

Transgender Prisoners' Rights Ignored

Report on the Treatment of Transgender Prisoners

Under the Policies of the Department of Corrections

Prepared by the Equal Justice Project

The Equal Justice Project is a youth-run pro bono initiative empowering communities to seek equal access to justice through education, service, and advocacy. It is entirely run and led by students from the University of Auckland, Faculty of Law.

The Pro Bono team promotes human rights discourse through legal research and writing. EJP Pro Bono provides support to practitioners, interest organisations, and community groups who share the Equal Justice Project's goals of promoting equality, inclusivity, and respect for human dignity. Our volunteers are generally final and penultimate year law students who have demonstrated a capacity for high quality legal research and a dedication to protecting human rights.

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1.0 INTRODUCTION

Every person has the same inherent dignity worth protecting. No person deserves to be subjected to degradation or be denied medical treatment based on their gender. No person deserves sexual assault or rape based on an outdated policy that refuses to prioritise their safety. The legislative punishment for a crime is a deprivation of liberty; adding a clear risk of sexual assault and violence to this is unacceptable.

This report provides an overview of the legal position in New Zealand regarding the treatment of transgender prisoners. It concludes that the current policies of the New Zealand Department of Corrections are discriminatory and places transgender prisoners at risk of sexual assault and rape.

It challenges two aspects of these policies:

1. The restriction on commencing medical treatment while in prison; and
2. The test for gender classification in housing prisoners.

As a response to the Department of Correction's policies, New Zealand courts have reduced the custodial sentences of transgender prisoners to mitigate their risk of experiencing sexual assault and violence. But this solution is not sustainable. Current Department mitigation practices, such as segregation, are not long-term viable solutions. Isolation in particular could amount to disproportionately severe punishment and do result in reduced privileges for prisoners that were the victim of an attack.

These approaches alone do not address the harm transgender prisoners are subject to simply because authorities are unwilling to effect policy changes that would recognise their inherent dignity.

We recommend that the approach taken in the United Kingdom should be adopted by New Zealand.

1.1 Why it matters

Increased risk of sexual assault and rape

There is a dearth of statistical information about transgender prisoners in New Zealand and the realities of their incarceration. There has yet to be a concerted study of the issues transgender prisoners face from arrest to release.¹ A report conducted by the Office of the Ombudsman recorded a Health Centre Manager explicitly stating that the “abuse (of transgender prisoners) goes unrecorded in male prisons.”²

Furthermore, information from official sources do not seem to reflect the realities of incarceration for transgender persons — or even provide an accurate number of transgender prisoners in New Zealand’s correctional facilities. Minister of Corrections, Anne Tolley, has stated that there are only five transgender prisoners out of the 8,500 prisoners in New Zealand³ — a figure that has been disputed by practitioners and other parties, who say that in Mt Eden Correctional Facility alone there are more than five women who have been wrongly-housed.⁴ In 2008, the Human Rights Commission obtained information from the Department of Corrections that there might be between ten and twenty prisoners who identified as transgender at any given time (this figure excluded persons who had completed gender reassignment surgery).⁵ The Department further believed that all were women incarcerated in men’s prisons.⁶

There is a lack of statistics on the incidence of violence amongst transgender prisoners in New Zealand prisons. But when questioned on this, Tolley said that while transgender prisoners were more vulnerable to verbal abuse, this did not apply to sexual assault in New Zealand prisons due to a “lack of widespread evidence”.⁷ Apart from the logical fallacy in proving the absence of a problem by reference to a lack of information on said problem, Tolley’s statements are contrary to global consensus that transgender prisoners are especially vulnerable to sexual abuse and assault.⁸ A study of violence in Californian correctional facilities in 2007 found that transgender prisoners are thirteen

¹ Sarah Murphy “Hard Times for Trans* Inmates” *Gay Express Magazine* (online ed, New Zealand, 26 February 2013).

² Beverly Wakem and David McGee *Investigation of the Department of Corrections in relation to the Provision, Access and Availability of Prisoner Health Services* (Office of the Ombudsman, A.3(2012), 2012) at 105.

³ (29 February 2012) 677 NZPD 667.

⁴ Murphy, above n 1.

⁵ Human Rights Commission *To Be Who I Am/Kia noho au ki tōku anō ao* (January 2008) at 92.

⁶ At 92.

⁷ NZPD, above n 3, at 667.

⁸ Sharon Dolovich “Strategic Segregation in the Modern Prison” (2011) 48 *Am Crim L Rev* 1 at 2.

times more likely to experience violence in prisons, with 59% of transgender prisoners reporting they had been sexually assaulted while in prison.⁹ When rape was defined as oral or anal penetration by force or the threat of force, 50% of transgender respondents reported having been raped while in prison.¹⁰ This figure dropped to less than 1% when the entire Californian prison population was considered.¹¹

The Department's belief that all transgender prisoners within New Zealand are women housed in men's prisons signifies that transgender persons in local prisons are at the bottom of the prison sexual hierarchy.¹² This makes them "automatic targets" for sexual abuse and assault.¹³ Criminologists have attributed this assault to the hyper-masculine nature of the prison environment: hyper-masculine posturing has been studied in prisoners' desires to appear "hard and tough" in men's prisons around the world.¹⁴ Masculine positioning requires relational distancing from that which is stereotypically feminine.¹⁵ Rape, sexual assault, violence and other abuse of "weaker prisoners" are manners in which prisoners prove their masculinity.¹⁶ Gender and sexuality variant prisoners are almost inevitably at the bottom of this prison hierarchy.

Transgender prisoners are therefore "doubly imprisoned": First, by criminal justice and legal systems that do not recognise their inherent dignity and self-identity; second, by the mistreatment, abuse, and assault they suffer in prison.¹⁷

Prohibitive nature of gender reassignment surgery

Transgender persons in New Zealand do not feel that completing gender reassignment surgery is always a practical or viable option. In speaking to the Human Rights Commission, transgender persons have said that gender reassignment surgery is not always medically recommended, and can

⁹ Valerie Jenness, Cheryl L Maxson, Kristy N Matsuda and Jennifer Macy Sumner *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (University of California, Irvine, 27 April 2007) at 27.

¹⁰ At 28.

¹¹ At 28.

¹² Dolovich (2011), above n 8, at 3.

¹³ At 3.

¹⁴ Sharon Dolovich "Two Models of the Prison: Accidental Humanity and Hypermasculinity in the LA County Jail" (2012) 102 J Crim L & Criminology 965 at 1003.

¹⁵ At 1005.

¹⁶ At 1005.

¹⁷ John Nguyet Erni "Legitimizing Transphobia: The Legal Disavowal of Transgender Rights in Prison" (2013) 27 Cultural Studies 136 at 139.

be risky.¹⁸ The surgical procedure will cause nerve damage and is dangerous, and current medical standards are still not at the level to reconstruct perfectly functioning genitalia. Furthermore, transgender persons sometimes feel that surgery is not necessary to express a desired gender identity and should not be forced to undergo such procedures for their identity to be recognised — physical genitalia is not determinative of gender; neither is the converse.¹⁹ As reported by the Human Rights Commission, some fa'a'fine have stated that they are able to express their gender identities without highly-invasive surgical procedures.²⁰

Gender reassignment surgery is expensive and thus financially restrictive for many people. There is limited public funding available to undergo such surgeries. The Special High Cost Treatment Pool (SHCTP) funds three male-to-female surgeries and one female-to-male surgery in each two-year period.²¹ The “vast majority” of those who have had genital surgery have paid for their own operations, which are commonly performed overseas.²² The cost of surgery alone is \$20,000 to \$30,000 for male-to-female operations, and up to \$70,000 for female-to-male operations. These figures do not include the cost of extensive pre- and post-operative consultations and treatments.

In multiple ways, setting a gender conformity test that requires surgery compels individuals to go under the knife when they may not want to, and ignores the restrictive financial realities and personal experiences of transgender persons.

1.2 A note on gender dysphoria

This report discusses treatment for transgender prisoners. It should be noted that the classification of transgender persons in the Diagnostic and Statistical Manual of Mental Disorders as having gender dysphoria is not ideal: such classification ignores gender as a social construct and stigmatises transgender persons. However, until New Zealand outlaws discrimination based on gender identity, as nations like Canada have done,²³ a diagnosis of gender dysphoria allows transgender prisoners to access gender-reassignment measures as treatment for a recognised disorder.

¹⁸ Human Rights Commission, above n 5, at 91.

¹⁹ At 91.

²⁰ At 91.

²¹ Counties Manukau District Health Board *Gender Reassignment Health Services for Trans People within New Zealand* (Ministry of Health, May 2012) at 28.

²² Human Rights Commission, above n 5, at 56.

²³ The Canadian Press “Commons Approves Transgender Rights Bill” (20 March 2013) *CBC News* <www.cbc.ca/news/canada/story/2013/03/20/pol-transgender-rights-bill-approved.html>.

2.0 THE DEPARTMENT OF CORRECTIONS' POLICIES

2.1 The policies in brief

Two enactments are challenged: Rule M.03.05.02(h) of the Department of Correction's Prison Service Operation Manual (PSOM) and Regulation 190 of the Corrections Regulations 2005.

The restriction on commencing medical treatment while in prison

Gender dysphoria is a recognised medical condition.²⁴ Rule M.03.05.02(h) of the Department of Corrections' Prison Service Operation Manual (PSOM) does not allow prisoners medical treatment if this treatment did not begin prior to imprisonment. Further, a prisoner is denied access to sexual reassignment surgery. No such restrictions exist for any other recognised medical condition.

Rule M.03.05.02(h) states:²⁵

Transgender prisoners — (h) can continue, at their own cost, any medical or hormonal treatment commenced prior to imprisonment. However, sexual reassignment surgery is not to be considered during a term of imprisonment.

The test for gender classification utilised in housing prisoners

Regulation 190 of the Corrections Regulations 2005 requires "completed" gender reassignment before prisoners are housed according to their gender. This is a surgical threshold and requires the finished construction of either a vagina or penis. In 2008, courts recognised that the "surgically completed" test for gender reassignment was narrow and restrictive, and instead adopted an "all steps desirable" approach.²⁶ This approach better recognises that gender is comprised of elements beyond the physical.

²⁴ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* (4th ed, 2000). See also Manukau District Health Board *Gender Reassignment Health Services for Trans People within New Zealand* (Ministry of Health, 2012).

²⁵ Department of Corrections *Prison Service Operation Manual* at r M.03.05.02(h).

²⁶ *Michael v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC).

Regulation 190 states:²⁷

Accommodation of transgender prisoners who have completed gender reassignment surgery — Where the chief executive is satisfied that a transgender prisoner has completed gender reassignment surgery, the chief executive must promptly ensure that the prisoner is placed in accommodation that accords with the prisoner’s new gender.

2.2 The policies are contrary to human rights obligations

The Department of Corrections’ policies are contrary to New Zealand’s domestic and international human rights obligations. In particular, the policies do not protect a person’s right to be free from discrimination and right not to be subjected to cruel, degrading, or disproportionately severe treatment or punishment.

Discrimination

Gender dysphoria is a recognised medical condition.²⁸ Yet, it is the only medical condition where the Department of Corrections denies affected prisoners access to surgery and medical treatment once imprisoned. For any other condition, it would be outrageous for the Department to deny medical treatment — imagine refusing to provide medical assistance to a prisoner who developed depression while imprisoned just because they had not begun treatment prior to incarceration. The Department should not discriminate and deny treatment to any prisoner who has recognised medical needs.

Section 19 of the New Zealand Bill of Rights Act 1990 and section 21 of the Human Rights Act 1993 prohibit discrimination on the grounds of sex and psychiatric illness.²⁹ The fundamental obligation on government departments to be free from discrimination is further imposed by the International Covenant on Civil and Political Rights (ICCPR) — “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”³⁰ — and the Universal Declaration of Human Rights (UDHR).³¹

²⁷ Corrections Regulations 2005, reg 190.

²⁸ American Psychiatric Association, above n 24.

²⁹ New Zealand Bill of Rights Act 1990, s 19; Human Rights Act 1993, ss 21(1)(a) and 21(1)(h)(iii).

³⁰ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26. [ICCPR]

³¹ Universal Declaration of Human Rights GA Res 217A (III), A/810 (1948). [UDHR]

More specifically, the United Nations General Assembly passed a resolution recognising that all “[p]risoners *shall* have access to the health services available in the country without discrimination on the grounds of their legal situation” (emphasis added).³² Further, The United Nations Standard Minimum Rules for the Treatment of Prisoners states that prisons “should seek to minimize any differences between prison life and life at liberty which tend to lessen... the respect due to [prisoners’] dignity as human beings”.³³ The operation of New Zealand’s prisons in accordance with these Standard Minimum Rules is codified as an objective of the Corrections Act 2004.³⁴ The Corrections Act 2004 also explicitly states that “the standard of health care that is available to prisoners in a prison must be reasonably equivalent to the standard of health care available to the public.”³⁵

Thus, transgender prisoners should not be denied the medical treatment that would otherwise be available to them if not for their status as prisoners or their specific medical needs. The refusal by the Department to provide treatment for some medical conditions and not others is discriminatory. The outright prohibition on gender reassignment surgery is further discrimination based on a person’s status as a prisoner. The implications of this policy include a transgender prisoner potentially being denied access to surgery if that prisoner became next in line on the waiting list for public surgery while in prison. This is a denial of access to health services that would otherwise be available to the prisoner if not for their legal situation.

No government department should be implementing policies that are discriminatory, nor should they be ignorant of the violent and demeaning effects of said discrimination.

Cruel, degrading, or disproportionately severe treatment

The Department of Corrections currently justifies housing transgender prisoners according to their assigned gender at birth — despite the high risk of violent assaults — through the use of “protective” measures. The standard “protective” measure appears to be the segregation and isolation of transgender prisoners “for [their] own protection”.³⁶

This is a practice that deprives transgender prisoners of access to social human interaction, effectively punishing transgender prisoners for being *victims* of an attack. Segregated prisoners are

³² *Basic Principles for the Treatment of Prisoners* GA Res 45/111, A/RES/45/111, art 9.

³³ *Standard Minimum Rules for the Treatment of Prisoners* A/CONF/611 (1955), art 31.

³⁴ Corrections Act 2004, s 5(b).

³⁵ Section 75(2).

³⁶ Government “Not Keeping Prisoners Safe” (Morning Report, Radio New Zealand, 20 December 2012).

also denied access to rehabilitation programmes,³⁷ which may prolong their availability for parole and, again, punishes victims for the wrongful actions of other prisoners.

The High Court in *Taunoa v Attorney-General*³⁸ found that segregation for purposes not related to penalties for misbehaviour formed a part of the factors in finding that prisoners were “not treated with the humanity, and with respect to the inherent dignity that they were entitled to as human beings.”³⁹ The court found that while prisoners “may not have been treated deliberately cruelly” the treatment “fell well below standards that befit a human being including one who is in prison”.⁴⁰ The court concluded: “Unlawful and difficult behaviour by prisoners can never justify unlawful conduct by their jailers.”⁴¹

The right of all persons not to be subjected to cruel, degrading, or disproportionately severe treatment or punishment is protected in section 9 of the NZBORA;⁴² the right of prisoners to be treated with humanity and respect for their inherent dignity is protected in section 23.⁴³ These rights are also protected in articles 7 and 10 of the ICCPR,⁴⁴ article 5 of the Universal Declaration of Human Rights,⁴⁵ and the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment⁴⁶ — to all of which New Zealand is a signatory.

These rights are further recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁷ The Rome Statute of the International Criminal Court,⁴⁸ the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders,⁴⁹ the Basic Principles for the Treatment of

³⁷ Morning Report, above n 36.

³⁸ *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC).

³⁹ At [277].

⁴⁰ At [277].

⁴¹ At [277].

⁴² New Zealand Bill of Rights Act 1990, s 9.

⁴³ Section 23(5).

⁴⁴ ICCPR, above n 30, arts 7 and 10.

⁴⁵ UDHR, above n 31, art 5.

⁴⁶ United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 4 February 1985, entered into force 26 June 1987).

⁴⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 3 [ECHR].

⁴⁸ *Rome Statute of the International Criminal Court* A/CONF.183/9 (1998), art 8(2)(c)(i).

⁴⁹ *Standard Minimum Rules for the Treatment of Prisoners* A/CONF/611 (1955), art 31.

Prisoners,⁵⁰ and the Code of Conduct for Law Enforcement Officials adopted by the United Nations General Assembly.⁵¹

In the United States, the Department of Justice's National Institute of Corrections has recognised that transgender prisoners are subject to "unnecessary and punitive isolation". The Prison Rape Elimination Act Standards prevents the isolation of transgender prisoners as a means of providing protection in all but exceptional circumstances. This recognises solitary confinement as disproportionately severe treatment that should not be utilised for administrative purposes.

The use of segregation not only has "excessive financial costs", but more importantly "can cause profound, long-term psychological damage".⁵² Growing research shows that prisoners who are isolated self-mutilate and attempt or commit suicide at higher rates than those in the general prison population — young prisoners are nineteen times more likely to kill themselves in isolation than in prison generally.⁵³ Courts in the United States have held that segregation units "are virtual incubators of psychoses — seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities."⁵⁴

A common argument against housing transgender women in women's prisons is the perceived risk of sexual assault to cisgender women. While it is encouraging seeing concern for women's safety, in this context that concern is factually inaccurate and misplaced. Sterility is an irreversible change for persons undergoing hormone treatment. A reduction in libido is also an urogynecological effect, along with the reduction or loss of erection and ejaculation. But perhaps most importantly, no *perceived* risk should take precedence over the *actual* risk of harm that transgender women face in men's prisons.

Segregation and isolation should not be used as administrative tools to avoid formulating policy that adequately safeguards transgender prisoners — especially when the obligation to protect prisoners appears to be exercised in favour of cisgender prisoners as a given. If the Department of Corrections

⁵⁰ *Basic Principles for the Treatment of Prisoners* GA Res 45/111, A/RES/45/111, arts 1 and 7.

⁵¹ *Code of Conduct for Law Enforcement officials* GA Res 34/169, A/RES/34/169, arts 2 and 5.

⁵² Patrick DePoy "Ending Solitary Confinement — The Dangers of Isolation for LGBTI Prisoners and Detainees" (27 June 2012) American Civil Liberties Union <www.aclu.org/blog/lgbt-rights-prisoners-rights/ending-solitary-confinement-dangers-isolation-lgbti-prisoners-and>

⁵³ Yasmin Vafa "Invisible Prisoners: Why Are So Many Children, Especially Girls, Placed in Solitary Confinement?" (18 June 2012) RH Reality Check <<http://rhrealitycheck.org/article/2012/06/18/girls-in-juvenile-justice-an-invisible-population>>.

⁵⁴ *Ruiz v Johnson* 154 F Supp 2d 975 (SD Tex 2001) at 984.

cannot protect transgender prisoners from violence and sexual assault through their current housing policy, that policy needs to change.

2.3 The policies are not authorised by legislation

The Department of Corrections' policies are not in accordance with the general objectives and intentions of the Corrections Act 2004 under which it was made. As regulations, the Department's policies must be authorised by legislation in order to be valid.

The relevant purpose and principles guiding New Zealand's corrections system are set out below:⁵⁵

5 Purpose of corrections system

- (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—

[...]

- (c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; and

6 Principles guiding corrections system

- (1) The principles that guide the operation of the corrections system are that—

- (a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision:

[...]

- (c) in order to reduce the risk of reoffending, the cultural background, ethnic identity, and language of offenders

⁵⁵ Corrections Act 2004, ss 5(1)(c), 6(1)(a), 6(1)(c), and 6(1)(h).

must, where appropriate and to the extent practicable within the resources available, be taken into account—

- (i) in developing and providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community; and
- (ii) in sentence planning and management of offenders:

[...]

- (h) offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community:

Sections 49, 69, and 75 are also relevant:

49 Prisoners must be assessed on reception and have needs addressed⁵⁶

The chief executive must ensure that—

- (a) every prisoner is assessed promptly after reception at a prison to identify any immediate physical or mental health, safety, or security needs; and
- (b) any needs identified by that assessment are addressed.

⁵⁶ Section 49.

69 Minimum entitlements⁵⁷

(1)

[...]

(g) to receive medical treatment, as provided for in section 75:

75 Medical treatment and standard of health care⁵⁸

(1) A prisoner is entitled to receive medical treatment that is reasonably necessary.

(2) The standard of health care that is available to prisoners in a prison must be reasonably equivalent to the standard of health care available to the public.

Section 75 is explicit that prisoners are to be provided with the same standard of medical care that would be available to them as a member of the public.⁵⁹ Denying transgender prisoners access to surgery and medical treatment would be contrary to this provision.

Furthermore, the Department's policies fails to meet the Corrections Act's stated objectives with regards to transgender prisoners. The maintenance of public safety is the "paramount consideration" in decision-making related to the management of individuals under state control and supervision.⁶⁰ Prisoner management should thus be guided by notions of rehabilitation and societal integration — this is in the best interests of reducing recidivism. The Department's policies disregard the safety and dignity of transgender prisoners by making them especially vulnerable to assault and restricting their expression of gender identity. Under these circumstances, it is doubtful whether the imprisonment of transgender prisoners achieves the custodial aims of rehabilitation and societal integration. For transgender prisoners, prisons represent a locale of discrimination and mistreatment: this precludes prisoner socialisation and rehabilitation with a view to reducing post-release offending and promoting public safety.

⁵⁷ Section 69(1)(g).

⁵⁸ Section 75.

⁵⁹ Section 75.

⁶⁰ Corrections Act 2004, s 6(1)(a).

Finally, Parliament intends New Zealand's corrections system to be attentive to cultural and ethnic issues. There is allowance for the "cultural background, ethnic identity"⁶¹ of prisoners to be taken into account — accordingly, the Department's policies must develop and provide rehabilitative programmes that reduce the risk of offending by ensuring reintegration into the community.⁶² Being transgender or non-binary in gender continues to be a visible part of Māori and Pacific Island communities.⁶³ In Māori society, someone whose gender identity is different from their assigned sex is known to be whakawhine;⁶⁴ in Pacific Island communities they are known as fa'afafine (Sāmoa), mahu (Hawai'i), fakeleiti (Tonga), akava'ine (Cook Islands), vaka sa lewa lewa (Fiji), rae rae (Tahiti) and fafafine (Niue).⁶⁵ It is necessary to note the disproportionate representation of Māori and Pasifika peoples in prisons: 51.3% of prisoners are Māori and 11.5% are Pasifika.⁶⁶ Parliamentary intent is acute to providing broad accommodating measures that ensure the rehabilitation and reintegration of all prisoners. Parliamentary purpose must be observed in relation to transgender prisoners from respective cultural and ethnic backgrounds.

2.4 Further legal concerns

In a study of relevant case law, the National Lawyers Guild and City & County of San Francisco Human Rights Commission concluded that a "genitalia-based classification policy arguably creates administrative problems and potentially opens jails to civil liability."⁶⁷

Such was the case in *Farmer v Brennan*, where a transgender woman was beaten and raped by her male cellmate.⁶⁸ The Supreme Court of the United States found prison officials were liable under the Eighth Amendment for denying "humane conditions of confinement", failing the requirement to "take reasonable measures to guarantee the safety of the inmates" and failing to "protect prisoners

⁶¹ Section 6(1)(b).

⁶² Section 6(c)(i).

⁶³ Human Rights Commission, above n 5, at 25.

⁶⁴ At 25.

⁶⁵ At 25.

⁶⁶ Prison facts and statistics – March 2012 (26 April 2013) Department of Corrections <http://www.corrections.govt.nz/about-us/facts_and_statistics/prisons/ps-march-2012.html>

⁶⁷ Murray Scheel and Claire Eustace *Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail* (National Lawyers Guild and City & County of San Francisco Human Rights Commission, report, July 2002) at 13.

⁶⁸ *Farmer v Brennan* 511 US 825 (1994).

from violence at the hands of other prisoners.”⁶⁹ The Eighth Amendment protects against “cruel and unusual punishment”.⁷⁰

Although to be liable a prison official must have *actual* knowledge that an inmate faces a substantial risk of serious harm, and then disregard that risk by failing to take reasonable measures, prison officials are not “free to ignore obvious dangers to inmates”.⁷¹

The Supreme Court stated:⁷²

[If there is evidence showing] that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past... such evidence could be sufficient to permit a trier of fact to find the defendant-official had actual knowledge of the risk.

Such evidence exists in New Zealand. The Office of the Ombudsman’s report into prisoner health found that “[t]ransgender prisoners are particularly vulnerable to abuse and/or sexual assault, in part because of the general policy of housing them according to their birth gender, regardless of their current appearance or gender identity.”⁷³ This report and specific finding was brought to the direct attention of the Minister of Corrections.⁷⁴

Further, *Gay Express Magazine’s* report that New Zealand prison staff did not act to protect a transgender prisoner — despite having video evidence of her multiple sexual assaults — is deeply disturbing.⁷⁵

⁶⁹ At 1976.

⁷⁰ Constitution of the United States of America, Eighth Amendment.

⁷¹ *Farmer v Brennan*, above n 68, at 1981.

⁷² At 1981.

⁷³ Wakem, above n 2, at 129.

⁷⁴ (29 February 2012) 677 NZPD 667.

⁷⁵ Murphy, above n 1.

3.0 OVERSEAS APPROACHES

3.1 United Kingdom

Background

The United Kingdom (UK) National Offender Management Service Agency Board has released new Prison Service Instructions for the management and care of transgender prisoners,⁷⁶ ensuring correctional establishments comply with provisions pertaining to public bodies in the Equality Act 2010.⁷⁷

The restriction on commencing medical treatment while in prison

Gender dysphoria is the disorder associated with being transgender.⁷⁸ Generally, medical and surgical treatment is available in UK either through the National Health System (NHS) or the private sector.

In terms of prisoners *continuing* medical treatment for gender dysphoria, correctional establishments must provide applicants diagnosed with gender dysphoria the same quality of care they would expect to receive from the NHS had they not been imprisoned.⁷⁹

In terms of *commencing* medical treatment while in prison, prisoners applying to begin hormonal treatment for gender dysphoria are assessed by specialist experts on a case-by-case basis. Such experts take into account the prisoner's circumstances, such as the length of sentence, security categorisation, risk to others, and how those risk factors may be minimised, and ultimately advise the prison doctor on the appropriate course of action.⁸⁰

⁷⁶ National Offender Management Service Agency Board "Prison Service Instructions: The Care and Management of Transsexual Prisoners" (Ministry of Justice (UK), PSI 07/2011, 2 March 2011).

⁷⁷ Equality Act 2010 (UK), s 149(1). The Equality Act 2010, which protects individuals against direct/indirect discrimination and harassment and which designates gender reassignment a protected characteristic, applies equally to the public sector, including prison establishments.

⁷⁸ "Transsexualism" is defined by the World Health Organisation as the "desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex" (International Statistical Classification of Diseases and Related Health Problems (Tenth Revision), ICD 10).

⁷⁹ National Offender Management Service Agency Board, above n 76, at 2.2. The medical treatment should be continued until the applicant's gender specialist has been consulted (see 2.4).

⁸⁰ At A.11.

Convicted prisoners applying for gender reassignment surgery are assessed, inter alia, in terms of risk: risks the applicant may face from other prisoners, risks the applicant may pose to other prisoners, and risks the applicant may pose to the public.⁸¹ Once approved, surgery relating to core commissioned services (such as genital reconstruction) is funded by the NHS. Procedures deemed non-core/cosmetic may require personal funding (such as facial electrolysis or breast augmentation).⁸²

The test for gender classification utilised in housing prisoners

Under the Prison Service Instructions, any correctional establishment must permit prisoners who consider themselves transgender, and who wish to begin gender reassignment, to live permanently as their acquired gender.⁸³

Prison authorities, in determining the appropriate custodial gender classification, will first look to the existence of a gender recognition certificate issued under the Gender Recognition Act 2004. Successful application of such a certificate is not difficult: to qualify, neither surgery nor hormone therapy is required.⁸⁴ The acquired gender appearing on a certificate then becomes, for all legal purposes, the new and valid gender. Placements in prisons must then be determined accordingly.

If the transgender prisoner does not hold a gender recognition certificate, a meeting will be held to determine where the prisoner should be placed — but, “under no circumstances should a physical search or examination be conducted for this purpose.”⁸⁵ This stems from an understanding that the issue to be determined is a legal rather than an anatomical one.

Preventing a prisoner from living fully in the acquired gender, even if the prisoner is not seeking a gender recognition certificate, may open the Prison Management Service to liability under the Human Rights Act 1998 for violation of Article 8 of the European Convention on Human Rights.⁸⁶

⁸¹ At A.12–13.

⁸² At A.14.

⁸³ At 3.2.

⁸⁴ To qualify for a full gender recognition certificate under the Gender Recognition Act 2004 (UK), a person must be 18 or over, be unmarried, be diagnosed with gender dysphoria (unhappiness with their birth gender), have lived as the new gender for two years, and intend to live in their changed gender for the rest of their life. See Gender Recognition Act 2004 (UK), ss 1 – 4.

⁸⁵ National Offender Management Service Agency Board, above n 76, at 4.6.

⁸⁶ At E.19.

3.2 Other jurisdictions

Australia

The various states of the Commonwealth of Australia adopt different approaches to gender classification. These range from the traditional approach of surgical intervention, to the “social-based” approach, which emphasises how a person self-identifies.⁸⁷ There seems, however, to be a shift towards a “social-based” approach, or at least one which combines the social approach with analysis of factors and circumstances surrounding an inmate’s background. This social approach is exemplified in the New South Wales (NSW) corrections policy.

New South Wales

The restriction on commencing medical treatment while in prison

The situation for applications to *continue* hormonal treatment commenced prior to imprisonment is virtually the same as New Zealand, considering the serious medical implications if on-going hormonal treatment is suddenly stopped. Generally, once a clinical review has been undertaken and the application approved, hormonal therapy is then provided to the applicant and funded by the State.⁸⁸

But in contrast to the New Zealand approach, applications to *commence* hormonal treatment or gender reassignment surgery while imprisoned may be made at any time.⁸⁹

As is the situation in New Zealand and the UK, gender dysphoria is a recognised mental condition. Failure to adequately treat transgender prisoners may be a breach of human rights.

The test for gender classification utilised in housing prisoners

The Anti-Discrimination Act 1977 (NSW) provides the definition of a “transgender” person.⁹⁰ It must be noted the definition is based on self-identification, rather than medical intervention or physical attributes. Gender reassignment surgery is therefore an irrelevant consideration.⁹¹

⁸⁷ See Jack Blight *No. 168 Transgender Inmates* (Australian Institute of Criminology, September 2000).

⁸⁸ Corrective Services NSW *Operations Procedures Manual* at 7.23.1.2.

⁸⁹ At 7.23.1.2.

⁹⁰ Anti-Discrimination Act 1977 (NSW), s 38A. To come under the s 38A definition, a transgender person is someone: (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or (b) who has identified as a member of the opposite sex by living as a member of the

New South Wales correctional policy reflects this understanding through formulation of a gender classification framework — broad enough to cover persons protected by the Anti-Discrimination Act 1977 — but also inclusive of those who have their birth certificates amended as a result of surgical intervention.⁹² The NSW Corrective Services Operation Procedures Manual provides that transgender prisoners are to be addressed and classified by the name and gender of their self-identified gender.⁹³ This arrangement has been termed a “presumption”: prisoners are classified as the gender they self-identify with as of “right”. The only exception to this is if the individual case necessitates the transgender prisoner to be placed elsewhere.⁹⁴

United States

The restriction on commencing medical treatment while in prison

Like other jurisdictions, United States prisons are required to maintain hormone therapy for transgender inmates who began treatment before incarceration.

In regard to medical treatment after imprisonment has commenced, decisions have shown that a “freeze-frame” policy should not be adopted: the provision of gender reassignment treatment, whether hormonal or surgical, must be individually assessed and not the result of a blanket rule.⁹⁵

As mentioned above, gender dysphoria is a recognised mental disorder. Although the United States medical system may be distinguishable from the New Zealand one, similar reasoning applies in regard to withholding medical benefits on the grounds of gender dysphoria. In *Doe v State of Minnesota Department of Public Welfare*,⁹⁶ the Supreme Court of Minnesota held that published State policy totally excluding sex reassignment surgery from medical assistance payments was void.⁹⁷ Further, the Court stated that medical assistance benefits cannot be completely denied merely on the basis that the recipients are transgender prisoners: such a denial is “arbitrary and unreasonable”.⁹⁸

opposite sex, or (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex.

⁹¹ See Blight, above n 87.

⁹² A “recognised transgender person” is one who has their birth certificate amended to account for their new acquired gender. See Births, Deaths and Marriages Registration Act 1995 (NSW), Part 5A.

⁹³ Corrective Services NSW, above n 88, at 7.23.1.1.

⁹⁴ Blight, above n 87, at 4.

⁹⁵ See *Kosilek v Maloney* 221 F Supp 2d 156 (D Mass 2002) at 193.

⁹⁶ *Doe v State of Minnesota Department of Public Welfare* 257 NW 2d 816 (D Minn 1977).

⁹⁷ At 820.

⁹⁸ At 821.

The test for gender classification utilised in housing prisoners

Although the United States does not adopt the same “social” approach of self-identification as the UK or NSW, criticisms of the traditional position at the federal level point towards considerations other than surgical intervention being taken into account.⁹⁹

The Federal District Court of Maine, in *Crosby v Reynolds*,¹⁰⁰ held that housing a pre-operative transgender woman with cisgender female prisoners did not violate the cisgender prisoners’ constitutional right to privacy.¹⁰¹ The decision was reached by assessing the risk of physical and psychological harm to the transgender prisoner herself, and the absence of physical risk posed to the cisgender prisoners.¹⁰²

Commentary by Human Rights Commissions and academics have argued that *Crosby v Reynolds* demonstrates that strict segregation by genitalia is not required at the federal level, but that the focus should be on weighing safety concerns.¹⁰³

⁹⁹ Generally, the traditional position is that transgender prisoners with incomplete reassignment surgery are incarcerated according to their sex at birth. See for example *Farmer v Haas* 990 F 2d 319 (7th Cir 1993) at 320; *Meriwether v Faulkner* 821 F 2d 408 (7th Cir 1987) at 410. The transgender women in these cases had all completed breast augmentation surgery, were undertaking hormone therapy, and were living as women; but were placed in male prisons because of their genitalia.

¹⁰⁰ *Crosby v Reynolds* 763 F Supp 666 (D ME 1991).

¹⁰¹ At 670.

¹⁰² At 667.

¹⁰³ Jerry Dasti “Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid” (2002) 77 NYU L Rev 1739 at 1754; Murray Scheel and Claire Eustace *Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail* (National Lawyers Guild and City & County of San Francisco Human Rights Commission, report, July 2002) at 12.

4.0 NEW ZEALAND ADOPTION OF THE UNITED KINGDOM APPROACH

The restriction on commencing medical treatment while in prison

At present, the New Zealand corrections system does not cater for those applying to *commence* medical treatment for gender dysphoria while imprisoned.¹⁰⁴

As discussed above, it is seemingly paradoxical that non-transgender prisoners suffering from mental illnesses are permitted to receive treatment while incarcerated, whereas transgender prisoners diagnosed with gender dysphoria are prohibited from taking steps to access medical treatment.

The current “blanket ban” on applications for the commencement of medical treatment precludes those prisoners who may truly require treatment as a result of their mental condition. The framework adopted in the United Kingdom is pragmatic,¹⁰⁵ moderated, and buttressed by the evaluation of specialist transgender and psychiatric experts, yet also accounting for the entirety of circumstances and risks surrounding a given transgender prisoner. This allows unfounded claims to be filtered out, while also accommodating and treating those who actually require intervention for gender dysphoria.

The test for gender classification utilised in housing prisoners

Adoption of the UK approach as outlined in the 2011 Instructions would resolve issues of discrimination and arbitrariness in the current classification of transgender prisoners in New Zealand. It must be realised that the issue of gender is a legal one, determined not in relation to anatomy, physical attributes, or surgical or hormonal procedures, but one which focuses on the personal dimension of gender reassignment procedures. It is on this foundation that the Equality Act 2010 (UK) extends protection against discrimination and harassment to transgender individuals, regardless of the stage of gender reassignment in which the person is engaged — or indeed where transition has not commenced.¹⁰⁶

The lack of comprehensiveness in New Zealand’s legislative framework pertaining to such a class of prisoners does not justify complacency. There is no domestic equivalent to the Gender Recognition Act 2004 (UK), nor does gender reassignment enjoy the same protection under the New Zealand

¹⁰⁴ Rule M.03.05.02(h) of the Department of Corrections’ Prison Service Operation Manual (PSOM).

¹⁰⁵ See above “4.1 United Kingdom”.

¹⁰⁶ See United Kingdom Equality and Human Rights Commission *Services, public functions and associations: Statutory Code of Practice* (Equality and Human Rights Commission, 2011) at 2.19–2.20.

Human Rights Act as it does under the Equality Act 2010 (UK). However, vindication of such rights does not require drastic Parliament action. Rather, it is for correctional facilities themselves to moderate and regulate their internal processes, including implementing measures to avoid discriminatory policies and practices.

5.0 RECOMMENDATIONS

1. Recognise gender identity is not purely a physical process and cannot be determined through a surgery-based approach alone.
2. Adopt similar provisions to the Equality Act 2010 (UK) stating that prisoners need not have initiated medical treatment to receive protection and recognition of their gender identity. Further, recognise that transgender persons must not be discriminated against or harassed.
3. Provide prisoners diagnosed with gender dysphoria the same quality of care as they would expect to receive through the public health service, including counselling, pre-operative and post-operative care, and continued access to hormone treatment.