons who need constant specialist care in prisons, and the establishment of special units, which put an immense burden on prison service resources, in a situation where most of these older prisoners would pose a minimal risk to the public, if cared for in the community under appropriate supervision.

2.4 Health care

Health is a universal concern for all older prisoners, due to their age, generally unhealthy lifestyles and histories of substance abuse. As mentioned earlier, the

individual age of prisoners is said to be above that of their chronological age, so a 50-year-old prisoner is likely to have the health problems of a 60-year-old in the community. Chronic and multiple health problems, such as heart and lung problems, diabetes, hypertension, cancer, Alzheimer's disease, Parkinson's disease, ulcer, poor hearing and eyesight, memory loss and a range of physical disabilities, are among common problems from which older prisoners suffer. In addition to physical health problems, depression and fear of dying in general, and particularly, dying in prison, affect the mental well-being of older prisoners. Alcohol abuse has also been identified as a widespread problem among this group. During imprisonment many of the critical health needs of older prisoners will not be met, while their health condition deteriorates at a rapid pace. Even where no specific health problems exist the nutritional requirements of older persons are different to those of other age groups, and need to be taken into account in prisons.

Adequate medical care for older persons requires considerable additional financial and human resources, putting a serious burden on the prison system.

2.5 Family links

Evidence suggests that maintaining family links has a positive effect on the social rehabilitation of all prisoners, and particularly older prisoners. But, older prisoners who have spent many years in prison lose their contacts with their families and the community, making them increasingly dependent on the institutional setting. The longer the period of imprisonment, the more severe are the problems associated with institutionalization. The ability to maintain family contacts depends also on the crime history of the prisoners and their prison placement. Studies in the United States, Australia, Canada and the United Kingdom, identify homicide and sexual offences as the most common offences committed by older prisoners. If the crime was committed against a family member, then visits by family members may not take place at all. If the spouse of the prisoner is too old to travel and the prisoner is not placed close to home, this also affects the maintenance of family contacts. One study in the United States found that a majority of the older prisoners in the research sample had no family visits and only 10 per cent received visits from friends.[153] Among adult prisoners in the United Kingdom, 9 per cent of men aged 21-24 had received no letter in the previous three months, whereas the ratio was 30 per cent in the case of men over 60.[154] Around 42 per cent of older prisoners interviewed in another study were divorced or separated.[155] In some societies, for example in Japan, the stigma of imprisonment may lead to family members severing their ties with their imprisoned relatives, which has a particularly harmful impact on older prisoners.[156]

The loss of family links and the death of family and friends, influence the mental well-being of older prisoners and their prospects of successful resettlement following

[153]Howse, K., op. cit. p. 33.

[154]Ibid., p. 33.

[155]Ibid., p. 33.

[156]e.g. in Japan. See "Elderly inmates find amenities in Japan's prisons", by Norimitsu Onishi, 2 November 2007. (www.iht.com/articles/2007/11/02/asia/japan.php)

release. Older female prisoners suffer particularly from separation from their families and communities, and especially in societies where the family, extended family and the local community are essential elements of the social fabric, in which women have the central role as caregivers.

2.6 Prisoner programmes

Prisoner programmes are generally designed to cater for the needs of younger prisoners, aiming to reduce their reoffending following release, by contributing to their job skills and education. Most older prisoners have needs and capabilities that differ from their younger counterparts. For example, many older prisoners may not be interested in vocational training courses, if they are past retirement age and will not be seeking employment on release. Education classes are geared toward the needs of younger prisoners, aiming to improve literacy and numeracy skills. Older prisoners, who have left the education system many years ago may not be motivated to participate at all, or they may be reluctant to join classes with younger inmates. If modifications are not made to job assignments, some older prisoners may not be in a position to work, due to physical disabilities or health problems.

Physically, many may not to be able to participate in recreational activities and outdoor exercise, due to disabilities or health conditions. For some, recreation may have to be restricted to board games and card games instead.

On the other hand, it is important to underline that, as the abilities and interests of older prisoners vary immensely, due to their different backgrounds, health status and profiles, mentioned earlier, blanket assumptions should not be made in terms of their ability or interest in participating in prisoner programmes and outdoor recreational activities (see section 4.2.8).

Older prisoners have different needs in terms of offending behaviour programmes, therapy and counselling, as well, due to their age, types of crimes they commit and length of imprisonment.

Staff bias against the participation of older prisoners in prisoner programmes has been noted in some research, on the basis that older prisoners are seen as past improvement stage and therefore additional effort to facilitate their participation in meaningful activities and therapy programmes may be viewed as a waste of time. Such an attitude has a very detrimental effect on the well-being of older prisoners and is unacceptable in terms of the equality of treatment, required by the Standard Minimum Rules.

In many systems, participation in prisoner programmes earns prisoners credits for early conditional release. Where the participation of older prisoners in prisoner programmes is not facilitated, there will be a clear case of discrimination, as they will be forced to spend more time in prison, despite their vulnerability, due to no fault of their own. This, in turn, increases the burden on the prison system. In addition, if older prisoners are excluded from paid work opportunities or are unable to

participate, they will suffer financially, which may have a particularly harmful impact on this group of prisoners, since many may not have any regular financial support from their families.

2.7 Preparation for release and post-release support

Older prisoners have very specific requirements in terms of preparation for release, with differences in their needs, based on the category to which they belong, outlined under section 2.2 above. The needs will vary also according to their social, economic and health conditions. Thus individualized pre-release programmes are essential for older prisoners, depending on all these factors.

Account needs to be taken of the fact that the only support many older prisoners, and especially those who have served long prison terms, can expect following release may be that offered by welfare services, where they exist, due to the disruption of links with their families. In many societies nursing homes for older persons are scarce and when available, they will not be accessible to former prisoners. The lack of a place to return to may be particularly problematic in developing countries, where institutions caring for older persons are usually lacking. Older female prisoners are especially vulnerable in this context and the challenges involved in addressing the difficulties involved are immense.

2.8 Early conditional release

Early conditional release is an effective way of preparing prisoners' gradual re-entry into society, and it is clear that in the case of long-term prisoners, the gradual reintegration would have a significant impact on their ability to cope, following release. However, where early conditional release is discretionary long-term prisoners are often at a disadvantage, due to the serious crimes for which they are generally in prison. Systems where the sentence of "life imprisonment without parole" exists, prisoners are condemned to die in prison. The lack of any hope of release has an extremely harmful impact on the mental health of prisoners.

Minimal participation in prisoner programmes, due to their unsuitability, mentioned above, may also put older prisoners at a disadvantage for eligibility in some systems. In addition, parole decisions usually take into account the prospects for accommodation and employment on release, which disadvantages older prisoners due to their age, which is usually past retirement age, and loss of contact with the community. Some older prisoners may be unemployable due to health conditions.

In fact, studies have shown that re-offending is reduced with age[157] and that most long-term prisoners do not represent a security risk. Some studies have also shown that older prisoners are better candidates for early conditional release than younger offenders.[158]

[157]Howse, K., op. cit, p. 25.

[158]Uzoaba, J., op. cit. p. 81.

2.9 Multiple needs

Mental and physical disabilities are common among older persons. Therefore, please also refer to chapter 1, Prisoners with mental health care needs and chapter 2, Prisoners with disabilities.

3. International standards

Although no specific standards have been adopted in relating to the treatment of older prisoners, the United Nations Principles for Older People, adopted in 1991, provide general principles which apply to the rights and needs of all older people, covering the principles that should guide policies and programmes developed for older prisoners. In addition, the United Nations Standard Minimum Rules for the Treatment of Prisoners apply to all prisoners, without discrimination. Therefore the equality of treatment and access to services covered in SMR, imply that prison authorities are obliged to take affirmative action to ensure the equal access of all vulnerable groups, including older prisoners, to all prison facilities and programmes.

The European Prison Rules, adopted in 2006, do not make specific mention of older prisoners either. The Committee of Ministers of the Council of Europe has, however, adopted a resolution in relation to the treatment of long-term prisoners, which cover concerns relating to a large part of older prisoners.

United Nations Principles for Older People (1991)

Care

[. . .]

12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

Dignity

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

See also the Madrid International Plan of Action on Ageing (2002), which committed governments to achieving a set of 33 objectives which cover areas of concern to older people and are linked to existing international agreements including the Millennium Development Goals.

United Nations Standard Minimum Rules for the Treatment of Prisoners

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Council of Europe, committee of ministers resolution (76) 2
on the treatment of long-term prisoners[a]

I. Recommends that the governments of the member states:

1. Pursue a criminal policy under which long-term sentences are imposed only if they are necessary for the protection of society;

2. Take the necessary legislative and administrative measures in order to promote appropriate treatment during the enforcement of such sentences;

3. Apply stringent measures of security only in those places where genuinely dangerous prisoners are detained;

4. Provide in prison opportunities for appropriate work and an adequate system of remuneration;

5. Encourage all education and vocational training by providing an adequate system of remuneration for these activities also;

6. Encourage a sense of responsibility in the prisoner by the progressive introduction of systems of participation in all appropriate areas;

7. Reinforce the contacts of the prisoners with the outside world, particularly by encouraging work outside the institution;

8. Grant periods of leave from prison not as a relief from detention but as an integral part of the programme of treatment;

9. Ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;

10. Grant the prisoner conditional release, subject to the statutory requirements relating to time served, as soon as a favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release;

11. Adapt to life sentences the same principles as apply to long-term sentences;

12. Ensure that a review, as referred to in 9, of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals;

13. Improve the training of prison staff of all ranks with reference to the special problems of long-term prisoners and provide staff adequate to ensure deeper understanding, personal contacts and continuity in the treatment of prisoners;

14. Promote studies by multidisciplinary teams, comprising, inter alia, psychiatrists and psychologists, on the effects of long-term sentences on the prisoner's personality, having particular regard to the effects of diverse prison conditions;

15. Take all steps to ensure a better understanding by the general public of the special problems of long-term prisoners, thereby creating a social climate favourable to their rehabilitation.

Council of Europe, committee of ministers recommendation No. R (98) 7, concerning the ethical and organizational aspects of health care in prisons

C. Persons unsuited to continued detention: serious physical handicap, advanced age, short term fatal prognosis

50. Prisoners with serious physical handicaps and those of advanced age should be accommodated in such a way as to allow as normal a life as possible and should not be segregated from the general prison population. Structural alterations should be effected to assist the wheelchair-bound and handicapped on lines similar to those in the outside environment.

[a]Adopted by the Committee of Ministers on 17 February 1976.

4. Responding to the needs of older offenders

4.1 Sentencing policies and non-custodial measures and sanctions

As with all vulnerable groups, a sentence of imprisonment comprises a particularly severe punishment for older persons, due to their special needs, outlined above, which most prison systems are unable to meet.

In addition, for older persons, a sentence of 15 or 20 years often means life imprisonment. Expecting to die in prison, with little chance of release can have a devastating effect on the mental well-being of prisoners, and can be argued to constitute a disproportionately severe punishment, when compared to the same punishment received by a younger prisoner, for the same offence.

Suggestions have been put forward on the basis that leniency in sentencing should be shown to older offenders. In the United States it has also been suggested that special judicial procedures be developed for older offenders, similar to those that apply to juveniles.[159]

- Whether the offender is older or not, States should pursue a criminal justice policy under which long-term sentences are imposed only if they are necessary for the protection of society. The current trend of increasing the length of sentences and the introduction of harsh sentences, such as life without parole, has influenced the growth of the prison population in many countries worldwide. This has led to the deterioration of conditions, increased prison violence, lack of prison activities, self-harm and suicides, which all undermine one of the essential purposes of imprisonment, which is social reintegration.
- The age of offenders, their mental and physical health, prospects of receiving adequate care in prison should be taken into account when passing judgment, to ensure that the sentence does not comprise a disproportionately harsh punishment.

[159]Howse, K., op. cit., p. 24.

- Older prisoners who have committed non-violent offences should be considered for non-custodial measures and sanctions as a matter of principle, as their care can much better be provided for in the community.

GOOD PRACTICE

Non-custodial sanctions for older persons in Uruguay[a]

Legislation in Uruguay provides for house arrest for offenders over 70, with the exception of those convicted of serious crimes such as homicide and rape. This provision of the legislation applies also to seriously ill prisoners and women in their last three months of pregnancy and first three months of nursing.

[a]Correspondence, Dr. Maria Noel Rodriquez, Ministry of Interior, Uruguay.

4.2 Prison management

4.2.1 Management policies and strategies

The growth rate of the number of older prisoners and the prospects for further increase, justifies the development of special policies and strategies by prison services to address the special needs of this vulnerable group of prisoners.

Given the diverse issues to be addressed in relation to the supervision and care of older prisoners, management policies and strategies should involve the input of a multidisciplinary team of prison specialists, working in coordination with specialists and service providers from the community, particularly in the area of medical care.

The policies and strategies to be developed should include issues such as staff training, placement of older prisoners within the prison system, improvement of services, coordination with civil society, early conditional release and resettlement. In addition, a strategy relating to compassionate release should also be considered (see section 4.2.10 below).

4.2.2 Staff

All staff that have any involvement in the supervision and care of older prisoners should receive training to enable them to work constructively and effectively with this group of prisoners. The training should include awareness building about the aging process and help develop an understanding about disabilities and other physical and mental problems related to growing old. Communication skills with older prisoners should also be developed.

Prison service staff should be encouraged to work with organizations of civil society, as well as health and welfare services, in order to cover all the needs of older prisoners, while laying the basis for their continuum of care in the community following release.

4.2.3 Access to justice

Older prisoners should be assisted by prison staff to gain access to suitable legal counsel, legal and paralegal aid services from the outset of their detention and throughout their imprisonment, as necessary. If they require additional help, due to mental or physical disabilities, suitable support should be provided during the whole criminal justice process, to ensure that older prisoners enjoy the same human rights as others in their access to justice and treatment in the criminal justice system.

4.2.4 Assessment and allocation

The assessment of the needs of older prisoners on admission is essential to ensure that the very varied needs of this category of prisoners are met. The assessment should include the prisoner's physical and mental health, family contacts, community relationships and criminal history to determine their placement and the individualized programme to be applied. The assessment should take into account the very low risk status of most older prisoners and avoid over-classification. As with all prisoners, older prisoners should be allocated to the least restrictive environment possible.

Due to the rapidly changing status of older prisoners, particularly in terms of health, reviews should be undertaken on a regular basis to modify programmes, as well as to review their security classification. Early detection and treatment of health conditions particularly are important both from an ethical point of view and in terms of minimizing costs of medical treatment.

4.2.5 Accommodation

The special needs of older prisoners in terms of accommodation and the arguments for and in favour of segregated units are outlined in section 2.3 above.

Prison services will need to make their own decision with regard to special units, taking into account cost factors, the services and facilities offered in prisons for the general prison population and resources available to ensure that older prisoners have access to such services if placed in the general population, the wishes of prisoners themselves, their security level, health conditions and other individual needs.

Taking into account resource limitations in most countries, there are strong arguments in favour of a system where the majority of older prisoners are placed in the general population, while only a small number who require specialized care and protection may be housed in special units. This approach is beneficial in ensuring that prisoners live in an environment, which is as close as possible to life outside. The Council of Europe, Committee of Ministers, Recommendation No. R (98) 7, "Concerning the Ethical and Organizational Aspects of Health Care in Prisons", recommends that older prisoners are housed together with other prisoners to ensure that they lead a normal life as possible. (Rule 50)

The determination of suitable accommodation should be based on a careful individual assessment of needs. Where older prisoners are accommodated in the general

population, account needs to be taken of their special accommodation requirements and their need for tranquillity and association with peers. Older prisoners may, for example, be housed in a separate wing or dormitory of the general building. The accommodation should be secure and easily accessible, protecting older prisoners from physical injuries. For example, dormitories or cells should be on the ground floor, minimizing the need to use steps and there should be easy access to sanitary facilities; single tier beds rather than bunk beds should be used and the distance between the accommodation and areas where prison activities take place should not be too large.[160]

4.2.6 Health care

Among the special needs of older prisoners, provision of appropriate health care is the priority for most. Many older prisoners have to cope with a range of health problems, as described in section 2.4. As a result, older prisoners are likely to require a number of health care services, including medical, nutritional and psychological. Some may be in need of constant medical monitoring and delivery of medications to their cells/dormitories on a regular basis. Thus, the health care of older prisoners necessitates the engagement of a multidisciplinary team of specialist staff, including a medical specialist, a nurse and psychologist as a minimum.

Prison authorities need to establish close cooperation with community health services to ensure that specialist care is provided by outside medical services, as necessary, and that prisoners whose needs cannot be met in prison are transferred to civilian hospitals without delay.

In addition to a range of general health care needs, many older prisoners may require treatment for alcohol abuse, as well as counselling for depression and fear of dying. Older prisoners will need to have access to special programmes addressing these needs. These could include: instruction on health care for older persons, counselling related to growing old, fear of death, isolation and substance abuse and special education courses that meet the needs of this age group. Specialized counselling may also include those designed for prisoners with terminal illness and those who have received a life sentence without parole.

All these requirements place a heavy burden on prison authorities and prison health care staff, impossible to cope with in most prison systems of the world. It is therefore highly recommended that older prisoners suffering from health conditions, which cannot be adequately treated in prison, are considered for compassionate release at the earliest possible time, taking account of public safety requirements (see section 4.2.10).

4.2.7 Contact with the outside world

As mentioned in section 2.5, family links are very important to ease the hardship of imprisonment for older prisoners and to help with their social reintegration following release.

[160]See Conclusions and Recommendations, in Uzoaba, J., op. cit. p. 85.

Placing older prisoners as close as possible to home is important to help maintain contacts with family members. In addition, where resources allow, family visits can be organised, for those who are too old to travel.

GOOD PRACTICE

India: Transferring older prisoners with life sentences to open prisons, to maintain contacts with families and enable social reintegration[a]

In September 2007 The Times of India announced that an open prison was being built for older prisoners with life sentences in Buxar District of the North Indian state of Bihar. It was expected to be ready by the end of the year.

Older prisoners with life sentences would be shifted to the minimum security prison, where they would live with their families and would be allowed to take up jobs of their choice within prescribed limits.

[a]http://english.people.com.cn/90001/90777/6263796.html

Regular prison leaves, enabling prisoners to spend time with their families and thereby to maintain contact with them, also comprise an effective way of keeping relationships alive and reducing the sense of isolation suffered by many older and long-term prisoners.

In addition, prison authorities should encourage organizations of civil society which work with older persons to include prison visits and projects in prisons within their programmes. Consideration could be given to concluding agreements with such organizations to ensure that the contact is long term and sustainable.

GOOD PRACTICE

The Netherlands: Union of Volunteers for prisoners with special needs[a]

A Union of Volunteers established in the Netherlands aims to provide essential practical and emotional support to vulnerable groups, such as homeless, substance dependent, foreign and older prisoners who used to live alone.

The volunteers visit the prisoners on a regular basis, as well as taking care of many practical issues and problems. For example, if a prisoner lived on his or her own, the volunteers might collect the post for them, pay the rent, take care of domestic animals, which is extremely important for the mental well-being of prisoners.

[a]Jan van den Brand, General Governor and Coordinator of Foreign Affairs, Dutch Prison Service, Ministry of Justice, UNODC Expert Group Meeting, Vienna, 18-19 October 2007.

4.2.8 Prisoner programmes

It has been mentioned that individual programming is essential for older prisoners, due to the heterogeneous nature of the older population. Counselling, education, vocational training and other programmes need to be adapted to their individual needs and circumstances, including age and health-related needs and length of sentence.

Where older prisoners are integrated with the general prison population, prison authorities should make modifications to existing programmes to enable all groups of prisoners, including those who are older, to participate, as well as to introduce special programmes that address the needs of older prisoners.

Special programmes for older prisoners can be arranged within a general regime suitable for all prisoners, without significant additional resources. For example such programmes may include skills training in a selection of arts and crafts, while areas can be set aside in prisons for older prisoners to read, play cards and board games or just to associate with each other.

Older prisoners' own wishes and abilities should determine the level of outdoor exercise they participate in and blanket assumptions should not be made. However, prison staff need to provide some support and flexibility in order to enable older prisoners to take exercise or participate in outdoor recreational activities to the maximum possible extent. Some, for example, may want to rest or go back indoors early, but may not be able to do so due to security and escort considerations, which might discourage them from participating at all, if rules are applied rigidly.

Other prisoners' assistance in helping care for older prisoners may be sought, after careful screening and assessment. This approach would lighten the burden of staff, who are usually overstretched due to personnel shortages, and provide selected prisoners with a meaningful and fulfilling activity. Such prisoners will need to receive training prior to engagement with older prisoners. Consideration could also be given to prisoners' conducting training of trainers for other prisoners, thereby developing peer group support, while contributing to the social reintegration process. In some systems, for example in Canada, where prisoners have been engaged as caregivers for older prisoners, the caregivers have been able to use their skills and experience in their employment following release.[161]

The engagement of community services and NGOs working with older persons in the community is of great value in designing and delivering programmes and activities for older prisoners, given the lack of resources in most prison systems to cater for the specific needs of this group. Contact with civil society is also beneficial to reduce the sense of isolation prevalent among older prisoners, who have lost family contacts.

[161]Terry Sawatsky, prison expert, Canada. UNODC Expert Group Meeting, Vienna, 18-19 October 2007.

GOOD PRACTICE
Older prisoners and community programmes in the United States

"Often correctional facility staff can work with community providers to identify areas where the institution can provide a service in return for technical assistance, training, or other needs. For example, older inmates at Hocking Correctional Institution in Ohio fold newsletters as a public service for the area agency on aging. Its staff, in turn, works with the institution to develop new programmes".[a]

[a]Dr Morton, J. B., op. cit. p. 20.

4.2.9 Preparation for release and post release support

Individualized preparation for release programmes are of particular importance in the case of older prisoners. The existence or not of family links and the length of imprisonment (therefore possible institutionalization) are two of the key factors determining prisoners' support needs, to be addressed as part of pre-release preparation and post-release support programmes. For most older prisoners, but especially for those who have grown old in prison, and for those who have no family to support them, helping re-establish links with the community, including with health and welfare agencies, to ensure that their health care, housing and welfare needs are met on release, is particularly important. The prison service needs to work in close coordination with probation services, where they exist, with other agencies of civil society and NGOs to ensure that maximum possible support is provided to older prisoners during the difficult period of re-entry into society. Older women prisoners are likely to need special support and assistance at this time, due to reasons such as the particular stigma associated with their position or due to past abuse by their partners or carers and disrupted family links as a consequence.

Responding to the needs of older prisoners who have nowhere to go to on release is extremely challenging in most countries, especially where resources are scarce. Nevertheless, it must be recognized that prison services should not be expected to continue to detain such prisoners and provide for their ongoing care due to lack of alternative arrangements in the community. States have a responsibility to ensure that older former prisoners are taken care of in the community, and make adequate investment in services that provide for the needs of this vulnerable group, such as nursing homes or other facilities, in line with the culture, traditions and economic resources of the country in question.

4.2.10 Early conditional release, compassionate release and amnesties

As mentioned under section 2.8, in many systems older prisoners are at a disadvantage in consideration for early conditional release, despite the fact that the gradual re-entry into society provided by early conditional release is of particular value for long-term prisoners. Therefore, consideration may be given by prison authorities to developing a different set of parole eligibility criteria relevant to the needs of long-term and older prisoners. For example, the obligation to have employment or to

have completed prisoner programmes (especially where none are offered to meet the needs of older prisoners) are irrelevant and unfair requirements in the case of many older prisoners.

Prisoners over a certain age, who are in need of constant specialist nursing care, should be considered for release on compassionate grounds, and transferred to an appropriate institution in the community, rather than burdening the prison service, with the additional costs of treatment and care.

At the appropriate stage contacts between older prisoners and legal aid services may be encouraged and facilitated, in order to assist such prisoners in gaining early conditional or compassionate release.

Older prisoners, and particularly older women, should be one of the groups of prisoners prioritized for release under amnesty laws, following a careful risk assessment.

GOOD PRACTICES

Early release project for older prisoners in the United States[a]

George Washington University Law students work within the criminal process, particularly the prison and parole system, through the Project for Older Prisoners (POPS). These students interview and evaluate low-risk older and geriatric prisoners in obtaining parole or other forms of release from imprisonment. POPS operates in five states—Louisiana, Maryland, Michigan, North Carolina, and Virginia—and the District of Columbia. It is reported that, to date, the programme has secured the release of almost 100 prisoners without a single act of recidivism on the part of those released.

[a] www.gwu.edu/~ccommit/law.htm

RECOMMENDATIONS

To sentencing authorities

- To pursue a criminal justice policy under which long-term sentences are imposed only if they are necessary for the protection of society.
- To take into account the age of offenders, their mental and physical health, prospects of receiving adequate care in prison, when passing judgment, to ensure that sentences do not comprise disproportionately harsh punishments.
- To consider older prisoners who have committed non-violent offences for non-custodial sanctions and measures as a matter of principle, as their care can much better be provided for in the community.

To prison authorities, probation and/or other social welfare services

Management policies and strategies

- To develop special policies and strategies to address the needs of this vulnerable group of prisoners.

- To involve the input of a multidisciplinary team of prison specialists, working in coordination with specialists and service providers from the community, particularly in the area of medical care.
- To include issues such as staff training, placement of older prisoners within the prison system, improvement of services, coordination with civil society, early conditional release, release on compassionate grounds and resettlement in the policies and strategies to be developed.

Staff

- To ensure that all staff that has any involvement in the supervision and care of older prisoners receive training to enable them to work constructively and effectively with this group of prisoners.
- To encourage prison service staff to work with organizations of civil society, as well as health and welfare services, in order to cover all the needs of older prisoners, while laying the basis for their continuum of care in the community following release.

Access to justice

- To assist older prisoners in accessing legal counsel, legal and paralegal aid services from the outset of their detention and to provide additional support to older prisoners with mental or physical disabilities, as required, to ensure that they are not discriminated against in their access to justice and treatment in the criminal justice system.

Assessment and allocation

- To ensure that a proper assessment is undertaken to determine the very varied needs of older prisoners on admission, taking into account the low risk status of most older offenders;
- Due to the rapidly changing status of older prisoners, particularly in terms of health, to undertake reviews on a regular basis to modify programmes, as well as to reconsider security classification levels.

Accommodation

- To place the majority of older prisoners in the general prison population, taking into account their special accommodation requirements and their need for tranquillity and association with peers.
- To accommodate a small number in special units, only if absolutely necessary to provide specialists care on an ongoing basis, and if it is in the interest of the prisoners' mental well-being and health care. Preference should be given to releasing such prisoners on compassionate grounds to be treated in the community, wherever possible (see below).

Health care

- To ensure that the medical, nutritional and psychological health care needs of older prisoners are met, with the engagement of a multidisciplinary team of specialist staff.
- To establish close cooperation with community health services to ensure that specialist care is provided by outside medical services, as necessary, and that prisoners whose needs cannot be met in prison are transferred to civilian hospitals.
- To provide special programmes addressing mental disabilities, such as depression and fear of dying, as well as individual counselling, as necessary.

Contact with the outside world

- To place older prisoners as close as possible to home in order to help them maintain contacts with family members. In addition, where resources allow, to organize family visits for those who are too old to travel.

- To grant regular prison leave as an integral element of prison regime, enabling older prisoners to spend time with their families and thereby to maintain contact and reduce the sense of isolation.
- To encourage organizations of civil society which work with older persons to include prison visits and projects in prisons within their programmes.

Prisoner programmes

- Where older prisoners are integrated with the general prison population, to make modification to existing programmes to enable all groups of prisoners, including older prisoners, to participate, as well as to introduce special programmes that address the needs of older prisoners.
- Special vocational training programmes may include skills training in a selection of arts and crafts, while areas can be set aside in prisons for older prisoners to read, play cards and boards games or just to associate with each other.
- Other special programmes could include instruction on health care for older prisoners, counselling related to growing old, fear of death, isolation and substance abuse, tailored physical activity and special education courses that meets the needs of this age group. Specialized counselling may also include those designed for prisoners with terminal illness and those who have received life sentences without parole.
- To be guided by older prisoners' own wishes and abilities in determining the level of outdoor exercise they participate in, and to provide some support and flexibility, as necessary, in arrangements in order to enable older prisoners to take exercise or participate in outdoor recreational activities.
- Other prisoners' assistance in helping care for older prisoners may be sought, after careful screening, assessment and training.
- To take steps to engage community services and NGOs working with older persons in the community in designing and delivering programmes and activities for older prisoners.

Preparation for release and post-release support

- To develop individualised preparation for release programmes taking into account the special needs of prisoners who have grown old in prison and those who have no family support, in order to help re-establish links with the community, including with health and welfare agencies.
- To work in close coordination with probation services where they exist and with other agencies of civil society and NGOs, to ensure that maximum possible support is provided to older prisoners during the difficult period of re-entry into society.

Early conditional release, compassionate release and amnesties

- To consider developing a different set of parole eligibility criteria relevant to the needs of long-term and older prisoners, to minimize the disadvantages they face in the consideration for early conditional release.
- To release on compassionate grounds older prisoners who are in need of constant specialist nursing care, and who do not pose a risk to society, transferring them to an appropriate institution in the community.
- To encourage and facilitate contacts between older prisoners and legal aid services at the appropriate stage, in order to assist such prisoners in gaining early conditional and compassionate release.
- To ensure that older prisoners, and particularly older women, are one of the groups of prisoners prioritised for release under amnesty laws, following a careful risk assessment.

7. Prisoners with terminal illness

DEFINITION

Terminal illness refers to a situation in which there is no reasonable medical possibility that a patient's condition will not continue to degenerate and result in death.

Although in many countries the high death rate among prisoners is primarily due to the prevalence of tuberculosis (TB) and HIV/AIDS, this chapter does not cover the treatment and control of TB or HIV/AIDS. It focuses on the situation and needs of prisoners with a terminal illness generally and exclusively. Please see *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response*, UNODC, WHO, UNAIDS, New York, 2006, for information on effective HIV/AIDS control programmes in prison settings; *Tuberculosis Control in Prisons: A Manual for Programme Managers*, WHO, ICRC, 2000, among others, for a framework for effective TB control programmes in prisons.

KEY MESSAGES

- The imprisonment of offenders who have been diagnosed with terminal illness exacerbates the suffering inherent in the sentence and due to the predicted death of the prisoner is irrelevant in terms of social reintegration. It also places a large burden on the medical services of prison administrations, which in most countries are severely under-resourced and not able to provide for the complex and costly needs of patients with terminal illness.
- States need to devise appropriate policies and strategies, or to review the accessibility of those in place, to deal with the needs of prisoners with terminal illness in a manner that respects their human rights, taking into account the needs of security and safety of the community.
- Such policies and strategies should address the medical care of prisoners with terminal illness in prison, the formulation of clear criteria and procedures for their release on compassionate grounds, and their medical care following release.

1. Overview

Poor prison conditions in a vast majority of prison systems worldwide, compounded by the growing prison population in many countries, the prevalence of risk behaviours among prisoners, and the vastly inadequate health services in most prison systems,

are some of the key factors leading to disease and death in prisons. In recent years, the aging of the prison population, mainly in economically developed countries, and the increase in tuberculosis (TB), HIV/AIDS and other transmissible diseases in a large number of prison systems, have led to the growth in the number of prisoners with terminal illness in prisons worldwide.

Prisoners, including those with a terminal illness, are entitled to a standard of health care equivalent to that available in the outside community. This principle of equivalence is fundamental to the promotion of human rights and best health practice within prisons, and is supported by international guidelines on prison health and prisoners' rights, as well as national prison policy and legislation in many countries. However, prisons are most often ill-equipped to provide for the intensive, multidisciplinary medical care which patients with terminal illness require.

Clearly the primary consideration in all prison systems should be to provide a healthy environment, to prevent the development of disease, and to ensure that those who are ill receive the medical care equivalent to that in the community. At the same time, by limiting the number of prisoners with terminal illness to cases which are genuinely justified, prison authorities will be in a better position to provide the constant and intensive health care needs such prisoners require and have a right to receive.

Taking account of these factors, as well as the need of prisoners with terminal illness to receive the support of family and friends during the extremely distressing period prior to death, a number of international instruments call for the release of prisoners with a terminal illness on compassionate grounds or the consideration of non-custodial sanctions, when the offenders do not pose a risk to society.

With the growth in the number of prisoners with terminal illness in many countries worldwide, there are strong ethical and financial arguments for States to devise appropriate policies and strategies, or to review the accessibility of those in place, to deal with the needs of this vulnerable group in a manner that respects their human rights, taking into account the needs of security and safety of the community. Such policies and strategies should address the medical care of prisoners with terminal illness in prison, as well as the formulation of clear criteria and procedures for their release on compassionate grounds and their continuum of care in the community.

2. Special needs and challenges

All patients with terminal illness, whether in prison or not, have special medical needs related to their disease, as well as psychological and spiritual support needs related to the prospect of impending death. Such needs are intensified in the isolating environment of prisons, where the requisite medical and psychological care is most often lacking.

2.1 Access to justice

Individuals with a terminal illness have particular needs in terms of adequate and timely legal representation at various stages of their detention and imprisonment. During pre-trial stage, they need legal assistance to facilitate the implementation of bail and other non-custodial measures, as well as to ensure that they receive adequate medical care throughout this period, whether in detention or in a community hospital. Lawyers may also argue for a non-custodial sanction to be imposed, if the defendant is convicted. After imprisonment prisoners' access to justice continues to be vital to ensure that they receive medical care equivalent to that in the community, and to facilitate early release on compassionate grounds if their condition continues to deteriorate and/or if they are not provided with the requisite health care services in prison. Many prisoners with terminal illness, especially those with advanced AIDS, may have been abandoned by their families, or links will have been disrupted due to the age of the prisoners and the length of their sentence. Thus the only assistance they can expect may be from lawyers.

2.2 Classification and accommodation

Prisoners with a terminal illness need to be accommodated in an environment that does not exacerbate the suffering inherent in their condition and that enables ongoing medical supervision. In some systems such accommodation may not be available, and patients with terminal illness will be held in overcrowded conditions with inadequate separation from other prisoners. Such conditions will not only intensify the suffering of the patients and adversely affect their medical condition, but may also put other prisoners at risk of infection.

In some systems adequate medical care for prisoners with terminal illness is only available at higher security level prisons, which means that patients with terminal illness may be accommodated far away from their homes and at a level of security that is higher than their classification level.

2.3 Health care

Prison services in the majority of countries worldwide are ill-equipped to deal with the medical needs of patients with terminal illness. Access to high cost clinical resources and ongoing palliative care, which most prisoners with a terminal illness are in need of, are simply unavailable in most prison systems. As a result, prisoners may suffer unnecessarily or receive aggressive medical treatment that is neither justified nor likely to be beneficial.

The possibility of rapid changes/deterioration in the medical condition of prisoners with a terminal illness necessitates 24-hour, 7-day medical supervision and nursing services, which most prison systems are unlikely to be able to provide.

In some prison systems palliative treatment for HIV/AIDS, TB and cancer sufferers, among others is problematic, mostly due to legal constraints, since palliative

treatment implies the use of morphine-like painkillers that are not allowed for use in some prison settings. As a result, the basic pain control needs of dying patients cannot be met, leading to unnecessary, prolonged suffering, constituting the harshening of the prison sentence.

Prisoners with AIDS may not have access to life-extending anti-retroviral drug treatment in prisons, which implies an additional and much harsher sentence, to that which was passed by the courts.

2.4. Psychological and spiritual support

The prospects of dying in prison, away from family and friends can have a very harmful impact on patients' mental well-being, exacerbating their suffering. Unless provided with adequate human contact and psycho-spiritual support, a dying prisoner is likely to suffer from a myriad of mental problems associated with feelings of isolation, and the prospects of dying in prison, in addition to physical pain.

2.5 Compassionate, medical or other forms of early release

Many legal systems make provisions for either alternatives to imprisonment or compassionate release for prisoners with a terminal illness in general and advanced AIDS in particular, with a variety of modalities and processes being adopted. [162] In addition, in some countries prisoners with terminal illness may be released as part of a general amnesty or within the framework of specific periodic measures taken to reduce overcrowding.

However, reports indicate that even when legislation allows for the release of prisoners with terminal illness, often very few releases on medical grounds actually take place, and the rate of compassionate release has in fact decreased in some countries. This is often due to the very strict criteria applied, the difficulty of the process and cumbersome procedures that lead to extensive delays. In some systems, prisoners sentenced to death or life imprisonment without parole are not eligible at all. In addition plea bargaining restrictions and mandatory minimum sentencing guidelines in some jurisdictions prevent prosecutors and judges from considering alternatives for non-violent offenders with terminal illness.[163]

Paradoxically, it has also been noted that the increasing availability in some countries of medical facilities and programmes for dying prisoners has meant that medical staff in prison services are pursuing fewer applications for compassionate release for prisoners with terminal illness and fewer are being released on parole, thus contributing to the growth of the prison population with terminal illnesses.

[162]United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Fifteenth Session, Vienna, 24-28 April 2006, Item 8 *(c)* of the provisional agenda, Use and application of United Nations standards and norms in crime prevention and criminal justice: combating the spread of HIV/AIDS in criminal justice pre-trial and correctional facilities, Report of the Secretary General, E/CN.15/2006/15, 10 February 2006.

[163]Incarceration of the Terminally Ill: Current Practices in the United States, A Report of the GRACE project volunteers of America, March 2001, p. 5.

When prisoners with terminal illness are released as part of a general amnesty to reduce overcrowding in prisons, often it is unclear whether any post-release medical care has been arranged.

3. International standards

United Nations Standard Minimum Rules for the Treatment of Prisoners

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

United Nations Basic Principles for the Treatment of Prisoners

9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

United Nations Economic and Social Council Resolution 2004/35, Combating the spread of HIV/AIDS in criminal justice pre-trial and correctional facilities[a]

2. Invites Member States to consider, where appropriate and in accordance with national legislation, the use of alternatives to imprisonment, as well as early release for prisoners with advanced AIDS.

Council of Europe Recommendation No. R (93) 6 of the Committee of Ministers to Member States concerning Prison and Criminological Aspects of the Control of Transmissible Diseases Including AIDS and Related Health Problems in Prisons[b]

14. Prisoners with terminal HIV disease should be granted early release, as far as possible, and given proper treatment outside prison.

Council of Europe, Committee of Ministers Recommendation No. R (98) 7 Concerning the Ethical and Organizational Aspects of Health Care in Prisons[c]

51. The decision as to when patients subject to short term fatal prognosis should be transferred to outside hospital units should be taken on medical grounds. While awaiting such transfer, these patients should receive optimum nursing care during the terminal phase of their illness within the prison health care centre. In such cases provision should be made for periodic respite care in an outside hospice. The possibility of a pardon for medical reasons or early release should be examined.

World Medical Association Declaration on Terminal Illness
(Adopted by the 35th World Medical Assembly Venice, Italy, October 1983
and revised by the WMA General Assembly, Pilanesberg, South Africa, October 2006)

The duty of physicians is to heal, where possible, to relieve suffering and to protect the best interests of their patients. There shall be no exception to this principle even in the case of incurable disease.

In the care of terminal patients, the primary responsibilities of the physician are to assist the patient in maintaining an optimal quality of life through controlling symptoms and addressing psychosocial needs, and to enable the patient to die with dignity and in comfort. Physicians should inform patients of the availability, benefits and other potential effects of palliative care.

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[a]Adopted at the 47th plenary meeting, on 21 July 2004.
[b]Adopted by the Committee of Ministers on 18 October 1993.
[c]Adopted by the Committee of Ministers on 8 April 1998.

4. Responding to the needs of offenders with terminal illness

4.1 Non-custodial measures and sanctions

The imprisonment of offenders who have been diagnosed with terminal illness exacerbates the suffering inherent in the sentence and due to the predicted death of the prisoner is irrelevant in terms of social reintegration. It also places a large burden on the medical services of prison administrations, which in most countries are severely under-resourced and not able to provide for the complex and costly needs of patients with terminal illness.

States are therefore advised to introduce legislation and policies that provide for community sanctions and measures for offenders with terminal illness, at all stages of the criminal justice process, to enable them to receive the medical care they require and to die in dignity, surrounded by their family and friends, rather than the isolating environment of prisons.

4.2 Prison management

4.2.1 Management policies and strategies

In order to ensure that the human rights of prisoners with a terminal illness are protected, including specifically their right to receive medical care equivalent to that in the community, prison authorities need to incorporate clear rules and procedures relating to the treatment and release of prisoners with a terminal illness into their prison management policies and guidelines.

Such rules and procedures should, as a minimum, include clear criteria and procedures relating to:

- Determination of terminal illness;
- Assistance to pre-trial detainees with terminal illness in bail applications;
- Health care for prisoners with terminal illness (in pre-trial detention and in prisons);
- Transfer of prisoners with terminal illness to civilian hospitals;
- Compassionate release of prisoners with a terminal illness;
- Cooperation with community health care services to ensure continuum of care following release.

4.2.2 Staff

An adequate number of qualified medical professionals and psychologists need to be available to cater for the unique needs of patients with a terminal illness. Other staff should receive training in caring and communicating with prisoners with terminal illness and their families with sensitivity.

4.2.3 Access to justice

As with all prisoners, those with a terminal illness should have access to legal counsel, including free legal aid services if indigent, during the entire criminal justice process. Access to lawyers is vital for defendants with terminal illness, who will be in need of particular assistance in the enjoyment of their rights for non-custodial sanctions and measures, such as bail, suspended sentences or other community sanctions, as well as their rights to the requisite medical care in prisons.

Legal counsel may be essential for prisoners to be granted compassionate release on medical grounds. As mentioned earlier, the process of release on medical grounds can be extremely complicated and cumbersome in some systems, and the assistance of lawyers is vital at this time to help with the timely release of patients with terminal illness.

Prison authorities need to assist prisoners with terminal illness to contact lawyers or legal aid services and facilitate their communication.

4.2.4 Allocation and accommodation

Prisoners with terminal illness should be placed as close as possible to their homes to enable regular visits from family and friends. As far as possible, allocation to a higher security level than necessary, purely because the requisite medical care is available in higher security locations, should be avoided. If there is no other option, and a non-custodial sanction has been excluded for justifiable reasons, then prison authorities should compensate for the unnecessarily high security level, by, for example, assisting with regular family visits, allowing for more contact with the outside world, and in general applying a regime corresponding to a lower security classification, in line with the risk assessment of the prisoner.

Prisoners with terminal illness should be accommodated in a comfortable environment under the medical care of prison health personnel. Those with infectious diseases should be separated from other prisoners to prevent the risk of spreading infection.

4.2.5. Health care

When patients with terminal illness are held in prisons, the State takes on the responsibility to provide them with all the medical and other support services that are available in the community.

The provision of the complex and changing needs of patients with terminal illness requires constant monitoring and the engagement of a multi-disciplinary team, comprising a physician, a nurse and psychologist, as a minimum.

GOOD PRACTICE

Brazil: Prison hospital for prisoners with terminal AIDS

"Since 1993 the Rio de Janeiro State Prison System in Brazil has a hospital with 37 beds for prisoners with advanced AIDS, diagnosed as terminal. This unit is today considered a reference unit in the public health system, is funded by the Ministry of Health, as the other prison hospitals in Rio, and is known to provide humane and very qualified treatment. This is unique in the country and no other State Prison System in Brazil has anything like it."[a]

[a]Dr Julita Lemgruber, Director, Centre for Studies on Public Security and Citizenship, Universidade Candido Mendes, UNODC Expert Group Review Meeting, Vienna 18-19 October 2007.

Palliative care should be available to all patients with terminal illness. In addition, each patient has specific needs, depending on the nature of their illness, age, existence or lack of family links, among others, and all these factors need to be taken into account when developing an individualized plan of care. Nursing services should be provided on a constant basis (24 hours a day, 7 days a week).

Prisoners with a terminal illness should be provided with any special diet and nutrition which their condition requires, as prescribed by a medical doctor.

Prisoners with advanced AIDS (similar to others who are HIV positive) should have the same access to antiretroviral treatment as such patients in the community.

Professionals from civil health care services, including specialists in palliative care, should be engaged in the care of prisoners with a terminal illness as far as possible, and provision should be made for periodic respite care in an outside hospice. If patients' health care needs cannot be provided in prison, they should be transferred to community hospitals, taking into account security and safety requirements.

The following are standards of practice developed by the GRACE (Guiding Responsive Action for Corrections in End-of-life) Project, Promoting Excellence in End-of-Life Care initiative, administered by Volunteers of America. Although more relevant to the economic possibilities of developed countries, the guiding principles apply to a wide range of settings.

END-OF-LIFE CARE STANDARDS OF PRACTICE FOR INMATES IN CORRECTIONAL SETTINGS, February 2000

[Extracts]

1. CARE

Standard 1A: Palliative care is available to every inmate who has been diagnosed with a terminal illness.

Practice 1A-1. Palliative care is available to patients in as wide a range of housing settings as health care and security can accommodate.

Standard 1B: The needs of the patient and family are met through care that is both individualized and holistic.

Practice 1B-1 Plans for palliative care are based on a needs assessment of the inmate population, characteristics of the physical plant, medical care capabilities, and other resources.

Interdisciplinary Team (IDT)

Practice 1B-2. An interdisciplinary team (IDT) assesses the patient's needs and plans, delivers, and evaluates each patient's care and services.

Practice 1B-3. The interdisciplinary team (IDT) consists of appropriate representatives of all disciplines that are significantly involved in rendering care. At a minimum, it consists of a physician, nurse, mental health representative, and chaplain. Others may serve as IDT members when needed, including but not limited to dietitians, pharmacists, facility security staff, a volunteer coordinator, a patient's family, the patient, other caregivers, and others, including volunteers, as appropriate.

Practice 1B-4. A qualified health care professional coordinates the interdisciplinary team.

Practice 1B-5. The interdisciplinary team consults with a qualified, trained professional in the area of ethical medical care whenever ethical dilemmas arise in the care of patients and families.

Plan of Care

Practice 1B-6. A patient-centered, individualized plan of care is developed and maintained by the interdisciplinary team, in collaboration with the patient.

Practice 1B-7. A written plan of care is developed for each patient within 24 working hours of admission.

Practice 1B-8. Communication concerning the care plan and status of the patient is provided to the patient and to designated family, with consent of the patient.

Practice 1B-9. Care plans are reviewed by the interdisciplinary team, at least every two weeks or when the patient's condition changes, and revised to reflect the changing needs of the patient and family.

[. . .]

Palliative Care Services

Practice 1B-12. The medical director or designee reviews, coordinates, and oversees the management of medical care for all patients.

Practice 1B-13. Nursing services are based on initial and ongoing assessments of the patient's needs by a registered nurse and are provided in accordance with the interdisciplinary team's plan of care.

Practice 1B-14. Nursing services are available twenty-four hours a day, 7 days a week to meet patients' nursing needs in accordance with the plan of care.

Practice 1B-15. Counseling services are based on initial and ongoing assessments of the patient's and family's needs by a qualified counselor or social worker and are provided in accordance with the interdisciplinary team's plan of care, utilizing community resources as needed.

Practice 1B-16. Spiritual care and services are based on an initial and ongoing documented assessment of the patient's and family's spiritual needs by a qualified chaplain member of the interdisciplinary team, utilizing community resources as needed.

[. . .]

4.2.6 Family links, psychological and spiritual support services

Patients with terminal illness will need psychological and spiritual support to help them cope with their situation. Where the prisoners' links with their families continue, patients should be given as much opportunity as possible to meet with their family members to alleviate the sense of isolation felt by the patients and to reduce the suffering of family members. Where links with the family have been disrupted, prison services may try to reestablish contact, depending on the wishes of the prisoner. Where visits by family members are difficult due to the age of the visitors or lack of financial means, prison services should assist with transport and finances, where resources allow.

In addition to family contact, prisoners with a terminal illness are likely to need professional psychological support to help them come to terms with their situation, and to find emotional peace, and they should have ready access to suitable psychological support services.

Spiritual support is vital for most prisoners with terminal illness, to help them maintain their mental well-being as far as possible. Such support can be provided by a minister of their religion or other persons who the prisoner knows and trusts. States are responsible for providing any religious/spiritual support to prisoners who are terminally ill, if they are not released on compassionate or medical grounds.

The assistance of outside services, NGOs and volunteers should be sought to supplement support provided by prison psychologists. Prisoners can also be trained to provide psychological support to prisoners with a terminal illness, which will be beneficial in the social reintegration of such volunteers, while providing for the needs of patients with a terminal illness.

GOOD PRACTICE

The Netherlands: "Buddies" for prisoners with AIDS[a]

A national union of buddies, which already provided support and guidance to people living with AIDS in the society, has, together with the Dutch Prison Service, recently developed a support system also for prisoners. Buddies have access to the prisons and can have confidential contacts with prisoners living with AIDS.

[a]Jan van den Brand, General Governor, Coordinator of Foreign Affairs, Dutch Prison Service, Ministry of Justice, the Netherlands, UNODC Expert Group Review Meeting, Vienna 18-19 October 2007.

Volunteers, whether from among other prisoners, or from the community, should receive training relating to the care and support of prisoners with terminal illness. Professional consultation by qualified personnel should be available on a continued basis to volunteers.

4.2.7 Recreation

Prisoners with a terminal illness should have access to books, periodicals, radio, television and board games, at least to the same extent as other prisoners. Their participation in outdoor and physical exercise will depend on their condition, based on advice from health care staff, but may be difficult in many cases. Special allowances should be made where resources allow, compensating for a prisoner's inability to participate in prison activities or physical exercise.

4.2.8 Compassionate release and other forms of early release

Compassionate or early release for prisoners with terminal illness[a]

Prisoners who enter the later stages of chronic or terminal illnesses—including but not limited to HIV and AIDS—require specialized end-of-life care. Prisons—even in high-income countries—are ill-equipped to provide such care. End-of-life care is unique and demanding, and prison staff often lack the necessary training and resources. The prison environment itself—with its security-focused architecture and routines, lack of comfort and privacy, barriers to access for family and friends—is also generally not conducive to compassionate and responsive end-of-life care. Proper end-of-life care—particularly in the context of HIV and AIDS—often involves providing large doses of pain management medication, which may conflict with the "drug-free" ethos of the prison system. For these reasons, many prison systems have introduced compassionate release programmes to allow terminally ill prisoners to be released from prison earlier in their sentence. Such early-release programmes fulfil a compassionate role but also recognize that the life expectancy of terminally ill prisoners may be lengthened as a result of receiving care in the community.

[a]Health in Prisons, A WHO Guide to the essentials in prison health, WHO Europe (2007), p. 69.

Eligibility criteria for compassionate release should take into account the need to ensure public security, while not being unjustifiably restrictive, and procedures should be accessible to prevent the unnecessary prolongation of the waiting period, resulting in the death of patients in prison, while a decision on release is still being considered.

The prison medical personnel need to undertake regular assessments of the condition of prisoners with a terminal illness and initiate procedures for early or compassionate release, as soon as it is determined that the medical care and other support services provided by the prison are inadequate to address the needs of the patient. Prison services should liaise with paralegal services or the legal representative of the prisoner, and if necessary facilitate legal aid, to ensure that the prisoner's legal rights are protected and enforced during this process.

Effective cooperation between prison and community medical services should ensure that patients released from prison receive all the necessary medical care, including palliative care, in community medical institutions. Cooperation should extend to establishing links with appropriate hospices, where available, which provide specialized care for patients with terminal illness.

If prisoners with terminal illness are being released as part of a general amnesty, steps should be taken to ensure that they receive the requisite medical care in the community following release and, if their disease is infectious, that all precautions are taken to prevent the spread of disease in the community.

GOOD PRACTICE
Early release of prisoners with a terminal illness

South Africa

Article 79 of the Correctional Services Act 111 of 1998 stipulates "[a]ny person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death".[a]

[a]The Correctional Services Act 111 of 1998, as published in the Government Gazette of the Republic of South Africa, 27 November 1998. (accessed at www.info.gov.za/gazette/acts/1998/a111-98.pdf)

RECOMMENDATIONS

TO LEGISLATORS

- To introduce legislation and policies that provide for non-custodial sanctions and measures for offenders with a terminal illness and for compassionate or early release for prisoners with a terminal illness, to enable them to receive the medical care they require and to die in dignity, surrounded by their family and friends, rather than the isolating environment of prisons.
- To ensure that rules and procedures relating to prisoners with terminal illness include eligibility criteria for compassionate release, taking into account the need to ensure public security, while not being unjustifiably restrictive, and procedures are accessible to prevent the unnecessary prolongation of the waiting period.

TO PRISON AUTHORITIES, PROBATION AND/OR OTHER SOCIAL WELFARE SERVICES

Management policies and strategies

- To incorporate clear rules and procedures relating to the treatment and release of prisoners with a terminal illness into prison management policies and guidelines.
- To ensure that clear criteria and procedures are in place relating to assisting pre-trial detainees with terminal illness in bail applications and/or immediate transfer to civil hospitals, depending on their medical condition, the compassionate release of prisoners with a terminal illness and cooperation with community health services to arrange continuum of care following release.

Staff

- To ensure that an adequate number of qualified medical professionals and psychologists are available to cater for the unique needs of patients with a terminal illness.
- To train other staff in caring and communicating with prisoners with a terminal illness and their families with sensitivity.

Access to justice

- To ensure that individuals with a terminal illness have access to legal counsel, including free legal aid services if indigent, during the entire criminal justice process and to provide assistance as necessary to ensure that this happens.

Allocation and accommodation

- To place prisoners with a terminal illness as close as possible to their homes to enable regular visits from family and friends.
- To accommodate prisoners with a terminal illness in a comfortable environment under the medical care of prison health personnel, at a level of security corresponding to their risk assessment. If appropriate medical treatment is available only in a higher security facility, to ensure that the regime applied to the prisoners concerned corresponds to their individual risk assessment.
- To separate those with infectious diseases from other prisoners.

Health care

- To set up a multi-disciplinary team, including a physician, a nurse, psychologist, as a minimum, to provide for the unique and changing needs of prisoners with a terminal illness and to monitor progress.
- To develop an individualized plan of care for each prisoner with terminal illness, taking into account their specific needs, depending on the nature of their disease, age, existence or lack of family links, among others.
- To ensure that prisoners with advanced AIDS (similar to others who are HIV positive) have the same access to antiretroviral treatment as such patients in the community.
- To provide for the special dietary and nutritional needs of prisoners with a terminal illness.
- To ensure that palliative care is available to all patients with a terminal illness, in cooperation with specialists in palliative care in community health care services.
- To make provision for periodic respite care in an outside hospice and where adequate medical care for prisoners with a terminal illness is not available in the prison setting, to transfer such patients to community hospitals.

Family links, psychological and spiritual support services

- To enable the maximum possible contact with family and friends.
- To ensure that the psychological, spiritual and religious support needs of prisoners with a terminal illness are met.

- To encourage the support of NGOs to prisoners with a terminal illness.
- To train prisoner volunteers to provide care and psychological support to patients with a terminal illness.

Recreation

- To ensure that prisoners with a terminal illness have access to books, periodicals, radio, television and board games, at least to the same extent as other prisoners and that their level of participation in outdoor exercise and/or physical activities is determined by their condition, based on advice from medical personnel.

Compassionate release and other forms of early release

- To undertake regular assessments of the condition of prisoners with a terminal illness and initiate procedures for early or compassionate release, as soon as it is determined that the medical care and other support services provided by the prison are inadequate to address the needs of the patient.
- To actively support the compassionate and early release of prisoners with a terminal illness: to liaise with the legal representative of the prisoner, and if necessary facilitate legal aid, to ensure that the prisoner's legal rights are protected and enforced during the decision process, which may involve lengthy and cumbersome procedures in some systems.
- To establish close cooperation between prison and civil health services to ensure that adequate continuum of care in the community is provided on release.
- To establish links with appropriate hospices, where available, which provide specialized care for patients with terminal illness.

8. Prisoners under sentence of death

DEFINITION

The term prisoners under sentence of death covers all prisoners who have been sentenced to death by a court of law and who are held in prison awaiting execution, pending a decision by the higher courts confirming or commuting the sentence, or pending a decision by legislators to abolish the death penalty. Such prisoners include those who are awaiting the decision of an appeals court, those who are awaiting the result of an application for pardon or commutation and those who are being held in prison due to a moratorium on executions in the country of imprisonment.

KEY MESSAGES

- International human rights instruments are unanimous in calling for the abolition of the death penalty. The United Nations Commission on Human Rights has repeatedly called upon States that still maintain the death penalty to abolish it and, in the meantime, to establish a moratorium on executions.
- In countries where the death penalty is retained, legislation and the implementation of legislation must guarantee all safeguards provided by United Nations safeguards guaranteeing protection of the rights of those facing the death penalty, in order to minimize miscarriages of justice, not to executive offenders who have not committed the most serious offences, with lethal or extremely grave consequences, and not to execute certain categories of prisoners, such as persons below the age of 18, pregnant women and persons with mental (including intellectual) disabilities.
- States and prison authorities need to fulfil the requirements of international instruments that provide special legal protection to prisoners under sentence of death and ensure that such prisoners are held in conditions that comply with those set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners, similar to all other prisoners.
- Foreign national prisoners have additional rights, including contact with consular representatives, contained in article 36 of the Vienna Convention on Consular Relations, as well as interpretation services, which should be provided from the outset of their detention and throughout the criminal justice procedures.

1. Overview

A number of international and regional treaties oblige States which have ratified them to abolish the death penalty. They include the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and Protocol No. 13 to the European Convention of Human Rights.

The Second Optional Protocol to the ICCPR and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty provide for the abolition of the death penalty, but allow states to retain it in wartime as an exception. Protocol No. 6 of the European Convention on Human Rights is an agreement to abolish the death penalty in peacetime. Protocol 13 to the European Convention on Human Rights provides for the total abolition of the death penalty in all circumstances.

Various United Nations bodies have called for the abolition of the death penalty in their resolutions, statements and recommendations for many years. Most recently, the United Nations Commission on Human Rights once again called for the abolition of the death penalty in Resolution 2005/59 adopted on 20 April 2005.

An increasing number of countries are abolishing the death penalty. By March 2008, 92 countries had abolished the death penalty for all crimes, 10 countries had abolished it for all but exceptional crimes and 33 countries which retain the death penalty in law had not carried out any executions for the past 10 years or more. Sixty-two countries and territories retained the death penalty, but the number of executions carried out each year was on the decline.[164] Although information is insufficient to know the total number of prisoners under sentence of death worldwide, it was estimated that between at least 19,185 and 24,646 prisoners were under sentence of death by the end of 2006.[165]

In many countries death row prisoners spend over a decade awaiting execution. Some will never be executed, due to moratoria, and eventual abolition of the death penalty. Thus prisoners under sentence of death have special needs due to the most extreme form of sentence which they are under, which renders access to legal assistance and the diligent application of legal safeguards absolutely fundamental. They also have special needs due to the length of time they usually spend in prison and the anguish suffered during the years of imprisonment, awaiting execution. Therefore in countries which have not yet abolished the death penalty, prison authorities need to put in place management policies and strategies that protect the human rights of this vulnerable group of prisoners, which should guarantee and facilitate their access to legal assistance, ensure that all legal safeguards they are entitled to are in place and that

[164]Amnesty International, www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (accessed on 23 March 2008).

[165]Amnesty International, Facts and Figures on the Death Penalty, accessed on 4 November 2007. www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries

such prisoners are held in conditions which comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners, similar to all other prisoners.

2. Special needs and challenges

2.1 Legal safeguards

Safeguards protecting the rights of prisoners under sentence of death are set out in ICCPR and Safeguards Guaranteeing Protection of the Right of those Facing the Death Penalty, as well as the provisions regarding the implementation of the safeguards contained in Social and Economic Council Resolutions 1989/64 of 24 May 1989; Resolution 1996/15 of 23 July 1996 and Resolution 2005/59 of 20 April 2005. Unfortunately, these safeguards are not followed in a large number of cases worldwide.[166]

Capital offences in many countries do not fall into the category of "most serious". For example, in some countries the death penalty may be imposed for the possession of small amounts of an illegal drug. In others the death sentence may be imposed for smuggling, speculation, fraud and embezzlement, sexual relations outside marriage, recidivist prostitution, committing a homosexual act and religious dissent, among many others.[167]

In a number of countries the death penalty is mandatory for certain crimes, which means that the circumstances of the offence and the background of the offender are not taken into account in passing sentence. The mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the ICCPR.[168]

In many countries of the world fair trial procedures fall far short of the requirements set out in article 14 of the ICCPR. Confessions to crimes that carry the death sentence may be extracted under torture. Trial procedures may be summary and discriminatory, on the basis of gender, race and nationality.

In some countries the right to appeal to a higher court, to seek commutation and pardon is not guaranteed. In others the right to seek pardon is not enjoyed by all on an equal basis, or the victim's family may decide whether a death penalty is carried out or not (e.g. the system of Diyat, where the relatives of the victim are given the choice between execution and reprieve of the offender, with or without

[166]United Nations Economic and Social Council, Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary General, E/2005/3, 9 March 2005, para. 67. (Henceforth E/2005/3.)

[167]United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty Report of the Secretary-General, E/CN.15/2001/10, paras. 90-95. (Henceforth E/CN.15/2001/10)

[168]See for example, decision taken by the United Nations Human Rights Committee with regard to a prisoner on death row in Guyana, CCPR/C/86/D/812/1998/Rev.1, 16 May 2006.

receiving compensation, in the form of "blood money").[169] In the latter case foreigners and those living in poverty are at a particular disadvantage (see section 2.6, Multiple needs).

In some countries death sentences are passed by field court-martial, without the possibility of appeal or to seek pardon or commutation.[170] In a number of countries executions have been carried out while appeals or petitions for clemency were pending, in contravention of article 8 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. In a few countries prisoners have been executed, in breach of ICCPR and the First Optional Protocol to the ICCPR, while their cases were under consideration by an international or regional body, such as the Inter-American Commission on Human Rights, the African Commission on Human and People's Rights, and the Human Rights Committee, when the Committee had requested interim measures of protection while the Committee examined the cases.[171]

In a number of countries children below the age of 18, at the time of the offence, are executed, which contravenes a number of international instruments, referred to above.

Although most countries have laws that protect "mentally ill" people or "mentally retarded" people, this is not the case in all countries. Even where the law prohibits the execution of such persons, the death penalty may still be imposed, since the definitions provided in legislation limit the scope of these categories to such an extent that in practice prisoners with mental disabilities continue to be executed.[172] An additional problem which as been reported is the shortage of medical specialists, such as forensic psychiatrists, to assess the mental condition of prisoners.[173]

In all cases, the poor are at a particular disadvantage since they typically have minimal access to legal counsel and have little knowledge about their legal rights.

2.2 Isolation and mental health

In many countries prisoners under sentence of death spend over a decade awaiting execution. Some prisoners have been on death row for well over 20 years. In most countries, prisoners on death row are segregated from others and held in some form of solitary confinement. Prisoners under sentence of death often spend 23-24 hours a day alone in their cells.

[169]See, for example, Concluding Observations of the Human Rights Committee: Yemen, 9/8/2005, CCPR/CO/84/YEM and United Nations Doc. E/2005/3, para. 114.

[170]See, for example, Concluding Observations of the Human Rights Committee: Uganda, 4/5/2004, CCPR/CO/80/UGA and E/2005/3, para. 105.

[171]See, for example, Concluding Observations of the Human Rights Committee: Uzbekistan, 26 April 2005, CCPR/CO/83/UZB; Concluding Observations of the Human Rights Committee: Tajikistan, 18 July 2005, CCPR/CO/84/TJK; E/2005/3, para. 117.

[172]E/2005/3, paras. 85-89.

[173]Ibid, para. 88

Thus in practice prisoners under sentence of death are often subjected to two distinct punishments: the death sentence itself, and the years of living in conditions tantamount to solitary confinement, which is a severe form of punishment that may be used only for very limited periods for general population prisoners. Psychologists and lawyers have argued that lengthy periods spent in these conditions can make inmates suicidal, delusional and insane. Some have referred to the bleak isolation and years of uncertainty as to the time of execution as the "death row phenomenon", and the psychological effects that can result as the "death row syndrome".[174] In the Caribbean, the Judicial Committee of the Privy Council held that it would constitute inhumane or degrading punishment or treatment to prolong the period of time spent under the threat of execution beyond five years.[175] The "death row phenomenon" has also been found to amount to cruel, inhuman and degrading punishment in violation of international human rights law by the European Court of Human Rights.[176]

Prisoners under sentence of death suffer from extreme anguish for many years

"The conditions of confinement are so oppressive, the helplessness endured in the roller coaster of hope and despair so wrenching and exhausting, that ultimately the inmate can no longer bear it, and then it is only in dropping his appeals that he has any sense of control over his fate."[a]

[a]Comments on the execution of a prisoner in the United States in 2005, who dropped his appeals; see Death Penalty Information Centre (www.deathpenaltyinfor.org), citing the Associated Press, 1 February 2005.

2.3 Prison conditions and activities

Most often prisoners under sentence of death are held in extremely poor conditions, with inadequate space, sometimes with no natural light, lack of ventilation and sanitary facilities. Additional restrictions, such as limits on food, may be placed in some countries increasing the suffering inherent in the sentence and conditions in which the sentence is served.

In almost all countries, prisoners on death row are excluded from prisoner programmes, have limited possibilities of daily exercise and their visits are sharply restricted. Strict limits are also placed on reading and writing materials in a number of countries.

The United Nations Human Rights Committee has expressed concern about poor living conditions, the restrictions placed on the visits, correspondence, exercise and inadequate time spent out of cells on a number of occasions and has called on States to improve these conditions in line with the requirements of the ICCPR.[177]

[174]Death Penalty Information Centre. (www.deathpenaltyinfo.org)

[175]E/CN.15/2001/10, 29, March 2001, paras. 124, 131, referring to the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General of Jamaica.

[176]Amnesty International, "The Grenada 17: Last of the cold war prisoners?", AI Index: AMR 32/001/2003, p. 29, referring to decision of the European Court of Human Rights in 1989 (Soering v. United Kingdom, European Court of Human Rights, App. No. 00014038/88 (7 July 1989); reaffirmed by the Parliamentary Assembly of the Council of Europe in 2001 (Resolution 1253).

[177]See E/2005/3, para. 124; Concluding observations of the Human Rights Committee: Uzbekistan, CCPR/CO/71/UZB, 26 April 2001, para. 10.

2.4 Informing the date of execution

In some countries prisoners are not informed of their date of execution to give them time to prepare, including by meeting with family members and a religious representative, if they so wish. The anguish and suffering involved in not knowing when the execution might take place is shared by the family of the prisoner. In a number of countries there is complete secrecy surrounding the date of execution, an absence of any formal notification prior to and after the execution and the refusal to hand over the body to the family for burial, causing family members turmoil, fear and anguish over the fate of their loved ones. The practice of maintaining families in a state of uncertainty amounts to cruel and inhuman treatment. The United Nations has expressed its concerns about such practices in a number of countries.[178]

2.5 Methods of execution

Where capital punishment occurs, it must be carried out so as to inflict the minimum possible suffering. (United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, Art. 9). In resolution 2005/59, adopted on 20 April 2005, the United Nations Commission on Human Rights urged all states that still maintain the death penalty "to ensure that any application of particularly cruel or inhuman means of execution, such as stoning, be stopped immediately". (Article 7(i)). In the same resolution the Human Rights Commission urged to ensure that, where capital punishment occurs, it "shall not be carried out in public or in any other degrading manner" (article 7 (i)). Unfortunately, death by stoning, public hanging, flogging and amputations prior to execution, are practices used in a number of countries worldwide, causing immense suffering to those being executed, while forcing public participation and complicity in an act that violates the right to life and the right not to be subjected to cruel and inhuman treatment.

It is debatable whether there is any form of execution which can be regarded as inflicting a minimal level of suffering. Until recently it was widely believed that lethal injection was likely to inflict the least suffering, but serious doubt has now been cast on this belief, with studies on execution by lethal injection concluding that "botched executions" involve possible immense suffering for prisoners, and that "[b]otched executions are indisputably an inherent component of the modern practice of capital punishment".[179] Following reports of cases of "botched executions" and concerns about the pain and suffering caused by the cocktail of three drugs used for lethal injections, in November 2007 the Supreme Court of the United States announced

[178]See for example, Report of the United Nations Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/Add.2, 3 February 2003, Paragraph 65; Concluding observations of the Human Rights Committee: Japan, CCPR/CO/79/Add.102, 19 November 1998, para. 21.

[179]See, for example, E/2005/3, para. 120, citing Marian Borg and Michael Radelet, "On botched executions", *Capital Punishment: Strategies for Abolition*, Peter Hodgkinson and William A. Schabas (eds.), Cambridge, Cambridge University Press, 2004, pp. 143-168. Borg and Radelet define "botched executions" as those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner. Amnesty International reported that in 2000 the execution of two men by lethal injection, broadcast live on television had been "botched", AI/AR 2001, p. 113; and the medical journal "The Lancet" published a study on 15 April 2005 by the University of Miami which found that some executed prisoners may have suffered excruciating pain because they were not properly anaesthetized (see www.handsoffcain.info, 2006 report).

that it would not permit any more prisoners to be executed until it reviewed the legality of lethal injection, on the basis that it carries substantial risk of unnecessary pain, violating the ban on cruel and unusual punishment contained in the United States Constitution.

GOOD PRACTICE

United States Supreme Court called a halt on executions[a]

In November 2007, the Supreme Court of the United States announced that it would not allow more prisoners to be executed until it reviewed the legality of lethal injection. The moratorium followed a decision by the Supreme Court two days previously to block the execution of a prisoner minutes before he was to be put to death. He had been on death row for 19 years.

[a]The Guardian, 1 November 2007. (www.guardian.co.uk/usa/story/0,,2202885,00.html)

2.6 Multiple needs

Foreigners and ethnic and racial minorities are overrepresented among prisoners sentenced to death in some countries. Their needs, especially in relation to their access to justice, are intensified due to discriminiation, language barriers, lack of family support and social networks in particular.[180] They may not be provided with adequate interpretation during interrogation and trial and foreign national prisoners may not be given access to consular assistance, in violation of article 36 of the Vienna Convention on Consular Assistance.[181]

In countries where a pardon may be dependent on the paying of "blood money" (Diyat) foreigners are at a particular disadvantage, since the family of the offender needs to be available, as well as able and willing to pay compensation, which is rarely the case.[182]

Please see chapter 3, Ethnic and racial minorities and indigenous peoples, and chapter 4, Foreign national prisoners, for additional guidance.

Prisoners under sentence of death are likely to have particular mental health care needs, as explained above. Please also refer to chapter 1, Prisoners with mental health care needs.

[180]For example, of the more than 630 people known to have been executed in Saudi Arabia between 1990 and March 1998, more than half were foreign workers. See United Nations: Investigate Discrimination Against Migrant Workers in Saudi Arabia, Human Rights Watch, (03/30/98). In May 2002, the Governor of Maryland, the United States, imposed a moratorium on executions because of racial bias in the state's death penalty system. A January 2003 study released by the University of Maryland concluded that race and geography are major factors in death penalty decisions. See Amnesty International USA, The Death Penalty is Racially Biased (www.amnestyusa.org/abolish/racialprejudices.html). See also The Persistent Problem of Racial Disparities in the Federal Death Penalty, ACLU Capital Punishment Project, ACLU Racial Justice Program. (www.aclu.org/pdfs/capital/racial_disparities_federal_deathpen.pdf)

[181]E/2005/3., para. 102.

[182]E/2005/3, para. 114.

In some countries consensual same sex relations in private between adults carry the death penalty, in contravention of the first safeguard of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty and Commission on Human Rights resolution 2005/59, 7(f) (see section 3 below). Please also refer to chapter 5, Lesbian, gay, bisexual and transgender (LGBT) prisoners.

3. International standards

International Covenant on Civil and Political Rights

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

See also the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the United Nations Economic and Social Council in resolution 1984/50 on 25 May 1984 and endorsed by the United Nations General Assembly in resolution 39/118, adopted without a vote on 14 December 1984

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

United Nations Commission on Human Rights resolution 2005/59, adopted on 20 April 2005 (extracts)

[. . .]

5. *Calls upon* all States that still maintain the death penalty:

(a) To abolish the death penalty completely and, in the meantime, to establish a moratorium on executions;

(b) Progressively to restrict the number of offences for which the death penalty may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply;

[. . .]

7. *Urges* all States that still maintain the death penalty:

(a) Not to impose it for crimes committed by persons below 18 years of age;

(b) To exclude pregnant women and mothers with dependent infants from capital punishment;

(c) Not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person;

(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

(e) To ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights;

(f) To ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence;

[. . .]

(i) To ensure that, where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering and shall not be carried out in public or in any other degrading manner, and to ensure that any application of particularly cruel or inhuman means of execution, such as stoning, be stopped immediately;

(j) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending;

8. *Calls upon* States that no longer apply the death penalty but maintain it in their legislation to abolish it;

9. *Calls upon* States that have recently lifted or announced the lifting de facto or de jure of moratoriums on executions once again to commit themselves to suspend such executions;

10. *Requests* States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that the death penalty will not be carried out, and calls upon States to provide such effective assurances if requested to do so, and to respect them.

Social and Economic Council Resolution 1996/15 of 23 July 1996

3. Also encouraged Member States in which the death penalty had not been abolished to ensure that defendants who did not sufficiently understand the language used in court were fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court;

World Medical Association Resolution on Physican Participation in Capital Punishment, adopted by the 34th World Medical Assembly Lisbon, Portugal, 28 September-2 October, 1981 and amended by the 52nd WMA General Assembly in Edinburgh, Scotland during October 2000

RESOLVED, that it is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process.

See also Social and Economic Council Resolution 1989/64 of 24 May 1989 and Resolution 1996/15 of 23 July 1996.

4. Responding to the needs of prisoners under sentence of death

4.1 Legislation

The United Nations and regional bodies have called for the abolition of the death penalty, as mentioned in section 1.

GOOD PRACTICES
Abolition of the death penalty in Rwanda

In July 2007 Rwanda abolished the death penalty, accelerating the worldwide trend towards ending capital punishment.

Abolition of the death penalty in Uzbekistan

In January 2008 Uzbekistan abolished the death penalty in law and practice. Capital punishment has now been replaced with life or long-term imprisonment.

In countries which have not abolished the death penalty, the United Nations has called for the restriction of crimes carrying the death penalty to the most serious crimes, which have extremely grave consequences. (ICCPR, article 6.2 and Safeguards guaranteeing protection of the rights of those facing the death penalty, Economic and Social Council Resolution 1984/50, 25 May 1984, article 1).

Article 6(5) of the ICCPR prohibits the imposition of the death penalty on children under the age of 18 and pregnant women. Safeguards guaranteeing protection of the rights of those facing the death penalty state that the death penalty may not be imposed on children under the age of 18, on pregnant women, new mothers and insane persons (article 3). The prohibition to sentence children to capital punishment is included also in the United Nations Convention on the Rights of the Child (article 37*(a)*), as well as the African Charter on the Rights and Welfare of the Child (article 5 (3)). The American Convention on Human Rights prohibits the imposition of the death penalty on children, on persons over 70 years of age and on pregnant women (article 4(5)).

Safeguards guaranteeing protection of the rights of those facing the death penalty prohibit the imposition of the death penalty on persons who have become insane (article 3). The Economic and Social Council has provided further guidance as to the implementation of these safeguards, calling for the elimination of the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution".[183] United Nations Commission on Human Rights Resolution 2005/59, adopted on 20 April 2005, urged all States that still maintain the death penalty not to impose the death penalty on a person with any mental or intellectual disabilities (article 7 *(c)*).

In countries where the death penalty is retained, it is of utmost importance that the death penalty is not mandatory for any crime, that prisoners' right to a fair trial is respected, and that those sentenced to death are provided with every opportunity to appeal their sentences, to ask for clemency and commutation, before an execution may be carried out.[184]

Legislation should guarantee all prisoners under sentence of death with legal assistance at all stages of the criminal proceedings. Legal assistance should be provided free-of-charge for those who cannot afford it, from the outset of their detention. In order to reduce the likelihood of miscarriages of justice to a minimum, appeals need to be mandatory for all death sentenced prisoners.[185]

[183] Economic and Social Council Resolution 1989/64, 24 May 1989.
[184] Safeguards guaranteeing protection of the rights of those facing the death penalty, 6 and 7.
[185] Economic and Social Council Resolution 1989/64, *(b)*.

GOOD PRACTICES
Towards the abolition of mandatory death sentences

The Bahamas[a]

On 8 March 2006 the Judicial Committee of the Privy Council, the highest court of appeal for most English-speaking Caribbean countries, delivered a landmark decision to abolish the mandatory death sentence in the Bahamas. The Judicial Committee of the Privy Council, ruled that the mandatory death sentence was in violation of the Bahamian Constitution. In 2002, the Committee upheld a ruling that the mandatory death penalty was in violation of the constitutions of St Vincent and the Grenadines, St Lucia, Grenada, St Kitts and Nevis, Dominica, Belize and Antigua and Barbuda.

Uganda[b]

On 13 June 2005 in the first ever case of its kind in Africa, the Constitional Court of Uganda declared unconstitional the death sentences on all 417 prisoners on death row. In a majority judgment, the Constitional Court ruled that the automatic nature of the death penalty in Uganda for murder and other offences amounted to inhuman punishment as it did not provide the individuals concerned with an opportunity to mitigate their death sentences. The Constitutional Court provided the Government with a two-year period to give effect to the judgment after which all death sentences will be set aside. The Constitutional Court also ruled that any of the prisoners who have been on death row more than three years were now entitled to have their death sentences commuted to life imprisonment.

[a]Penal Reform International, Newsletter, No. 54, April 2006, p.1.
[b]See www.deathpenaltyproject.org

Legislation should provide for foreign national prisoners' regular access to their consular representatives, in accordance with article 36 of the Vienna Convention on Consular Assistance[186], as well as the United Nations Standard Minimum Rules for the Treatment of Prisoner (Rule 38). States should undertake to provide interpretation services to foreign prisoners facing the death penalty during all stages of the criminal justice process. Those who do not sufficiently understand the language used in court must be fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court.[187]

Legislation should ensure that foreign nationals, who may be executed if extradited to their home country, should not be extradited, unless effective assurances that the death penalty will not be carried out are received from the relevant authorities of the State requesting the extradition.[188]

Where capital punishment occurs, legislation should guarantee that it is carried out so as to inflict the minimum possible suffering and that it is not carried out in public or in any other degrading manner.

Consideration should be given to including a provision in legislation to commute the sentences of prisoners who have spent more than a certain number of years on

[186]Office of the High Commissioner for Human Rights, The question of the death penalty, Human Rights Resolution 2005/59, 7 *(h)*.
[187]Social and Economic Council Resolution 1996/15, 23 July 1996.
[188]Human Rights Resolution 2005/59, 10.

death row, without any final outcome of the appeals process or application for commutation or pardon, to an appropriate prison term.

4.2 Prison management

In countries which retain the death penalty, prison authorities will usually be responsible for detaining prisoners under sentence of death. In some cases, such prisoners will spend years or decades in prisons, awaiting the outcome of their appeals, as discussed earlier. In countries where moratoriums on executions exist, prisoners may spend prolonged periods in an uncertain state, waiting for the commutation of their sentences.

States and prison authorities need to fulfil the requirements of international instruments that provide special legal protection to prisoners under sentence of death and ensure that such prisoners are held in conditions that comply with those set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners, similar to all other prisoners.

4.2.1 Access to justice and legal safeguards

Prisoners under sentence of death need to be provided with special protection, including all necessary legal assistance at every stage of the proceedings. States are responsible for providing special protection "above and beyond the protection afforded in non-capital cases"[189] Thus, prison authorities need to ensure that prisoners facing the death penalty have full access to their lawyers in dealing with appeals against sentence or conviction, and writing petitions on behalf of their clients for clemency or commutation. They need to provide prisoners with facilities to meet with their lawyers in confidentiality, and provide interpreters if necessary.

Prison authorities should ensure that foreign nationals facing the death penalty are given prompt and regular access to consular assistance and interpretation services during meetings with their lawyers, as necessary.

Prison authorities can assist prisoners in legal matters by working actively with NGOs, lawyers or paralegal groups, which provide legal aid to prisoners. They can also prevent some miscarriages of justice by maintaining regular contact and communication with other criminal justice agencies, by keeping proper records and responding promptly to requests of information. Every criminal justice agency involved needs to be fully informed of the status of appeals and petitions for clemency of prisoners under sentence of death.[190]

Prison authorities (or any other authority that is responsible for carrying out executions) must never execute a prisoner while an appeal or any other procedure relating to pardon or commutation of sentence is still pending.

[189]United Nations Economic and Social Council Resolution 1989/64, adopted on 24 May 1989.
[190]Article 6 of United Nations Economic and Social Council Resolution 1996/15, 23 July 1996.

GOOD PRACTICES

Working with NGOs to improve legal safeguards in Malawi

In Malawi, working closely with the prison administration, the Paralegal Advisory Service (PAS) has established a standard appeal form for prisoners facing a sentence of death. This simplified form has been agreed to by the High Court. Its use has allowed more prisoners on death row to appeal their cases than was possible before.[a]

In Malawi most pre-trial detainees charged with homicide, which carries the death penalty, may await trial for up to ten years. The highest proportion of pre-trial detainees comprises those who are charged with murder or manslaughter. Before PAS paralegals started their activities, most prisoners charged with homicide were not ready to plead guilty to a lesser charge of manslaughter, because they did not understand the difference between the two charges. This meant that they risked being sentenced to death on charges of murder or waiting for years in prison, sometimes longer than the sentence they would have received if they had been convicted of manslaughter. PAS paralegals educated prisoners awaiting trial on capital offences on substantive law, procedures, and basic evidentiary rules surrounding the charge of murder or manslaughter, thereby enabling them to make an informed decision as regards their case.[b]

Legal aid to death row prisoners in the Caribbean and Africa[c]

The Death Penalty Project is an international human rights organization which provides free legal representation to the many individuals still facing the death penalty in the Caribbean and Africa, and works to ensure compliance with regional and international human rights standards.

Since 1992, the project has saved the lives of more than 500 prisoners who would almost certainly otherwise have faced execution. The project has also continued to highlight the real risk of tragic and irreversible mistakes being made in the application of the death penalty. Since its inception, the project has ensured that more than 50 miscarriages of justice cases have been redressed, resulting in convictions for murder and sentences of death being overturned.

The project was formerly a project of Simons Muirhead and Burton, Solicitors, and Penal Reform International. The project is now established in its own right as an independent NGO with a connected charity, The Death Penalty Project Charitable Trust.

The project provides free legal representation to those who would otherwise not have access to legal advice and representation; trains other lawyers and NGOs in domestic and human rights law as it relates to the death penalty and develops and commissions research studies on homicide and related topics concerned with the administration of justice and the use of the death penalty.

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[a]Human Rights and Vulnerable Prisoners, Penal Reform International, Training Manual, No. 1, pp. 129, 130.

[b]Clifford Msiska, National Coordinator, Paralegal Advisory Service, Penal Reform International, The Role of Paralegals in the Reform of Pre-trial Detention: Insights from Malawi, UNODC, expert group review meeting, Vienna, 18-19 October 2007.

[c]See www.deathpenaltyproject.org for further information.

4.2.2 Staff

Prison staff assigned to supervise prisoners should be carefully selected, after having been given an opportunity to decline the task. They should be especially trained to deal with the difficult responsibility. Their training should include the need to demonstrate particular sensitivity towards prisoners facing the death penalty and their families. They should be able to identify signs of distress and mental disabilities, and ensure that psychological support is provided to such prisoners, as necessary and

without delay. The staff themselves should receive psychological support themselves, as they are likely to feel the distress of having to supervise prisoners who may be executed.

The World Medical Association has resolved that it is unethical for physicians to participate in the imposition of the death penalty in any way during the entire process.

4.2.3 Classification and prison conditions

In Resolution 1996/15, adopted on 23 July 1996, the United Nations Economic and Social Council urged "[m]ember states in which the death penalty may be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering".

In this context, it is also important to underline comments by the United Nations Secretary General that "the conditions of confinement even for those spared execution under a moratorium or whose sentences have been commuted to life imprisonment must be regarded as relevant to countries that have abolished or contemplate abolishing the death penalty." [191] There have been reports from at least one country of persons pleading to be executed rather than being imprisoned in intolerable conditions.[192]

There is no justification to detain death row prisoners in prolonged solitary confinement[193] or to segregate them as a matter of routine. They should be assessed as all other prisoners and accommodated according to the risk they pose to others, with access to activities in prisons, in line with their classification.

The conditions of accommodation should comply with the Standard Minimum Rules for the Treatment of Prisoners, as a minimum. They should not be inferior in any way to that of other prisoners. Prisoners facing the death penalty enjoy the same rights as others, in relation to access to space, fresh air, natural and artificial light, heating, ventilation and sanitary facilities, outlined in the Standard Minimum Rules.

4.2.4 Health care

The fact that prisoners facing the death penalty may be executed in no way absolves States of their responsibility for their physical and mental health. Prisoners under sentence of death have the same rights as other prisoners to health care, which should be equivalent to that available to the general public. They must undergo a full

[191] E/2005/3, para. 126.

[192] Ibid., para. 126.

[193] See "The Istanbul statement on the use and effects of solitary confinement", adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul, which calls for the prohibition of solitary confinement on death row and life-sentenced prisoners by virtue of their sentence.

medical screening on entry to prison, as all other prisoners. They should receive adequate nutrition and exercise, and regular access to a medical practitioner, similar to all other prisoners.

Since prisoners facing the death penalty are more likely than others to develop mental health problems, regular psychological and/or psychiatric care should be provided to prisoners sentenced to death. If possible they should be attended to by specialists from civil health services.

In countries where resources are lacking, prison authorities can establish links with NGOs that provide assistance to prisoners on death row to improve their health care.

GOOD PRACTICE

Medical care for death row prisoners, Belize[a]

The Prison Welfare Fund, a registered Belizean trust, was established in 1997 to assist prisoners under sentence of death. It raises funds to assist prisoners with items that are considered essential to maintain a basic standard of living. Medical and other basic provisions as well as primary medical care are provided to prisoners.

[a]Human Rights and Vulnerable Prisoners, Penal Reform International, Training Manual No. 1, p. 124.

4.2.5 Prisoner programmes

Prisoners under sentence of death should have access to all activities provided to other prisoners, with possible restrictions being applied according to their classification only. They should have access to education, work and vocational training, similar to other prisoners. They should also have similar access to reading and writing materials.

Bearing in mind that many prisoners under sentence of death spend more time in prison than the majority of prisoners, giving them equal access to activities is one of the most obvious means of reducing the suffering inherent in their sentence.

GOOD PRACTICE

Access to education in Kenya

Five death row prisoners in Kenya were among the candidates who began their Kenya Certificate of Primary Education (KCPE) examination on 7 November 2006. The prisoners had had a chance to be taught by two qualified staff, one a graduate teacher from the Kenyatta University. Their head teacher was herself a prisoner who had a year left to serve of her 10-year prison term. One of the death row prisoners said that she intended to reach Form Four, working according to prison plans, to start a secondary school.[a]

Although the death penalty is retained in law, no executions have been carried out in Kenya since 1987.[b]

[a]"Five Death-Row Inmates Among 666,000 KCPE Candidates", 7 November 2006, www.allafrica.com.

[b]Country Status on the Death Penalty, www.handsoffcain.info.

4.2.6 Contact with the outside world

Prisoners facing the death penalty have the same right as other prisoners to contact with the outside world. There is no justification to restrict their correspondence or visits from families and friends, on the basis of their sentence. In fact, prison authorities should demonstrate particular sensitivity to the need of prisoners facing the death penalty to communicate with their families. The way they treat the prisoners themselves and their visitors should reflect this approach.

Prison authorities should also try to establish links with NGOs which run support programmes for prisoners under sentence of death.

GOOD PRACTICE

Death row visits in the Democratic Republic of Congo[87]

The NGO "Culture pour la Paix et la Justice" regularly organizes volunteers to visit death row prisoners, since family visits are so restricted and some prisoners do not keep in contact with family members.

87 Human Rights and Vulnerable Prisoners, Penal Reform International, Training Manual, No 1, p. 125.

4.2.7 Informing families of execution and burial

Prisoners themselves, their families and lawyers must be informed of the date of execution. Prison authorities must give prisoners time to prepare and an opportunity to meet with their families, lawyers and a minister of their religion.

Prison authorities should provide prisoners, their family members and lawyers the opportunity to meet in circumstances that do not increase the trauma inherent in the visit. Facilities should also be provided to those prisoners who wish to perform their religious duties prior to execution.

The Human Rights Committee has stigmatized the practice of not informing families of the date of execution, of place of burial or not returning the body to the family, as having the effect of intimidating or punishing families by leaving them in state of uncertainty and distress, amounting to a violation of article 7 of the International Covenant on Civil and Political Rights.[194] The body of the person executed should be handed back to the family to reduce the suffering caused by the execution itself. The distress of prisoners' families should never be exacerbated by keeping the place of burial secret, if the body cannot be returned for justifiable reasons.

[194]E/2005/3, para. 125.

RECOMMENDATIONS

TO LEGISLATORS AND POLICYMAKERS

- To abolish the death penalty completely and, in the meantime, to establish a moratorium on executions.

If the death penalty is not abolished:

- To restrict the number of offences for which the death penalty may be imposed.
- To abolish mandatory death sentences.
- Not to impose the death penalty for crimes committed by persons below 18 years of age.
- To exclude pregnant women and mothers with dependent infants from capital punishment.
- Not to impose the death penalty on a person suffering from mental (including intellectual) disabilities.
- Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court. To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences.
- To provide all prisoners under sentence of death with legal assistance at all stages of the criminal proceedings. Legal assistance should be provided free of charge for those who cannot afford it, from the outset of their detention.
- In order to reduce the likelihood of miscarriages of justice to a minimum, to ensure that appeals are mandatory for all death sentenced prisoners.
- Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending.
- To commute the sentences of prisoners who have spent more than a certain period on death row, to an appropriate prison term.
- To ensure that, where capital punishment occurs, it is carried out so as to inflict the minimum possible suffering and that it is not carried out in public or in any other degrading manner.
- Not to extradite people to States where they may face the death penalty, unless such States provide explicit assurances that the death penalty will not be imposed, and to refuse extradition in the absence of convincing assurances.

TO PRISON AUTHORITIES, PROBATION AND/OR OTHER SOCIAL WELFARE SERVICES

Access to justice

- To ensure that prisoners facing the death penalty have full access to their lawyers in dealing with appeals against sentence or conviction, and writing petitions on behalf of their clients for clemency or commutation, and to provide prisoners with facilities to meet with their lawyers in confidentiality, and provide interpreters if necessary.
- To assist prisoners in legal matters by working actively with NGOs, lawyers or paralegal groups, which provide legal aid to prisoners.

Foreign national prisoners

- To ensure that foreign national prisoners have regular access to their consular representatives, in accordance with Article 36 of the Vienna Convention on Consular Assistance, as well as the United Nations Standard Minimum Rules for the Treatment of Prisoner (Rule 38).

- To provide interpretation services to foreign prisoners facing the death penalty during all stages of the criminal justice process, including in court.
- To ensures that foreign national prisoners enjoy all rights and safeguards provided to prisoners under sentence of death by international instruments on an equal basis as all other prisoners.

Staff

- To ensure that prison staff assigned to supervise prisoners are carefully selected, given a choice to decline the task, and especially trained to deal with the difficult responsibility.

Classification, prison conditions and prison activities

- To ensure that prisoners facing the death penalty enjoy the same rights as other prisoners, set out in the United Nations Standard Minimum Rules for the Treatment of Prisoners.
- Not to detain death row prisoners in prolonged solitary confinement. To assess prisoners under sentence of death as all other prisoners and accommodate them according to the risk they pose to others, with access to activities in prisons, to visits, correspondence, recreation, in line with their classification and sentence plan.

Health care

- To ensure that prisoners under sentence of death enjoy the same right as other prisoners to health care.
- To provide access to regular, appropriate mental health care to prisoners under sentence of death, with any treatment being administered following the informed consent of the prisoners and in line with guidelines provided in chapter 1 of this handbook.

Contact with the outside world

- Not to restrict correspondence or visits from families, solely on the basis of the prisoners sentence.
- To treat prisoners on death row and their visitors with sensitivity.
- To establish links with NGOs which run support programmes for prisoners under sentence of death and encourage visits and assistance by such organizations.

Informing families of execution and burial

- To inform prisoners themselves, their families and lawyers of the date of execution, giving them adequate time and facilities to prepare. To give prisoners time and facilities to meet with ministers of their religion and to carry out any final religious duties.
- To return the body of the person executed to the family, to reduce the suffering caused by the execution itself. Never to exacerbate the distress of prisoners' families by keeping the place of burial secret, if the body cannot be returned for justifiable reasons.

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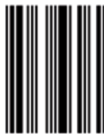

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