

MEMO EXCERPTS W/R/T INTERNATIONAL POLICIES ON TRANS DETENTION RESEARCH BY JP 12.2005

Canada

In a 2001 case *Synthia Kavanaugh and the Canadian Human Rights Commission v. Attorney General of Canada*, the Canadian Human Rights Tribunal ruled that the then current policy of housing pre-operative MTF prisoners in facilities with the male population was discriminatory. The court recognized that this policy failed to take into account the special vulnerability of transgender persons as a group under Section 5 of the Canadian Human Rights Act. This section renders as a discriminatory practice denial of access to any service customarily available to the general public to any individual, as well as adversely differentiating between individuals on a prohibited ground of discrimination. Section 3 of the Act lists sex and disability as prohibited grounds of discrimination. Citing to a number of recent Tribunal decisions, the court held that “there is no dispute that discrimination on the basis of Transsexualism constitutes sex discrimination as well as discrimination on the basis of disability.”¹ The Tribunal further required that the corrections service assess transgender prisoners’ housing needs on an individual basis after consultation with a medical expert in treatment of GID.

While the court did consider the option of creating dedicated facilities for pre-operative transgender prisoners, it found that this policy was not economically feasible on the basis of testimony from correction staff members. In addition, the court offered several other reasons for rejecting the idea of a separate transgender facility.² First, correctional services might not be able to provide adequate programming to transgender inmates on account of the small number of prisoners in the facility. Second, the concern that creation of a separate facility might lead to a “ghettoisation” of transgender inmates. Third, the testimony of Synthia Kavanaugh herself, who stated that she had “always tried to avoid spending time with other transsexuals, as she did not feel comfortable with them.”³

The *Kavanaugh* holding requires that Canada’s correctional services provide the option of sex reassignment surgery to transgender inmates who have satisfied the qualifying period and conditions for this surgery prior to incarceration.⁴ In formulating the qualifications necessary for this surgery, the Tribunal adopted the standard proffered by the Harry Benjamin International Gender Dysphoria Association, an international professional organization devoted to the understanding and treatment of “Gender Identity Disorders.” This standard stipulates that in order to be eligible for sex reassignment surgery, candidates must be the age of majority, must have had 12 months of continuous hormone therapy, and have successfully completed 12 months of a continuous, full-time “real life experience” living in the target gender. Factors considered when determining “real life experience” living are the individual’s ability to maintain full or part-time employment, ability to function as a student or community-based volunteer, or some combination thereof. However, the Harry Benjamin Standard does allow for some departures from this standard as a result of “a patient’s unique anatomic, social, or psychological situation.”

The court then went on to explore the question of whether the “real life experience could be carried out while an individual was in prison. The court found that this requirement could not be satisfactorily fulfilled in prison. Relying on expert testimony given at trial, the court stated, “It appears from all of the evidence that pre-operative transsexuals need to be able to interact with *both* men and women in their day to day lives in order to properly fulfill the requirements of the real life experience.”⁵ However, toppling the then current ban on all sex-reassignment surgeries for prisoners, the Court held that prisoners could qualify for this surgery if they had already completed the “real life experience” component of the Harry Benjamin criteria prior to incarceration.⁶ To comply with this requirement, the real life experience must be carried out under the supervision of a recognized gender identity clinic.

¹ See *Case of Kavanaugh v. Attorney General of Canada*, Canadian Human Rights Tribunal, T.D. 11/01, 2001/08/31 at ¶ 135.

² *Id.* at ¶ 163.

³ *Id.*

⁴ See Disabled Women’s Network Ontario: “Synthia Kavanaugh: Transgender Wins Right to be Housed in Women’s Prison,” 2001.

⁵ See *Case of Kavanaugh v. Attorney General of Canada*, at ¶ 178.

⁶ *Id.* at ¶ 185.

Finland

There are no precedents for dealing with transgender prisoners in Finland. However, they would be placed in a prison according to their PIN which can be changed to reflect a change of gender. Before changing the PIN number the LRO requires the person to have undergone hormonal treatment for about one year - surgery is not a pre-requirement for changing a person's legal gender. (Between 1988-98, there were a total of 87 PIN changes for transgender people in Finland). The Department of Prison Administration has taken the position that a male prisoner cannot be denied possession of female clothing.

Hungary

Although I was unable to find specific prison policies regarding transgender inmates, Hungary has recently adopted more progressive laws that pertain to the transgender community in general. In 2003, Hungary adopted the Equal Treatment Act. This Act includes gender as well as sexual orientation as protected categories. In addition, official recognition of gender requires only two psychiatric evaluations, rather than certain surgical procedures.

The process of developing the Equal Treatment Act spanned several years. The first general anti-discrimination draft bill was submitted only after two attempts to propose this type of bill in 2001. The bill went through significant changes in the subsequent two years. While sexual orientation was one of the initial protected categories stipulated, gender identity was finally added at the end of 2003. The bill passed in December 2003 and came into effect at the end of January 2004.⁷ The inclusion of gender identity in this bill is important because it provides a legal framework for advocates to take action against official discrimination against transgender individuals. Since the correctional facilities are state institutions and prison officials are state actors, advocates could reference this bill when challenging discriminatory treatment of transgender inmates.

Netherlands

A change of gender is recognized for all legal purposes from the moment it has been registered on a person's birth certificate. It follows that a transgender prisoner would be sent to a prison appropriate to their self-identified gender. However, in order to qualify for a change in gender the person must be physically incapable of procreation and have undergone full gender reassignment surgery. Exceptions are made for those persons who have had at least partial reassignment surgery if medical and psychiatric experts are certain that the wish to change sex is permanent.

New South Wales and Australia

i. Policy on Transgender Inmates

The NSW policy stipulates that all inmates who self-identify as transgender should be classified and housed in accordance with their gender identification. Transgender prisoners are individually case managed. The only criterion for such management is self-identification, and any such inmate will usually be housed in a correctional facility appropriate to his or her gender identity. The specific statutory language reads: "Identification of a transgender person is to be made routinely on reception into Corrective Service Custody, whether at court or in a reception correctional centre." In addition, the Inmate Lodgment Form has been amended to enable inmates to identify themselves as transgender.

Once an inmate has identified her/himself as transgender, the inmate "must be kept separate from all other inmates, accommodated in a single cell, provided access to a separate shower and toilet facilities." Further, the inmate "must not be transported with any other inmate in the same compartment of a transport vehicle until the full induction screening process is complete." This policy applies to all correctional facilities in New South Wales, as well as to court cells and police stations.

⁷ See Judit Takacs, "How to Put Equality Into Practice" (Unpublished research paper available at <http://www.policy.hy/takacs/research-paper>) at III.2.

While the above represents the normal process once inmates have identified themselves as transgender, in certain cases, prison staff will place transgender inmates in a facility according to their biological gender. Individual case managers make this decision on the basis of three factors. First, “the nature of their offence and criminal history; for example, crimes of a violent nature, including sexual, against women or children.” Second, “custodial history; for example, previous management problems which impacted the safety of other persons, or the security of the correctional centre.” Third, the “perceived risk(s) to the continuing safety of the transgender inmate.” If a prisoner disagrees with the initial placement decision, they may apply for review of the decision by submitting a written application stating the reasons for the request to the Director of the Inmate Classification and Management Branch.

Once inmates are housed, the policy directs prison guards to address them “by name and according to their chosen gender.” Specifically, guards are “not to refer to them as ‘it’ or thing.” In addition, transgender inmates, even those who are housed in facilities according to their biological gender, have the right to dress at all times in clothing appropriate to their gender identification. New South Wales’ policy on access to health services is the same as the United States – “hormone therapy will only be provided to those transgender inmates who have been receiving this treatment before imprisonment.”

ii. Implementation of the Policy

Whereas on its face, the New South Wales policy on transgender inmates is generally more progressive than most on its face, in practice, poor implementation and dissemination of the policy by correctional authorities has led to an uneven and flawed implementation of the policy. On a number of occasions prison authorities have transferred transgender inmates without giving prior warning to the receiving facilities. Moreover, even now, seven years after the policy first came into effect, many prison staff are unaware of the existence of the policy. According to reports by the Gender Centre, a NSW organization focusing on transgender issues, even when staff members are aware of the policy regarding transgender inmates, there has been a general lack of response to breaches of the policy by prison guards. According to one staff member of the Gender Centre, “There is a general culture that seeks to blame the transgender individual for any problems arising out of the policy rather than the system itself.”⁸ As a result of these issues, activists among the NSW transgender community have been engaged in frequent battles with corrective services in an effort to promote improved implementation of the government policy.

A related, but separate, issue is the documentation required by case management services to prove that an inmate does actually identify as transgender. While the language of the NSW policy implies that an inmate only has to self-identify as transgender, in practice, most case managers require an inmate to present a minimal amount of documentation, such as a driver’s license, to qualify for transgender status. However, this could be problematic for a transgender individual who is in the process of transitioning between genders. For example, if such an individual is not yet fully living in a new gender role, he or she has likely not changed his or her name. Therefore, this person would not be able to “prove” his/her gender identity through official documentation. In this scenario, the case manager may seek written permission from the individual to establish a community history. For example, evidence that the prisoner attended the Gender Centre for counseling or had sought psychiatric treatment for issues related to gender identity would suffice for these purposes.

Over the past seven years, approximately thirty inmates have sought protection under the NSW policy with varying degrees of success. The Gender Centre reported one instance when prison authorities had placed a post-operative transgender woman in a male facility. Authorities only transferred the inmate after the Centre intervened on her behalf.

The impetus for the NSW policy was the 1997 suicide of a MTF transgender inmate, who had been raped by another inmate in a male facility. In response to the suicide and rape, the Gender Centre and the NSW Anti-Discrimination Board banded together to advocate for systemic change. In fact, the reform that they were requesting was only the practical implementation of a policy, similar to the current policy, in place since 1996 under the Anti-Discrimination Act. Under this Act, it is unlawful to discriminate against a person on the grounds of that person’s gender or sexuality. In response to pressure from the transgender community, Corrective Services agreed to implement the existing policy. According to the Gender Centre, advocacy was limited to the transgender community in New South Wales, rather than the LGBT community as a whole.

iii. NSW as Compared to the Rest of Australia

⁸ Quote is from the text of an October 25, 2005 email from Elizabeth Riley.

The New South Wales Anti-Discrimination Act defines a transgender person as someone who “identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.” No further documentation or medical evidence is necessary for legal recognition of transgender identity. Therefore, individuals will be recognized as transgender irrespective of whether they have undergone genital surgery. A similar definition to that of New South Wales appears in anti-discrimination legislation for the Australian Capital Territory, Northern Territory, and South Australia. Correctional policies on transgender prisoners vary across jurisdictions. The NSW policy on transgender inmates is the most recent and comprehensive in Australia. For example, it covers areas such as clothing and transport that fail to appear in policies of other jurisdictions.⁹ Across the various territories of Australia, there are two basic approaches used by correctional managers to classify transgender persons. The first, which is based on the same principles as the current anti-discrimination legislation, turns on how a person self-identifies. The second approach, which is more similar to current birth certificate legislation in place in some Australian territories, turns on whether a person has undergone surgical intervention. Since the anti-discrimination legislation mentioned in the last paragraph does not require surgery, those correctional policies relying on the surgery-based approach may be considered in breach of that legislation.¹⁰ For example, the Northern Territory’s surgery-based approach to placement of transgender inmates conflicts its definition of gender identity, based on self-identification, as expressed in its anti-discrimination legislation.

The Northern Territory’s correctional policy also demonstrates why the surgery-based approach as applied to transgender prisoners is problematic. Under the Northern Territory policy, those prisoners who have not undergone sex reassignment surgery are placed according to their birth gender. However, prison officials have discretion to approve placement based on an inmate’s own gender identification with appropriate medical advice. Section 3.3.2 of the Northern Territory’s policy articulates the conditions that could prompt alternative placement:

[Gender reassigned] prisoners are to be placed in a location that corresponds with their reassigned sex; i.e. they are to be treated as they would be in the community. This rating would also cater to those persons who have had partial surgery reassignment (breast implants etc.).

The policy pairs the concept of how a prisoner would be treated “in the community” with the requirement of partial surgery for placement purposes. However, even without surgery, many individuals who have taken steps towards changing their gender identity are regarded as the opposite gender in certain communities. For example, a MTF who has been taking female hormones may experience some enlargement of the breasts. Under the Northern Territory policy, that individual would not be considered female unless she had silicon breast implants.¹¹

The Australian Capital Territory’s Department of Corrective Service records inmates as one of four classifications – male, female, other or unknown. Classification is based solely on appearance in a strip search. There are no official guidelines regarding the criteria that are taken into consideration when making these classifications. A 2000 report on transgender inmates in Australia hypothesizes that “such an attitude is likely to prevail in states with no formal policy on transgender inmates.” In these cases, transgender inmates are left vulnerable to the unfettered discretion of correctional staff.¹²

New Zealand

A post-operative transgender inmate would be sent to a prison appropriate to their acquired gender. However, pre-operative inmates are entitled to single cell accommodation or to share cells with other transgender inmates. Transgender prisoners can continue, at their own cost, any medical or hormonal treatment commenced prior to imprisonment.

Norway

It is difficult to ascertain the Norwegian policy on transgender inmates. One Norwegian contact, Tone Maria Hansen, stated that currently, there are only 4 transgender prisoners in Norway. From the minimal knowledge of their situation, Hansen stated that “they were all treated well.”¹³

⁹ See Jake Blight, “Transgender Inmates,” 168 *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice*, iv (September, 2000).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.*

¹³ October 17, 2005 email from Tone Maria Hansen to Joanna Pozen.

United Kingdom

The Prison Service in England and Wales is currently in the process of formulating guidelines for dealing with transgender prisoners, scheduled for release in the spring of 2006. The impetus for these guidelines was the 2004 enactment of the Gender Recognition Bill, which allows transgender persons to apply for legal recognition of their change of gender and new birth certificates to be issued. This Bill was a legislative reaction to the 2002 European Court of Human Rights decision in *Goodwin & I v. United Kingdom Government*. This decision held that the UK government's failure to alter the birth certificates of transgender persons and to allow them to marry in their new gender role was a breach of the European Convention of Human Rights.

The draft bill sets out a clear process for a newly formed Gender Identity Panel to assess applications for recognition of a change in gender. Legal recognition of a change in gender depends on the following factors: 1) The individual is at least 18 years old; 2) Has been diagnosed with Gender Dysphoria; 3) Has lived in the new gender role for at least 2 years; 4) Is unmarried; 5) Provides the Committee with evidence of factors 1 through 3 along with a processing fee. The general process of application is the same for all persons, irrespective of whether they have had any form of gender reassignment surgery.¹⁴

Issues w/UK Guidelines on Trans Prisoners

There are 3 basic categories of issues with the British guidelines:

- Conceptual
- specific measures
- lack of enforcement mechanisms.

A brief summary of issues under these 3 headings:

1) Conceptual

The guidelines distinguish between "transsexualism" and "transvestism". While the guidelines identify transsexualism as a permanent condition ("gender dysphoria"), they identify transvestism as only a temporary desire for the "experience of membership of the opposite sex." Whereas this definitional dichotomy is not in itself necessarily pernicious, the guidelines fail to address the needs of those persons who fall under the latter category of "transvestism". This issue stems from the dualistic definition of transgender persons in the Gender Recognition Act of 2004, which only provides opportunity for legal change in gender for those persons with "gender dysphoria."

b. The guidelines fail to take into account prisoners' self-identified gender as the principal factor in deciding upon placement.

c. General vagueness throughout the guidelines-- manifested in passive tense and unidentified "relevant" persons/establishments-- could thwart meaningful implementation

2) Specific Measures

i. Placement

a. The initial placement of any pre-operative prisoner will be according to their biological gender. However, when "there is any doubt about such a placement," the prison will organize a case conference with the prison health care staff and "representatives from the relevant establishments" to address the issue. The duration of the case conference process is unspecified, and could presumably last a considerable length of time, especially if representatives from relevant establishments are difficult to identify. Thus, pre-operative MTF prisoners will likely face heightened risks of sexual violence in male prisons (see, e.g., studies of prison hierarchies based upon perceived masculinity et al).

b. Under the guidelines, only a transgender prisoner to whom a Gender Recognition certificate has been issued is presumptively afforded accommodation based upon their self-identified gender. Obtaining such a certificate depends upon a successful application to the newly established gender recognition

¹⁴ Press For Change, "Detailed Analysis of the Gender Recognition Bill" (August, 2003), available at <http://www.pfc.org.uk/grb-anal.pdf>.

panel-- an application process which could span over many months and depends upon specific requirements such as a extended and continuous period of psychiatric counseling. Therefore, this policy is likely to apply to only a small segment of the transgender prison population.

c. Decisions that are made concerning pre-operative transgender prisoners are based upon a totality of circumstances test, dependent upon the results of a full physical and psychiatric examination by a "gender dysphoria specialist."

After such an examination, factors such as the "most obvious physical characteristics: and " the anticipated reaction of other prisoners to his/her placement amongst them" are taken into consideration. While the guidelines stipulate that these prisoners "should be offered as wide a regime of activities as any other prisoners," they make no mention of any alternative placement options or special unit for transgender prisoners.

ii. Access to medical treatment

a. In order to qualify for gender reassignment surgery, a prisoner must undergo a period of assessment and counseling in order to assess whether he or she is affected by gender dysphoria. As some point during this process, the person must undertake a "real life experience" by living in his/her new gender role for a period of 6 months. During this period, the person "should be able to demonstrate acceptance by society in this role," including participation in "full time employment, education or training in role." However, the guidelines are unclear as to how a prisoner would be able to fulfill the requirements of the "real life" test while incarcerated. The guidelines proffer that the fact of a person's imprisonment "may" prove relevant to the clinical judgment that the person is unable to effectively live "in role". Even when a clinical need for surgery has been established, the guidelines frame this need in the negative, rather than as a positive obligation on the part of prison services:

"[I]t would be inappropriate for the Prison Service to refuse to allow surgery to proceed for non-medical reasons."

b. Procedures are divided into the categories of "core" and "cosmetic" (see table on p. 5 of the guidelines). Core services (which are quite inclusive) are to be funded by the state; Cosmetic services are to be funded by the individual prisoner. Examples of cosmetic services for MTF: vocal cord surgery, electrolysis of facial hair, and in some cases, shaving Adam's apply. The medical needs of transgender prisoners cannot so easily be categorized; rather, they fall into a more general spectrum of needs. Moreover, the issue of prisoner-funded treatment is problematic in that transgender individuals are likely to have been marginalized by society, and, as such, do not have access to economic resources (especially while incarcerated!).

c. For those prisoners awaiting conviction, policy presumption is to delay the consideration of medical requests until the handing down of convictions.

Medical interventions in this period are limited to "short term and emergency interventions." The guidelines do not offer examples or further description of such interventions. Later, the guidelines, do carve out an exception to this emergency-only policy of treatment in the case when an unconvicted prisoner requests to continue "medical treatment for gender dysphoria commenced and still underway" prior to incarceration: "unless the prison doctor has a very doing reason for believing the prisoner is not telling the truth, hormone treatment should be continued pending the outcome of the specialist referral."

iii. Searches

a. Pre-operative prisoners will normally be searched according to their biological sex. Only when determined "appropriate...where it would be in the best interests of the prisoner to be treated differently"(the guidelines fail to stipulate by whom) will the prison depart from this rule.

b. Both the wishes of the prisoner and the staff member who may be asked to conduct the search are taken into account when departing from the general rule.

This may lead to prejudicial effects if staff members express unwillingness to perform searches on trans prisoners.

3) Lack of Enforcement Mechanisms

a. The guidelines fail to provide any kind of enforcement mechanism to ensure meaningful implementation of these rules. In addition, there are no disciplinary procedures set forth for prison staff who fail to comply with these guidelines.

b. The guidelines fail to provide for a central committee to oversee the implementation of the rules.