

## ***West Coast Prison Justice Society v. Correctional Service of Canada***

The West Coast Prison Justice Society (WCPJS) files this representative human rights complaint, on behalf of transgender prisoners under the control of the Correctional Service of Canada (CSC), against CSC. WCPJS asserts that CSC discriminated in the area of “goods, services, facilities or accommodation” on the ground of sex and disability. The discrimination took place in federal prisons in Canada and is ongoing.

Prisoners’ Legal Services (PLS) is a legal aid clinic for federal and provincial prisoners in British Columbia. PLS is a project of the WCPJS.

### **A. Discriminatory Conduct**

Specifically, WCPJS asserts that CSC policy fails to accommodate transgender prisoners in the following areas.

#### **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 with male biology. 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 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.

Other jurisdictions in Canada and internationally have implemented guidelines prohibiting placement by genitals. Certain jurisdictions, such as British Columbia and Ontario corrections, require placement of transgender prisoners based on self-identified gender, if that is the prisoner’s preference. Other jurisdictions require an individualized assessment that will ensure the prisoner’s health and safety.

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. This policy is contrary to the World

Professional Association for Transgender Health (WPATH) Standards of Care (Version 7) which allow the “real life test” to be completed in prison. The WPATH standard is consistent with American case law that has found that a person can have a real life experience in prison (see *Kosilek v. Spencer*, 2012). It has also been adopted by the US Department of Justice, Federal Bureau of Prisons.

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.

### **3) Cell sharing**

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

CSC policy does not prohibit double bunking of transgender prisoners when housed in institutions that do not align with their gender, against their wishes. CSC policy does not require interviews with prisoners regarding their vulnerabilities to be in private. Other jurisdictions have prohibited double bunking of transgender prisoners against their wishes, including British Columbia.

### **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. Transgender prisoners can be forced to be strip searched and urinalysis tested by guards of the opposite gender, which is 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.

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

Transgender prisoners often face difficulty receiving personal items (such as make-up) 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 Correctional Service of Canada 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.

## **D. Remedies Sought**

1. WCPJS seeks the following remedies to this complaint:
  - (a) a declaration that the Correctional Service of Canada's current policies that:
    - (i) require placement by genitalia,
    - (ii) limit access to Sex Reassignment Surgery,
    - (iii) allow cell sharing of transgender prisoners against their wishes,
    - (iv) do not allow transgender prisoners to choose the gender of officers who conduct searches and urinalysis testing,
    - (v) do not provide transgender prisoners with private showers and toilet facilities,
    - (vi) do not guarantee equal access to clothing and personal effects according to gender, and
    - (vii) do not require staff to identify prisoners according to preferred names and gender pronouns verbally and in all written documents are discriminatory;
  - (b) an order that the Correctional Service of Canada cease the discrimination by amending its policies to be in accordance with human rights law, in consultation with the Commission; and
  - (c) any other remedies that the Canadian Human Rights Tribunal deems appropriate.