

Fallon Aubee
Complaint to the Canadian Human Rights Commission
April 12, 2023

Background and overview

This complaint is against Correctional Service Canada (“CSC”) for discriminating against me on the basis of my gender identity, my Indigenous identity and my physical disability.

I am a 63-year-old Indigenous woman and I am transgender. I am a survivor of residential schools and I have experienced extensive victimization throughout my life, beginning in childhood.

I am currently incarcerated at Fraser Valley Institution for Women (“FVI”). I was transferred to FVI in 2017 after spending 16 years in institutions designated for men, where I experienced violence, harassment and sexual violence as a result of my gender identity.

Finally being able to live with other women and express my gender in a safer environment has been extremely important and affirming for me. However, CSC still refuses to recognize my gender in its electronic systems because of my anatomy. This includes the Offender Management System (“OMS”) and my electronic medical records (known as OSCAR), which continue to categorize my sex as “male”. There may be other places where my sex is displayed as “male” that I am unaware of.

Although I have been cleared for gender-affirming surgery at this time, I have a heart condition that could impact my ability to proceed with it, especially given the long wait-times for bottom surgery in particular. Seeing CSC continue to classify me as “male” makes me feel like they are erasing my identity as a woman. Those four letters are a constant reminder that CSC does not view me as an equal to other women. It reminds me of my time in residential school, where we were told we could not be who we were as Indigenous people. It also violates my privacy and dignity, since it reveals intimate details about my body in a very public way.

There is no reason for CSC to display sex information in OMS or other electronic identification systems at all, and I seek a remedy that this practice be discontinued immediately.

CSC policy

According to Commissioner’s Directive (“CD”) 100 – Gender Diverse Offenders, “the ‘sex’ of an offender is determined solely by their current genitalia.” CD 100 further specifies that “An offender’s sex code in OMS will not change unless the offender undergoes gender-affirming surgery involving a change to their genitalia”.

The identifying information (or “tombstone data”) listed in OMS, including sex, is also printed at the top of many CSC documents, such as assessments for decision.

I am not aware of any policy about how sex information is displayed in OSCAR, but I have seen the front page of my electronic medical file and it lists my sex as “male” in two places, including the heading. Even if information about my anatomy is relevant to the medical care I receive, there is still no reason for it to be prominently displayed on every one of my medical records.

Dignity and human rights

CSC’s policy relies on the incorrect idea that I am not a “real” woman unless I have surgery and undermines my dignity and human rights, in violation of the *Canadian Human Rights Act*.

The view that trans people are always – or should be – progressing toward surgery is based on outdated theories of gender that pathologized and stigmatized transgender and gender-nonconforming people and that are now rejected by trans health experts and others. In *XY v. Ontario* (2012 HRTO 726), the Ontario Human Rights Tribunal found that Ontario’s requirement that a person undergo “transsexual surgery” before changing the sex designation on their birth registration was “substantively discriminatory because it perpetuates stereotypes about transgendered persons and their need to have surgery in order to live in accordance with their gender identity, among other things.”

CSC’s over-emphasis on genitals could also pressure people to have surgery who might otherwise choose not to, since it is currently the only way to have one’s public sex marker changed within CSC.

CSC’s approach also reinforces western gender binaries and implies that someone’s genitals and gender must “match” according to these categories. The imposition and enforcement of western gender binaries against Indigenous Peoples was part of colonization, and continues within federal prisons, where Indigenous people are grossly over-represented. By refusing to affirm my identity in their electronic system, CSC is discriminating against me as an Indigenous trans person.

CSC’s policy also discriminates against me and other people with disabilities for whom surgery is more dangerous or impossible. Older people like me are also more likely to have medical conditions that would interfere with surgery.

Privacy

Most people in prison know that I am trans. However, this does not entitle them to private information about my genitals, nor does it entitle them to broadcast this information in such a public way, “outing” me in the process.

The OMS database – where I understand sex information is prominently displayed – is available to a large portion of CSC’s approximately 18,000 staff. A wide variety of other agencies also have access to OMS, according to CSC’s policy “Information Sharing with Partners from the Criminal Justice System”. Anyone who looked me up would see that my sex is listed as “male” and would immediately know private details about my body.

Further, because of the way my sex is classified in OMS, many of my printed CSC documents (such as assessments for decision) also list my sex as “male” in the header section. These documents could potentially be visible to an even broader array of people, including parole authorities, courts, police and other legal bodies. If my documents found their way into the hands of other incarcerated people, they would also see this information. Parole hearings, where documents might be presented and considered, can be observed by members of the public, including media.

If I were to have gender-affirming surgery, health providers would have to disclose my personal medical information to non-medical staff so that my information could be changed in OMS.

Given these impacts on my privacy, it is clear that CSC’s refusal to recognize my gender in its electronic systems constitutes negative treatment that is directly linked to my disability, Indigenous identity and gender identity.

Further, for people who enter CSC custody having lived in their core gender for many years (perhaps since childhood) and having documents that match their gender identity, having information about their anatomy so widely available could “out” them and put them at risk of violence, including sexual violence.

CSC’s approach is inconsistent with its own policies, including CD 100 ¶158, which speaks to the privacy and confidentiality of information related to an incarcerated person’s gender identity and expression. It is also inconsistent with several provisions of CD 701 – Information Sharing, which focuses on sharing a person’s private information only when there is a “need to know” and in other limited circumstances.

It is also out of line with the Government of Canada’s “Policy Direction to Modernize the Government of Canada’s Sex and Gender Information Practices”, and with the practices of numerous other federal and provincial government agencies, which allow people to obtain identity documents that affirm their gender and reflect their identity without undergoing surgery. Indeed, I was able to change the sex marker on my birth certificate to female without having to undergo surgery.

If CSC wishes to verify an incarcerated person’s identity, there is ample other information to rely on, such as date of birth and FPS number (a unique number assigned to each person in federal custody connected to the person’s finger prints).

Remedy

CSC should immediately stop displaying sex information in open forums like OMS, and should eliminate the portion of CD 100 that requires genital surgery to change one’s sex marker. If CSC continues to display sex information, I and other gender-diverse people should be able to change our sex markers without having to undergo surgery.