



## **Prisoners' Legal Services**

A Project of the West Coast Prison Justice Society  
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VIA EMAIL: [kyleva@csc-scc.gc.ca](mailto:kyleva@csc-scc.gc.ca)

**Vanessa Kyle, Senior Advisor**  
**Director General's Mental Health Branch**  
**National Headquarters, Correctional Service of Canada**  
340 Laurier Avenue West  
Ottawa, ON CAN K1A 0P9

Dear Ms. Kyle:

**Re: Policy Recommendations Regarding Transgender Prisoners**

I write to provide the Correctional Service of Canada ("CSC") with Prisoners' Legal Services' policy recommendations regarding transgender prisoners.

Prisoners' Legal Services is the only legal aid clinic for prisoners in Canada. We have been serving the legal needs of prisoners in British Columbia since 1980. Over the years we have assisted a number of transgender prisoners facing unique challenges while serving their sentences.

Under current CSC policies, pre-operative transgender women prisoners in federal custody are forced to live in men's prisons. These women are most likely to be considered "protective custody" prisoners due to their vulnerable status as women with male biology. They may also rank high on the "institutional adjustment" scale, resulting in a higher level of security classification. These factors mean that these women are required to live in prison with the most violent male sex offenders in Canada. Needless to say, this situation puts transgender women at great risk of sexual assault while incarcerated.

Prisoners' Legal Services has received reports from transgender women that they are required to "double bunk" with male prisoners. This practice puts the women at constant risk of, and in constant fear of, sexual assault. Transgender women are forced to be strip searched and urinalysis tested by male guards, which is extremely

humiliating. They face daily gender-based harassment by both prisoners and guards, including being called “it”, “freak”, “fag”, “queer” and being referred to in the masculine. Transgender women also report facing routine difficulties receiving female personal items and clothing.

Transgender women who have lived as women for their entire adult lives, and who have been approved for sex reassignment surgery (“SRS”) by gender identity medical experts are routinely denied surgery by CSC, despite current policy that indicates CSC should provide surgery. The process often drags out until the prisoner has been released to the community. CSC policy refuses surgery for women who have been in prison most or all of their adult lives because (according to CSC’s interpretation) they do not meet the “real life test” as set out in the outdated 2001 Harry Benjamin Standards of Care.

The following are Prisoners’ Legal Services’ recommendations for policy reforms that, in our view, would be a step toward respecting the dignity of transgender prisoners in federal custody. Omissions to existing policy are indicated by struck out text and additions are indicated by underlining.

## **1. Sex reassignment surgery**

CSC Commissioner’s Directive 800 “Health Care” states:

36. Sex reassignment surgery shall be considered during incarceration only when:

(a) a recognized gender identity specialist has confirmed that the offender has satisfied the real life test, as described in the Harry Benjamin Standards of Care, for a minimum of one year prior to incarceration; and

(b) the recognized gender identity specialist recommends surgery during incarceration.

37. If the recognized gender identity specialist provides an opinion that sex reassignment surgery is an essential medical service under CSC's policy, CSC will pay the cost. In making the decision the specialist shall consult with CSC.

The 2001 Harry Benjamin Standards of Care require 12 consecutive months of real life experience. The standards do not specifically exclude life in prison from “real life experience”.

The policy is based on *Kavanagh v. Canada (Attorney General)*, [2001] C.H.R.D. No. 21. In that case, the Tribunal agreed with CSC's experts who opined that a transgender woman living in the "artificial" prison environment could not fulfill the "real life experience" requirement for SRS.

*Kavanagh* was decided before the implementation of the most recent version of the World Professional Association for Transgender Health ("WPATH") (formerly the Harry Benjamin International Gender Dysphoria Association) Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People (7<sup>th</sup> Version, 2011) (the "2011 Standards of Care"). The 2011 Standards of Care indicate that they apply "in their entirety" to all transgender people, "irrespective of their housing situation. People should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons..." The standards specify that health care in prison "should mirror that which would be available to [prisoners] if they were living in a noninstitutional setting within the same community". The 2011 Standards of Care also require 12 continuous months of living in a gender role that is congruent with the patient's identity before SRS.

The experts who testified on behalf of CSC in *Kavanagh* were from the former Clarke Institution (now the Gender Identity Clinic at the Centre for Addiction and Mental Health). After much criticism by the transgender community and international transgender experts, the Gender Identity Clinic has undergone significant changes to its policies, and now adopts the 2011 Standards of Care.

The 2011 Standards of Care were written by Dr. George Brown. Dr. Brown has extensive experience working with transgender prisoners.<sup>1</sup> In *Kavanagh*, the Tribunal was concerned that the gender experts who testified on behalf of the Commission lacked expertise in relation to prisoners with gender dysphoria.

Dr. Brown's 2009 recommended revisions to the Standards of Care emphasize the importance of an individualized assessment of patients' medical needs, regardless of whether they are institutionalized. Dr. Brown also stresses that the real life experience can be met in cases where prison is a person's "real life" for extended periods of time. He is critical of policy that bases housing arrangements on the appearance of external genitalia rather than on the gender of the individual, given the safety issues faced by transgender prisoners.

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<sup>1</sup> See G.R. Brown, "Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder" (13 May 2010) *International Journal of Transgenderism* and G.R. Brown, "Recommended Revisions to the World Professional Association for Transgender Health's standards of Care Section on Medical Care for Incarcerated Persons with Gender Identity Disorder" (1 April 2009) *International Journal of Transgenderism*.

These concepts were confirmed by the United States District Court of Massachusetts in *Kosilek v. Spencer*, 2012. The Court finds that “[a]dequate medical care also requires an individualized assessment of a patient’s medical needs” and that “a person can have a ‘real life experience’ in prison”. The Court finds that an expert called by the respondent was not a “prudent professional” on the basis that “he does not accept certain fundamental features of the Standards of Care, which “describe the quality of care acceptable to prudent professionals who treat individuals suffering from gender identity disorders.”

The 2011 Standards of Care are recognized internationally as the appropriate standards for the treatment of transgendered people, including prisoners. The U.S. Department of Justice, Federal Bureau of Prisons revised its policy on May 31, 2011 regarding the treatment of transgender prisoners to be in compliance with the 2011 Standards of Care. The policy now provides: “The development of the treatment plan is not solely dependent on services provided or the inmate’s life experiences prior to incarceration”. The policy specifies that evaluation of transgender prisoners by specialists “will include an assessment of the inmate’s treatment and life experiences prior to incarceration as well as experiences during incarceration (including...real life experience consistent with the inmate’s gender identity...)”.

***Recommendations:***

Prisoners’ Legal Services recommends that the following changes be made to Commissioner’s Directive 800, “Health Services” (2011-04-18).

**GENDER IDENTITY DISORDER DYSPHORIA**

33. CSC recognizes that some offenders may have gender ~~identity disorder~~ dysphoria. Where there are reasonable grounds to believe that such a condition exists, a referral by the institutional Psychiatrist shall be made to a Psychiatrist who is a recognized expert in the area of gender identity, ~~if and when available~~, for an assessment and possible diagnosis of gender ~~identity disorder~~ dysphoria. For those diagnosed with gender ~~identity disorder~~ dysphoria, there shall be continuity of care with respect to the provision of health services.
34. Inmates with diagnosed gender ~~identity disorder~~ dysphoria shall be able to initiate or to continue hormone therapy as prescribed by either a Psychiatrist who is a recognized expert in the area of gender identity or other specialist Physicians in the area of gender ~~identity disorders~~ dysphoria or endocrinology, ~~if and when available~~.
35. ... [See below regarding placement].
36. ... [See below regarding placement].
37. Sex reassignment surgery shall be ~~considered during incarceration only~~ offered when:

- a. a recognized gender identity specialist has confirmed that the offender has satisfied the ~~real life test, as described in the Harry Benjamin Standards of Care, for a minimum of one year prior to incarceration~~ criteria for surgery under the current version of the World Professional Association for Transgender Health "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People" as these standards are updated; and
  - b. the recognized gender identity specialist recommends surgery during incarceration.
38. If the recognized gender identity specialist provides an opinion that sex reassignment surgery is an essential medical service under CSC's policy, CSC will pay the cost. In making the decision the specialist shall consult with CSC.
  39. CSC shall proceed without delay to determine the timing of the surgery ~~taking into account operational considerations and the offender's release date.~~
  40. The recognized gender identity specialist shall normally be the same specialist who provided care to the offender throughout the transition prior to his or her incarceration, unless the offender and CSC agree to a different choice of gender identity specialist.
  41. The Institutional Head shall ensure that staff who have regular contact with offenders with gender ~~identity disorder~~ dysphoria have the necessary knowledge to effectively respond to their needs.
  42. Subject to operational considerations, offenders diagnosed with gender ~~identity disorder~~ dysphoria shall be permitted to ~~cross-dress~~ wear clothing appropriate to their gender.

## 2. Placement

CSC's policy requires transgender clients to be placed in institutions according to their genitals rather than their genders:

34. Pre-operative male to female offenders with gender identity disorder shall be held in men's institutions and pre-operative female to male offenders with gender identity disorder shall be held in women's institutions.

The Tribunal in *Kavanagh* considered the safety of other female prisoners who would potentially be housed with a transgender woman with a functioning penis when it upheld CSC's policy on institutional placement.

Since *Kavanagh*, the issue of institutional placement has been considered by governments internationally. In the United Kingdom, the Ministry of Justice

introduced guidelines on the rights of transgender prisoners that require placement of transgender prisoners, who are legally recognized as women, in female prisons. Legal recognition requires two years of living as a woman and two physicians' diagnoses of gender identity disorder.

The United States National Prison Rape Elimination Commission produced an extensive report in June 2009 to inform of the development of standards for correctional facilities so the facilities can work toward the elimination of sexual abuse in prisons. The Report notes that "male-to-female transgender individuals are at special risk." It states that "the Commission requires individualized determinations based on other factors in addition to the person's current genital status" in determining whether to house transgender individuals in men's or women's facilities.

On May 16, 2012, the US Department of Justice Attorney General signed the National Standards to Prevent, Detect, and Respond to Prison Rape. These rules prohibit placement of prisoners to facilities "based on genital status":

Rather, the agency must consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate's own views regarding his or her own safety. In addition, transgender and intersex inmates must be given the opportunity to shower separately from other inmates.

The current state of international law demonstrates that it is discriminatory to place transgender women who have not undergone SRS in men's prisons.

***Recommendations:***

Prisoners' Legal Services recommends that the following changes be made to Commissioner's Directive 800, "Health Services" (2011-04-18).

35. ~~Pre-operative male to female offenders with gender identity disorder shall be held in men's institutions and pre-operative female to male offenders with gender identity disorder shall be held in women's institutions.~~ Transgender or intersex prisoners who identify as women, and who are diagnosed with gender identity disorder dysphoria, shall not be refused placement in a women's institution if requested. Transgender or intersex prisoners who identify as men, and who are diagnosed with gender identity disorder, shall not be refused placement in a men's institution if requested.
36. For all placement and program decisions, individual assessments shall be conducted to ensure that offenders diagnosed with gender identity disorder dysphoria are accommodated with due regard for the vulnerabilities with respect to their needs, including safety and privacy.

In the alternative, Prisoners' Legal Services recommends a policy that requires decisions to place transgender or intersex women prisoners at men's or women's institutions to be based on an individualized assessment of the safety of both the transgender or intersex prisoner and other prisoners.

### **3. Double bunking policy**

CSC policy requires an assessment to be completed before prisoners are required to share a cell. Criteria include an assessment of a prisoner's vulnerability and potential for victimization, whether the person has a history of predatory or permissive behaviour that could undermine safety, and the person's criminal record. Despite this requirement, Prisoners' Legal Services has received reports of transgender women being required to double bunk with male prisoners against their wishes. CSC's policy contains no prohibition against double-bunking a transgender prisoner and no requirement that the assessment be based on private interviews with the prisoners. (See Commissioner's Directive 550 "Inmate Accommodation", ¶ 23).

In New Zealand, Department of Corrections' policy 1.08 "Shared Accommodation Cell Risk Assessment" provides that transgender prisoners are entitled to single cell accommodation if they choose, or to share a cell with another transgender prisoner if appropriate.

In the UK, as noted above, transgender prisoners have the right to be housed in institutions according to their gender. Policy also provides that if a transgender woman refuses transfer to a women's prison, "she must be held separately and according to a female prisoner regime" in the men's prison.

The US Department of Justice National Standards to Prevent, Detect, and Respond to Prison Rape, referred to above, call for individual assessments of whether a placement would ensure the safety of transgender and intersex prisoners.

#### ***Recommendations:***

Prisoners' Legal Services recommends that Commissioners' Directive 550 "Inmate Accommodation" be amended as follows.

#### **Commissioner's Directive 550, "Inmate Accommodation" (2013-02-12)**

##### **INMATE PLACEMENT CRITERIA**

23. Where it is necessary to accommodate two inmates in a cell, an assessment must be completed to determine who will share accommodation with whom. Assessments shall take into consideration information provided by the inmates

in a private interview. The assessment must consider the following criteria based on information available:

- a. For both offenders, the nature and gravity of their offences and the degree of responsibility of each offender.
- b. **Compatibility** – Is there an existing incompatibility issue between the inmates, as defined in CD 568-7 – Management of Incompatible Offenders and as listed in OMS?
- c. **Vulnerability** – Does the inmate have a history of being victimized by others or is it assessed that there is a possibility that the inmate could be victimized by another inmate living in the same cell?
- d. **Predatory/~~permissive~~ behaviour** – Does the inmate’s behaviour have the potential to undermine the safety and security of the inmate with whom he/she shares a cell?
- e. **Preventive security considerations** – Does preventive security information exist that suggests the inmates proposed to share a cell would jeopardize the safety and security of the institution or the safety and security of another person?
- f. **Medical information** – Does the inmate have a medical condition that would be negatively affected by placement in a cell with another inmate? This information should be confirmed through Health Services.
- g. **Criminal profile** – Does information exist in the criminal profile that suggests the inmate would pose a risk to the safety and security of another person if he/she were required to share a cell? The Case Management Team should be consulted when making this determination.
- h. **Psychological information** – Does information exist that indicates an inmate’s psychological health or psychological or psychiatric treatment would be negatively affected by placement in a cell with another inmate? This information should be confirmed through the Case Management Team or Psychological Services.
- i. **Security threat group** – Does the inmate have a past or current affiliation or membership to a security threat group?

24. In no case will a transgender or intersex female prisoner be required to share accommodation with a male prisoner.

25. Transgender or intersex prisoners shall be provided private shower facilities upon request.

#### 4. Search and urinalysis policies

CSC’s policy regarding frisk searches of transgender prisoners allows correctional officers to decide whether a male or female officer will do the search. CSC’s strip



search policy provides for the establishment of search protocols, which may include a “split search” involving a female officer searching the top part of a transgender woman and a male officer searching the bottom part. The policy does not offer the prisoner her choice as to the gender of the officers conducting the search.

In 2006, the Peel Regional Police established a policy for searching transgender and intersex people which allows the person being strip searched to choose between being searched by male officers, female officers or a split search. The policy change was made after the Human Rights Tribunal of Ontario upheld a human rights complaint brought by Rosalyn Forrester, a pre-operative transgender woman whose request for a female officer to conduct a strip search was denied. The Tribunal found that the police decision to have a male conduct the search was humiliating and ordered the change to policy (*Forrester v. Peel Regional Police Services Board*, 2006 HRTO 13).

CSC policy regarding the searching and urinalysis testing of prisoners does not adequately consider the vulnerabilities or human rights of transgender prisoners and is not in accordance with the current state of the law in Canada.

***Recommendations:***

Prisoners’ Legal Services recommends that Commissioner’s Directive 566-7 “Searching of Inmates” be amended to require that transgender or intersex prisoners be provided a choice of a male or female officer to conduct searches, as follows.

**Commissioner's Directive 566-7 “Searching of Inmates” (2012-06-13)**

**ANNEX E: TRANSGENDER SEARCHING REQUIREMENTS**

It is the policy of the Service that the searching of transgender and intersex persons be conducted under the law with full respect for human dignity and according to the highest standards of professional skill.

A prisoner to be searched may self-identify as a transgender or intersex person. In most cases, it will likely be possible to recognize or accept a transgender prisoner on self-identification where it is accompanied by objective evidence such as dress, breast development, personal identification or medical evidence.

If an officer has serious reason to doubt the prisoner’s self-identification as transgender, the officer shall defer to the Correctional Manager who shall make the final determination based on a private interview with the person.

### **Frisk searches**

Transgender or intersex prisoners shall be offered the option of a female or male officer conducting a frisk search.

Upper body searches involve ensuring that the bra line be searched moving up from the bottom around the bra line to the top down the middle of the breast. The inmate will pull the bra away from the body so that any contraband will fall out.

### **Strip searches**

Transgender or intersex prisoners shall be offered a choice of three (3) options as to the process of the strip search to be conducted:

- (a) Male officer(s) only;
- (b) Female officer(s) only; or,
- (c) A split search.

A split search shall be conducted with female officer(s) conducting their stage of the search privately. Male officers shall not be in the search area at the same time. Officers are not permitted to "opt out" of the strip search of a transgender or intersex prisoner and shall perform their duties as assigned. The Correctional Manager may relieve an officer of their duties only if the officer has significant human rights interests of their own to protect. Such circumstances shall be documented by the Correctional Manager.

An individualized search protocol will be created for all transgender inmates. Protocols will be developed and placed as an alert on OMS. This annex will assist institutions in developing protocols for the searching of transgender inmates. A sample protocol is included for reference.

Searches will be conducted in a manner consistent with the CCRA. The procedures of this CD also consider the privacy and dignity of the individual being searched. ~~Given the above, where an offender has been diagnosed with gender identity disorder as per CD 800 – Health Services, the searching of transgender inmates, especially strip searching, will take into consideration the gender physiology of those individuals.~~ To respect the dignity of the inmate, individualized protocols for searching will be put in place through private consultation with the inmate.

Prisoners' Legal Services recommends that Commissioner's Directive 566-10 "Urinalysis Testing" be amended to require transgender or intersex prisoners to be provided a choice of a male or female officer to conduct the urinalysis test, and the option of following procedures for prisoners with "shy bladder syndrome", as follows.

**Commissioner's Directive 566-10 "Urinalysis Testing" (2012-06-13)**  
**Collection of Samples – Institution and Community**

...

31. The Collector will be of the same sex gender as the offender.

32. Transgender or intersex prisoners shall be offered a choice of a male or female Collector, as well as the option of following the procedure for prisoners with shy bladder syndrome under Annex D.

Collectors are not permitted to "opt out" of urinalysis testing of a transgender or intersex prisoner and shall perform their duties as assigned. The Correctional Manager may relieve an officer of their duties only if the officer has significant human rights interests of their own to protect. Such circumstances shall be documented by the Correctional Manager.

An individualized urinalysis protocol will be created for all transgender inmates. Protocols will be developed and placed as an alert on OMS. To respect the dignity of the inmate, individualized protocols for urinalysis testing will be put in place through private consultation with the inmate.

**ANNEX D: SHY BLADDER SYNDROME AND URINALYSIS COLLECTION**

Shy bladder syndrome is a condition where someone is unable to provide a urine sample under direct observation.

In the case of shy bladder, the least restrictive option available is to have mirrors strategically placed so that the Urinalysis Collector can still observe the offender donating in order to ensure chain of custody.

Where mirrors cannot or are not being used or the use of mirrors does not resolve the shy bladder concern, the following steps will be followed:

- During a demand for a urine sample, where the offender states that he/she is unable to provide due to shy bladder, you proceed to informal resolution.
- In these cases only, informal resolution consists of the Urinalysis Collector offering the offender a strip search, in accordance with CSC policy, including protocols for transgendered inmates.
- After the offender has been strip searched, and the collection area has been thoroughly searched, the offender proceeds to the collection area unobserved and provides a sample. When the offender hands in the specimen bottle, the Urinalysis Collector then processes the sample, as per procedure.
- In the institution, if the inmate continues to claim that he/she is unable to provide and refuses to submit to a strip search, an Inmate Offence Report and Notification of Charge CSC/SCC 0222) for refusing to provide a sample under paragraph 40(l) of the CCRA is completed indicating that informal resolution was sought by the Collector and was refused by the inmate.

...

## 5. Personal Effects

Transgender women prisoners routinely report difficulties in the process for ordering personal items (such as makeup) and clothing.

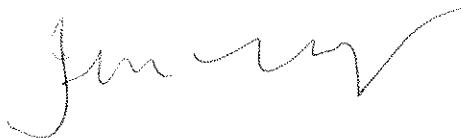
### ***Recommendation:***

Prisoners' Legal Services recommends that Commissioner's Directive 566-12 "Personal Property of Offenders" be amended to provide transgender or intersex prisoners the same process for ordering and receiving personal effects for men or women as other prisoners.

Thank you for your consideration of these policy amendments. Please feel free to contact me by telephone or email if you would like to discuss any of our recommendations.

Yours truly,

**PRISONERS' LEGAL SERVICES**

A handwritten signature in black ink, appearing to read "Jennifer Metcalfe", with a stylized flourish at the end.

Jennifer Metcalfe  
Executive Director  
Barrister & Solicitor