

CBABC SOGIC Section Meeting

**Trans\* Prison Policy in Canada**

December 9, 2015, 5:30 – 7:00 p.m.

McMillan LLP, Lang Michener Boardroom, 1500-1055 West Georgia Street, Vancouver

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Prisoners' Legal Services is the only legal aid clinic in Canada. We provide legal services to federal and BC provincial prisoners on issues that affect their liberty rights, health care and human rights.

Prisoners' Legal Services has assisted at least eight federal transgender prisoners in the past ten years, and has represented a number of transgender prisoners with human rights complaints. None of these complaints have gone to hearing. As a result, there is still a need for meaningful systemic remedies.

The following are areas in need of policy reform that, in our view, would be a step toward respecting the dignity of transgender prisoners in federal custody.

**1) Placement**

Under CSC policy, transgender prisoners are placed according to their genitals rather than by gender or preference. This means that transgender women who have not had sex reassignment surgery (SRS) 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 in men's prisons. They may also rank high on the "institutional adjustment" scale, resulting in a higher level of security classification (a greater deprivation of liberty). These factors mean that these women are often required to live in prison with the most violent male sex offenders in Canada and puts them at great risk of sexual violence while incarcerated. 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.

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.

British Columbia and Ontario corrections require placement of transgender prisoners based on self-identified gender, if that is the prisoner’s preference, unless there are overriding health or safety concerns that cannot be resolved.

Although the Canadian Human Rights Tribunal addressed the issue of placement in *Kavanagh v. Canada* (2001), 41 CHRR 119, we submit that expert opinion, international standards and human rights law has developed since 2001 to the point that the Tribunal would come to a different conclusion on this issue today.

## **2) Sex Reassignment Surgery (SRS)**

CSC policy prevents transgender prisoners from accessing medically necessary SRS unless they have lived in their gender outside of prison for at least one year.

Many transgender prisoners have led troubled lives and have been in custody since they were young. Prisoners who are serving life sentences, or “life by installment”, are unable to meet CSC’s criteria of living for at least one continuous year transgender in the community.

CSC’s policy on SRS was established after the *Kavanagh* decision found that the real life experience in prison is not a reliable indicator of a person’s suitability for SRS. *Kavanagh* was decided before the implementation of the most recent version of the World Professional Association for Transgender Health (“WPATH”) 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 require 12 continuous months of living in a gender role that is congruent with the patient’s identity before SRS, but this time period can include “institutional environments such as prisons”.

The determination in *Kavanagh* was made on the basis of CSC experts from the former Clarke Institution (now the Gender Identity Clinic at the Centre for Addiction and Mental Health) which had been under much criticism by the transgender community and international transgender experts, and which now accepts the 2011 Standards of Care (which allow the real life test to be completed in prison).

The Tribunal in *Kavanagh* was also concerned that the Commission's experts lacked experience in the prison setting. The 2011 Standards of Care were written by Dr. George Brown. Dr. Brown has extensive experience working with transgender prisoners.<sup>1</sup>

The United States District Court of Massachusetts in *Kosilek v. Spencer*, 2012 finds 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...)".

CSC's policy prevents many transgender prisoners from having SRS, contrary to expert medical opinion that surgery is medically necessary. This means that transgender prisoners are not receiving health care services on par with community standards. It also means that they are prevented from ever being able to transfer to a prison that aligns with their gender. For transgender women, this means they will continue to be at risk of sexual violence and harassment living in men's prisons.

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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*.

### 3) Double bunking

PLS has received reports from transgender women that they are required to “double bunk” (share a cell) with male prisoners. This practice puts women at constant risk of, and in constant fear of, sexual assault.

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.

BC Corrections policy prohibits double bunking of transgender prisoners against their wishes.

### 4) Searches and urinalysis testing

CSC’s policy allows correctional officers to decide whether a male or female officer will frisk search, strip search and urinalysis test transgender prisoners. 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 a choice as to the gender of the officers conducting the search. Transgender prisoners can be forced to be strip searched and urinalysis tested by guards of the opposite gender, which can be extremely humiliating.

In *Forrester v. Peel Regional Police Services Board*, 2006 HRTO 13, the Ontario Human Rights Tribunal found that it was discriminatory under human rights law to deny a transgender woman her request to be searched by a female officer, and that the decision to have a male officer conduct the search was humiliating. The Peel police have since established a policy that allows transgender people to choose between being searched by male officers, female officers or a split search. BC and Ontario corrections have also adopted this search policy.

## **5) Shower and toilet facilities**

CSC policy does not require transgender prisoners to be provided private shower and toilet facilities. This poses a safety risk to women held in men's prisons, and may be extremely stressful for any transgender prisoner, many of whom have anxiety around body image.

BC and Ontario corrections have both adopted policies to ensure private shower and washroom facilities for transgender prisoners. The US Department of Justice in the National Standards to Prevent, Detect, and Respond to Prison Rape includes a rule that transgender prisoners have the opportunity to shower separately from other prisoners.

## **6) Personal items and clothing**

Transgender prisoners often face difficulty receiving personal items (such as make-up or deodorant) and clothing in accordance with their gender. CSC policy does not adequately protect the rights of transgender prisoners to access items in accordance with gender with the same ease as other prisoners. Not being able to wear make-up, bras, or to access shaving items can cause great stress and depression for transgender women.

BC and Ontario corrections have adopted policy to protect these rights.

## **7) Identification**

There is no requirement under CSC policy to refer to prisoners by their preferred names or gender pronouns verbally and in all written documents, except in rare cases when a person's legal name is required for identification purposes.

It is hurtful and discriminatory to refer to transgender people by gender pronouns or names that do not correspond to their gender identities.

Ontario and BC Corrections have adopted policies that require prisoners to be referred to by their preferred names and gender pronouns.