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Transgender Inmates

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People who transgress the traditional boundaries of sex and gender pose a challenge for correctional systems. Transgender persons are those for whom sex (physical characteristics) and gender (self- and social-identity) is not always congruent. While there is currently only a small number of transgender inmates in the Australian prison system, these particular inmates are at substantially high risk of assault and/or self-harm. For this reason, it is important that there are appropriate policies and procedures in place for the management of transgender inmates.

Adam Graycar
Director

This paper is a summary of a longer report on the issue of transgender persons and the Australian legal system (which is available on request). The longer report covers the following issues in more detail and explores the role of the common law, international obligations, and legal definitions of sex and gender.

Defining Transgender

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; or
- has identified as a member of the opposite sex by living as a member of that sex; or
- being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex, and includes a person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

Transgender people may be male to female (MtF) or female to male (FtM). The definition in the anti-discrimination legislation also covers inter-sexed people; that is, those people who have both male and female characteristics from birth.

A similar definition to that outlined above appears in the Australian Capital Territory, Northern Territory, and South Australia anti-discrimination legislation, as well as the Commonwealth Sexuality Discrimination Bill. Note that these definitions are largely based on self-identification, not medical intervention. Therefore, a transgender person falls within this definition whether they have had any "reassignment surgery".

In some jurisdictions, birth certificate legislation provides for a new birth certificate to be issued to a transgender person after "reassignment surgery". Statutory definitions of "reassignment surgery" are, however, not currently consistent. In some jurisdictions, any surgical procedure that involves the reproductive organs, that has been carried out for the purpose of assisting the person to be considered a member of the opposite sex, is considered

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"reassignment surgery". Hysterectomy or castration could be enough to satisfy this test. The South Australian Act considers a reassignment procedure to involve "genitals and other sexual characteristics". Where a birth certificate is amended, a person is to be treated as a member of the reassigned sex for the purposes of the law of that state/territory, and others with similar legislation.

Any definition of transgender for the purpose of correctional policy needs to be broad enough to cover individuals protected by the anti-discrimination legislation, as well as those who have had their birth certificates amended.

Occurrence of Transgender Persons

It is notoriously difficult to ascertain the number of transgender people in the population. Overseas studies have estimated a broad range of figures. Bodlund (1996) cites studies indicating 1 for every 12,000–37,000 people for MtF, and 1 for every 30,000–150,000 for FtM. Bourke (1994) cites the figures as 1 for every 40,000 MtF and 1 for every 100,000 FtM. These ratios may vary between countries. However, Beemer (1996) estimates the incidence of MtF and FtM to be approximately equal.

It appears that far fewer FtM individuals come to the attention of medical and legal professionals, making estimates of this group extremely unreliable. This is believed by some to be because FtM individuals are able to "pass" more easily in a social context as men, which leads to fewer social and psychological difficulties (Hage 1995).

Perkins' (1994) study on transgender lifestyles and HIV/AIDS risk suggested that there was a total of about 5,000 transgender people in Australia, with up to half living in New South Wales.

Identified Issues for Corrective Services

It has been suggested that social stigmatisation associated with transgender status often leads to an inability to hold regular employment. Social stigma is also associated with low self-esteem and drug use. These factors combined with the need to self-fund expensive hormones and surgery contribute to the relatively high involvement in crime, particularly prostitution, of transgender people (Perkins 1994)

It is already known that transgender people are at higher than average risk for self-harm and sexual assault in the general population (McGovern 1995; Koranyi 1983). This information, combined with the literature available on transgender inmates, suggests that such persons are at an extremely high risk for self-harm and sexual assault while in custody (Irving 1998). There has been at least one recent case of a death in custody involving a transgender person.

There are several inter-related issues that need to be addressed in correctional policy with regard to transgender inmates.

Choice of Institution: How to determine where particular transgender inmates will be housed within the correctional system, specifically regarding

Table 1: *Prison Policy, Discrimination and Birth Certificate/Recognition Legislation*

	Prison Policy	Discrimination	Birth/Recognition Certificate
NSW	Has comprehensive policy based on self-identification.	Express protection on transgender grounds in *Anti-Discrimination Act* 1977. Also TG vilification.	Yes. Birth cert. Altered based on surgery involving reproductive organs. *Births, Deaths and Marriages Act* 1995.
VIC	Policy under development.	No specific protection. *Equal Opportunity Act 1995* covers "physical features" and "sex". Amendments currently being considered.	Not able to be altered.
WA	Has policy. Based on social approach. Brief mention of FtM.	Bill pending.	Bill Pending.
SA	Has fairly comprehensive policy based on surgical re-assignment.	*Equal Opportunity Act 1984* expressly protects transsexuals.	*Sexual Reassignment Act 1988* requires magistrate to determine. Must have genital surgery, true belief, lifestyle and counselling.
ACT	No Formal policy but several categories for sex. Accommodation based on physical appearance at strip search.	Transsexuality expressly protected. *Discrimination Act* 1991.	Yes. Birth cert. Altered based on surgery involving reproductive organs. *Births, Deaths and Marriages Act* 1997.
NT	Has Policy. Post op to be treated as in community, includes partial surgery.	Express protection under sexual orientation. *Anti-Discrimination Act* 1992.	Yes. *Births, Deaths & Marriages Registration Amendment Act 1997*— reproductive organs.
TAS	No formal policy. Management on a case by case basis.	Not expressly protected but *Sex Discrimination Act 1994* protects "gender" (not defined).	Not able to be altered.
QLD	†	*Anti-Discrimination Act* 1991.	Not able to be altered.

† Queensland corrective services did not respond to inquiries regarding their policy on transgender inmates and is thus not included in this review.

relevant laws and safety concerns during induction and transport.

Self-Harm and/or Sexual Assault: How measures developed to reduce the risk of self-harm and assault to other inmates at identified risk could be applied to transgender inmates.

Hormonal and Surgical Intervention: On what basis hormonal and/or surgical intervention is, or should be, available to inmates.

Need For Statistics—Further Research and Consistent Policy Development: Lack of data collection in this area, how to identify and record the number of transgender inmates, and the need for further research and policy development.

Choice of Institution

In determining whether to "classify" a transgender prisoner as male or female, there are several issues which require consideration. It is clear that a transgender inmate, whether MtF or FtM, who is placed with biologically male prisoners is likely to be at a much greater risk of harm, particularly sexual assault, than those placed within a female institution. Several state and territory correctional departments currently have policies about where transgender inmates should be housed. These policies are not consistent across Australia and, in some cases, are not consistent with a jurisdiction's own legislation. A brief summary of the state and territory legislation and policy is presented in Table 1. Table 2 highlights the inconsistency with which an individual may be treated.

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, places emphasis upon the social aspects of identity; that is, how a person self-identifies. The second approach, which is more akin to the current birth certificate legislation, considers whether surgical intervention has been undertaken. Neither approach gives completely satisfactory results within the correctional context.

The social-based approach is open to criticism that it is too subjective and that individuals may try to "rort the system". The surgery-based approach is also problematic because there is no single agreed standard of surgery amongst the Australian jurisdictions. Furthermore, as anti-discrimination legislation does not require surgery, any correctional policies relying on the surgery-based approach may in fact be in breach of that legislation.

The Northern Territory correctional services policy on transgender inmates demonstrates the difficulty of balancing the two approaches and the inconsistency of a surgery-based approach. Under that policy, those who have not undergone "surgical reassignment" are placed according to the gender assigned at birth. Discretion also exists for the superintendent on medical advice to approve alternative placement. The existence of such broad discretion begins to undermine the supposed "certainty" of a surgically-based approach. The policy then goes on to consider placement of those who have had surgical intervention:

Table 2: *Summary of How Hypothetical Examples Would be Classified by State and Territory Prison Policies and Birth Certificate Legislation*

	NSW Prison	NSW Act	VIC Prison	VIC Act	WA Prison	WA Act	SA Prison	SA Act	ACT Prison	ACT Act	NT Prison	NT Act	TAS Prison	TAS Act	QLD Prison	QLD Act
MtF pre-op	♀	♂	?	♂	♀	♂	♂	♂	♂	♂	♂	♂	?	♂	?	♂
MtF part-op = breast implants and castration	♀	♀	?	♂	♀	♂	♂	♂	♂	♀	♀	♀	?	♂	?	♂
MtF post op = penis and testicles removed, vagina and labia created	♀	♀	?	♂	♀	♂	♀	♀	♀	♀	♀	♀	?	♂	?	♂
FtM = hysterectomy and mastectomy	♂	♀	?	♀	?	♀	♀	♀	♀	♂	♂	♂	?	♂	?	♂

3.3.2 Gender Reassigned

> Any such prisoners are to be placed in a location that corresponds with their reassigned sex; ie, they are to be treated as they would be in the community. This rating would also cater for those persons who have had partial surgery reassignment (breast implants etc) and who would require single cell accommodation.

The concept of how such an individual would be treated in the community overlaps with a socially-based approach. However, the continuing insistence on some form of surgery produces curious results. The following examples highlight the difficulties. A MtF who has been taking female hormones for a reasonable length of time will have some natural breast enlargement (Kirk 1996). These breasts may be enough for the community to consider them as such, but the above policy will only recognise the silicone variety. Similarly, a FtM who had undergone a hysterectomy would seemingly be regarded as male for this policy. Yet, whether or not he had a uterus would not be obvious to the general community.

The Australian Capital Territory Department of Corrective Services records detainees as one of four classifications: male, female, other, or unknown. Classification is based on "physical appearance during strip search". No indication is given on what criteria are required in making up the physical appearance of "male" or "female"—let alone "other" or "unknown". Though the Australian Capital Territory is small in terms of detainee population, this policy is indicative of how "sex" is taken for granted with no real consideration being given to transgender individuals. Such an attitude is likely to prevail in states with no formal policy on transgender inmates. Absence of policy, or policy with unfettered discretion, leaves transgender inmates in a vulnerable position and the particular correctional department open to criticism under anti-discrimination legislation.

An example of the social-based approach is the policy in Western Australia, where it takes into account the following factors when assessing the management of transgender inmates.

- Family background.
- Developmental history including development of sexual identity.
- Recent lifestyle.
- Medical history with particular reference to hormonal and / or interventions.
- Gender identity preference.

According to the policy, post-operative MtF "transsexuals" are to be treated in all respects (other than formal legal status) as female prisoners. Pre-operative MtFs are to be placed at a women's prison with certain measures to be taken regarding sleeping accommodation and showering. This position seemingly provides for placement of transgender inmates, which would be consistent with anti-discrimination legislation. However, this did not exist in Western Australia when the policy was formulated.

The Western Australian policy, like most others, says very little about FtM transgender prisoners leaving their placement entirely at the discretion of the prison administrators without any policy-based guidance.

A different approach is taken by South Australia, whose policy opens with the statement:

> In general at common law, a convicted prisoner retains all civil rights which are not taken away expressly or by implication by statute.

The policy was drafted in response to amendments to the *Equal Opportunity Act* 1984 (South Australia) to include pre- and post-operative "transsexuals".

When addressing the initial placement of transgender inmates, the South Australian policy illustrates the tension between the social-based and the surgery-based approaches. Initial placement is dependent on "operative status"; there is provision for placement to be reviewed within 2 weeks. However, as identified within the wider correctional literature, those first 2 weeks can represent the highest risk period for new inmates. This was recently exemplified by the sexual assault and death in custody of a transgender prisoner within the first 3 days of her incarceration.

New South Wales goes one step further by creating a presumption that inmates will be placed in an institution of their "gender identification" as a *right*, unless if it is determined on a "case management" basis that they should be placed elsewhere. During the initial induction of self-identified transgender inmates, they are to be kept separate from other prisoners. The New South Wales policy is the most recent and most comprehensive, and covers areas such as transport and clothing, which are not discussed in other policies.

According to the New South Wales approach, MtF transgender inmates will be placed in female institutions except where there are over-riding security concerns, presumably to other female inmates. This suggests a lingering concern that "men" will try to get moved to a female institution by "pretending" that they are transgender. This argument does not apply to people who were living as female in the community prior to their incarceration.

According to the New South Wales policy, most FtM transgender inmates will also be placed in female institutions. This is because there are identified safety concerns for such individuals if placed in a male institution. The small number of known FtM inmates have been placed in female institutions. There has been no suggestion that FtM inmates pose any particular risk to the females they are

housed with. By contrast, if FtM inmates were placed with male prisoners, the risk of assault, particularly sexual assault, to the transgender inmate would be extremely high. Few FtMs have genital surgery and such surgery is considered experimental and its results imperfect (Beemer 1996). Thus, it would seem that for FtM transgender inmates, the safest option continues to be placement within a female institution unless special circumstances exist to prove otherwise.

The New South Wales policy treats a transgender person who has had their birth certificate amended conclusively as the new sex, and stipulates that they must be housed as such. For MtF individuals, this would have the effect of placing them in a female institution, the same result as a case management approach would probably have. However, FtM individuals who have altered their birth certificate would be placed in a male institution. To alter a birth certificate, a FtM does not necessarily have to have any genital surgery. Placing such an inmate in a male institution would place them at great danger, and is contrary to the general intention of the policy. New South Wales and other state birth certificate legislation is likely to be binding on corrections authorities as to the "legal sex" of the individual. However, corrective services agencies have the ultimate responsibility for the placement of individual inmates, including the selection of the most appropriate institution for any individual, irrespective of sex.

Self-Harm and Sexual Assault

Considerable research has been undertaken to reduce the risk of harm to other groups of inmates that have been identified as "at risk", particularly Indigenous inmates. Similar principles could be applied to transgender inmates.

However, it should be noted that the recent death in custody of a transgender inmate occurred while she was in "strict protection". This suggests that merely placing transgender inmates "in protection" may not be sufficient.

The New South Wales policy specifies that transgender inmates are to be provided with separate toilet facilities and allowed to shower separately. The policy also identifies some management issues that could be related to helping maintain transgender inmates' self-identity and self-esteem. These include ensuring that staff refer to transgender inmates by their chosen name and gender, and that transgender inmates are allowed to wear gender appropriate clothing. South Australian and Western Australian policies also refer to the importance of addressing transgender inmates in gender neutral or chosen pronouns. For these policies to be effective, appropriate staff training is required.

Hormonal and Surgical Intervention

"Treatment" for "transsexuality" is conventionally described as helping that person to live in their psychological gender by means of hormonal, and sometimes surgical intervention (Bodlund 1996). Whether or not surgical intervention is appropriate in a prison context is controversial. Some reports tend against it on the basis that part of the process for "approval" for surgery is a "real life test" (Petersen et al. 1996). For those already approved for surgery prior to incarceration or serving long sentences, the situation may be different (Perkins 1991).

Regarding hormonal treatment, it is generally agreed that transgender inmates who are already on a hormone program prior to incarceration should continue on that program generally for medical/health reasons. The sudden cessation of hormone therapy can have serious medical consequences.

Prison policies on surgical and hormonal therapies are not consistent across Australia. Hormonal therapies commenced prior to incarceration will generally be continued at the discretion of prison medical services, but commencement of hormones or surgery is not necessarily permitted. In South Australia, hormone therapy may be initiated at the direction of prison medical officers. In New South Wales, inmates may have hormones or "elective" surgery, provided they bear the cost. Note that it is not clear whether all transgender surgeries are considered elective (Koranyi 1983). Where there is no formal policy, it may be presumed that medical treatment of any kind would be in accordance with the general prison policy at the direction of visiting medical officers. Assessment by prison physicians is unlikely to be adequate, as the medical management of transgender people is regarded as a highly specialised field (Hage 1995).

Finally, as transsexuality is a recognised medical disorder, failure by correctional departments to address these issues and to provide adequate treatment could be argued to be a breach of basic human rights standards.

Need for Statistics, Further Research and Consistent Policy Development

It is clear from the definition of transgender adopted in anti-discrimination legislation that self-identification is the key indicator of transgender status. Consequently, there needs to be opportunity for inmates to self-identify as transgender, and for this status to be recorded and respected.

Recent changes to the New South Wales Offender

Management System will allow for the collection of data on the number of transgender inmates in the New South Wales correctional system. Similar changes in other jurisdictions would also allow for a more accurate measurement of the incidence of transgender persons in the Australian correctional system.

There exists an opportunity for all states and territories to review current policies, or to create policies on the management of transgender inmates. The New South Wales policy, with some additional consideration of FtMs, provides a good model with which to start as it addresses a broad range of management issues.

There is also a need for further research on the management of transgender inmates. Ideally, such research would be conducted in conjunction with correctional service agencies, community gender organisations, and medical and legal professionals.

Conclusion

As can be seen from the brief outline of issues above, there is an identified need to have appropriate policies in place for the management of transgender inmates. Transgender inmates present a unique set of issues that, if not appropriately dealt with, could lead to a greatly increased incidence of assault and self-harm in that population. Failure to implement appropriate policies may also amount to a breach of anti-discrimination legislation and / or human rights obligations. Issues that need to be addressed as a priority in correctional policy include choice of institution, classification procedures, measures to reduce risk of assault and self-harm, the provision (or otherwise) of hormonal and / or surgical intervention, as well as the need for a mechanism to identify and record the incidence of transgender persons in the prison population.

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December 1997. After an appearance in a Local Court, bail was refused and Ms M. was remanded in custody. Late on 22 December she was transported to a remand and reception centre where that night and into the morning of December 23 she underwent induction assessment. She was identified as transgender by the welfare officer and it was determined she should go into a "protection" wing. Having spent December 24 in court Ms M. spent December 25 and 26 in "strict protection". During this time she was brutally raped at least twice during daylight hours. The attacks were so vicious that two other prisoners took the unusual step of reporting the incidents and giving sworn evidence. On December 27 Ms M. was found dead in her cell hanging by a shoelace.[1]

[1] Inquiry into a death, Coroner J Abernethy, Wednesday 21 July 1999. Ref: W308 201 / 99 JI-D1.

The views contained in this paper are not necessarily the views of the Attorney-General's Department.

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