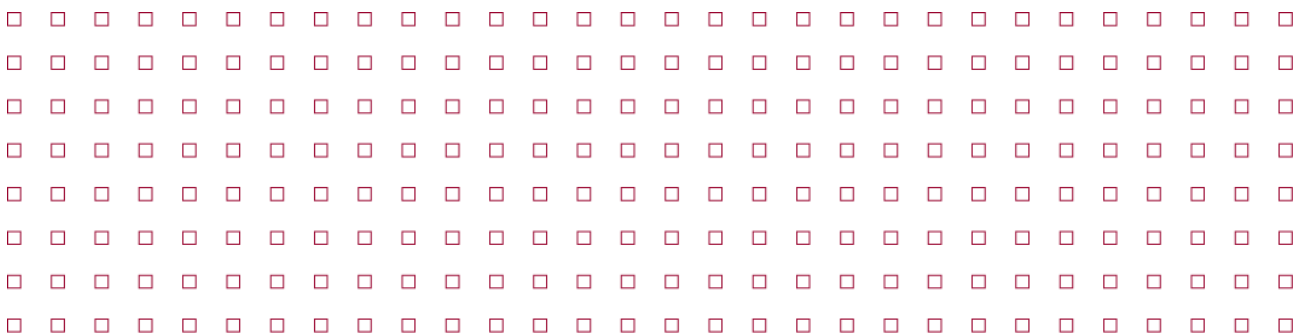




Ministry  
of Justice

# Review on the Care and Management of Transgender Offenders

November 2016



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## Background

The Government is committed to taking action to remove barriers to equality, including transgender equality.

During the autumn of 2015 a number of events linked to transgender prisoners were reported in the media and attracted widespread attention. These coincided with the already-commenced refresh of the National Offender Management Service's (NOMS) policy on transsexual prisoners, but highlighted the need for the policy to be given a more fundamental re-appraisal.

This review was announced on 8 December 2015 with a terms of reference to ensure that the care and management of transgender offenders is *"fit for purpose and provides an appropriate balance between the needs of the individual and the responsibility to manage risk and safeguard the wellbeing of all prisoners"*.

The review's scope was considerably wider than the prison service instruction that, since 2011, has applied to the "Care and Management of Transsexual Prisoners" and its findings apply to all areas of NOMS's offender management, such as its work in courts by the National Probation Service or by community rehabilitation companies for those on community orders. The review also took into account both domestic and international developments in working with transgender people in offender management.

The review was internally commissioned but benefitted from the independent oversight of Peter Dawson (Deputy Director, Prison Reform Trust) and Jay Stewart (Director, Gendered Intelligence). The review gathered evidence from a wide range of stakeholders, including many in the transgender community, and met transgender prisoners serving both long and short sentences.

The review will inform a new NOMS-wide instruction on the management of transgender offenders, to replace the Prison Service Instruction (PSI 07/2011: Care and Management of Transsexual Prisoners).

## Introductory remarks

From the evidence received and the conversations held as part of the review, it is apparent that the treatment of transgender people in courts, probation and prison services has not kept pace with the development of a more general understanding of the issues surrounding gender in society.

Current instructions and practice place an emphasis on gender at birth, the possible acquisition (or desire to acquire) a gender recognition certificate (GRC), and on a person's decision to undergo surgery or undertake other significant medical intervention. While those people with a GRC must be treated in the acquired gender in every respect, it must also be taken into account that not all these factors are equally important to all transgender people. Many successfully live their lives without such interventions and therefore policy in this area needs to evolve and take as its starting presumption a wish to respect someone in the gender in which they identify, once in the care of the criminal justice system.

Allowing transgender offenders to experience the system in the gender in which they identify will, in the great majority of cases, represent the most humane and safest way to act. We believe it will also assist successful rehabilitation.

In the minority of cases where that is not possible, the reasons for departing from this starting presumption must be clear, explicit and made known to the person they affect, especially when it involves assigning someone to a male or female prison. The majority of such cases are likely to concern transgender people convicted of serious offences, where both public protection and the best interests of the person themselves may not be compatible with the general presumption described above. However, this will not be true of all transgender serious offenders and it is important that policy for the majority should not be founded upon the highly complex considerations raised by a minority.

At the time of the review there was very little data available on the number of transgender, non-binary or intersex people entering prison or commencing court orders. Estimates the review heard - of tens rather than hundreds of transgender prisoners - were based on observation rather than any audit or collection from information recorded on case management systems, and therefore they were not sufficiently reliable to be given any real weight. Nobody attempted to estimate the number of transgender people in the larger and lower risk cohort of offenders supervised in the community.

Two planned developments promise to provide a clearer picture; a data collection exercise across the prison estate that was commissioned as the review started, and the planned introduction of an equality information form that includes a question on gender identity, alongside other equality questions.

However, though small in number, transgender people are not difficult to find in prisons and the review's conclusions confirm that, despite the likelihood of the proportion being small, it is a subject that deserves the time and attention of policy-makers and practitioners.

## Underpinning actions and principles

### Gender Identity

People who are living in a gender different to that of their assigned sex at birth should, as a general presumption, be treated by offender management services according to the gender in which they identify.

Clear, reasonable criteria should be applied from the outset for all transgender people who receive a binary (i.e. either a male or female) service from NOMS, where it is required. This process should be free from bias, follow a clear, recorded process and be undertaken by staff who have a sound basic awareness of transgender identity, with access to specialist advice. The transgender person must be fully involved with face-to-face assessment and the giving of reasons both orally and in writing.

There will be circumstances when a transgender person's location cannot be straightforwardly reconciled with their views. This may be due to a lack of evidence (or the presence of counter evidence) relating to the gender in which they identify and/or concerns raised via an assessment of all known risks, indicating they cannot be safely managed in a prison that does match their self-identified gender. Guidance on how NOMS staff weigh evidence and risk should accompany any new instruction.

Decisions on the allocation of transgender people to binary services, especially custody, must include the possibility of a review and rapid remedy if it appears that the initial allocation might have an unforeseen and detrimental impact on the person's mental health or wellbeing, their social integration and access to services, or an impact on safety to themselves or the safety of others.

Decisions to transfer serving prisoners between male or female prisons (or vice versa) should be based on clear criteria, with reasons given for the outcome and appeal processes clearly explained. As part of this process, it will be necessary to factor-in the impact on and risks to those in current or potential establishments especially, for instance, in the women's estate where many prisoners will have been the victims of domestic violence or sexual abuse and may continue to be exceptionally vulnerable.

In any new policy, the operational tests or criteria applied to decision making, including location decisions, need to enable staff to balance the views and wellbeing of the transgender person with the need to ensure the safety and security of other prisoners, prison staff and the prison environment as a whole, including the maintenance of appropriate levels of decency and privacy. Where an assessment made against these tests overrides the person's view on how they should be treated, relevant evidence must be identified and relate to something that could not be reasonably managed if the person was located in a place consistent with the gender in which they identify.

Transfer decisions should, at least while a new policy is being introduced and understood, be taken with specialised or centralised support and outcomes monitored. A centralised process would allow for expertise to develop and for consistency. It will provide a place for the few highly complex cases to be dealt with more swiftly and fairly than they appear to be at present, providing a single point of liaison for specialists from outside the prison

service, and informing the development of policy, including the commissioning of necessary research and analysis.

Regardless of where prisoners are held, they should be respected in the gender in which they identify, being provided with those items that enable their gender expression.

The prison service should develop a single "facilities list" of items available to be purchased that can be used in either male or female establishments, and standardise rules on what constitutes acceptable clothing. As far as possible, the facilities used by transgender prisoners (such as showers) should lend themselves to more easily managing their privacy.

### **Risk and risk assessment**

Any assessment of a transgender offender's risk of reoffending should be based on valid, evidenced factors that relate to that individual, as for any other offender. We have seen no evidence that being transgender is in itself linked to risk. Risk assessments must be free from assumptions or stereotyping.

For a small group, transgender issues can be present and interact at the same time as conditions or disorders including one or some of the following; mental health problems including mental illness and personality disorder, learning disability, and Autistic Spectrum Disorders<sup>1</sup>. Together, issues may have a complex relationship to risk of harm to others, and risk to self.

This group are likely to be longer-serving than other transgender prisoners, requiring policy specific to their needs and circumstances. As with any sexual or violent offender they should continue to be managed through public protection processes. That complexity does not by itself represent a reason to refuse the person the opportunity to live in the gender in which they identify. In the few cases where the risk of serious harm to others may be intertwined with issues of gender identity, central specialised support is required and will facilitate the development of both consistency and expertise.

### **Early and anticipative**

The universal principle that the best outcomes typically rely on anticipation and early intervention holds for transgender offenders.

Some transgender offenders will have existing vulnerabilities (such as mental health or alcohol misuse) and some will become vulnerable as a consequence of finding themselves in criminal justice system. Once identified, transgender people's needs may make them suitable for diversion from court and criminal justice altogether.

For some coming into court or returning to court, it is very likely that some information about them will be available to enable a degree of forward planning.

Where a transgender person is on or awaiting trial, or serving a suspended sentence and there is the possibility of going into custody, or on any form of licence with the possibility of a return to custody, addressing the allocation question early will obviate the need for late-stage decisions by court-based or escort staff. Where possible, case conferences on

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<sup>1</sup> Gender dysphoria is not included as it is a recognised medical condition, and not a mental illness.

allocation decisions should be held pre-sentence and before any decision to remand in custody, and information used in sentencing recommendations and sentence planning.

If necessary, processes should to be slowed by adjournment for reports to be produced, for instance. The requirement to keep vulnerable people safe outweighs the desirability of swift proceedings.

### **Isolation and integration**

Where transgender people are allocated to services that are divided male and female, care must be taken to avoid extreme isolation (such as in Care and Separation Units or in in-patient healthcare units when there is no clinical justification). Being transgender should not be used as a reason to isolate someone without another legitimate reason, and only after reallocation has been considered.

Transgender people, and particularly transgender prisoners, like any other minority group, should be able to have day-to-day contact with peers while remaining to the greatest possible extent integrated with others. Transgender prisoners have friendships and receive support from both transgender and non-transgender prisoners.

NOMS should monitor the distribution of longer-serving transgender prisoners (i.e. those with care and support management plans) and produce a policy that builds on the existing informal clustering of transgender prisoners that seems to account for some concentrations in the estate. These locations should foster inter-disciplinary links to gender clinics. Nationally, they should be recognised and developed as sources of expertise. Specifically in relation to transgender prisoners convicted of sex offences, there should be specialised support in a small number of sex offender prisons (i.e. not the whole sex offender estate), ideally with reasonable access to appropriate NHS facilities in the community.

It is desirable that services provided by community-based transgender support organisations, or other VCS organisations with expertise in the field, should be routinely available to prisoners, both on short or long sentences.

### **Training and expertise**

As part of their wider equality awareness, all NOMS staff should understand the rights of all transgender and non-binary people, and not just those undergoing gender reassignment, through training and e-learning.

Training should equip staff to enable offenders to identify themselves as transgender and to consent to that information to being recorded and shared for the purposes of ensuring their safety and dignity or the safe operation of the service. Staff should understand how to ask people about their preferences, for instance on how be addressed (as he or she), and appropriately respect their wishes. Staff must also understand when, formally and informally, information must not be shared.

Staff should have ready access to factual information about transgender people's experiences and understand how to access further support via line managers, equality managers or the expertise of experienced or specialist colleagues.

Terminology – which is evolving rapidly – should always be respectful and staff should be guided by NOMS on what terms are appropriate.



All staff should understand their responsibility to confront discrimination, bullying or unwarranted attention aimed at transgender people.

Best practice that we have come across has included prisoners and staff being trained together. We recommend this for diversity training generally.

### **Recording and monitoring**

The ambition should be better recording of transgender identities.

Subject to consent and other safeguards (including those in the Gender Recognition Act), information should be shared, especially at points where an individual's vulnerability may be heightened, for instance while being escorted or at their initial reception into custody.

Equality information should be gathered at the earliest stage and disclosure and consent for it to be shared should be encouraged by, for instance, demonstrating transgender inclusion.

A proportion of transgender offenders, particularly those on community orders, may currently choose not to disclose their transgender status and therefore may not be getting the services and support necessary to better support them in their day-to-day life and, importantly, reduce their reoffending in the long term.

### **Policy Review**

To ensure that any new operational policy is fit for purpose and being correctly implemented an Advisory Group on transgender people in custody or subject to community supervision should be established, initially for three years. The terms of reference will explicitly include transgender people's safety and high-level monitoring of allocation and transfer processes.

The Group will include, among others, representatives from transgender advocacy groups, NHS and clinical experts, youth justice, inspecting and scrutiny bodies, and offender management practice experts.

The board's chair will be identified by the NOMS equality sub-committee (including a NOMS non-executive) and will be an existing public servant. The Board will report at least annually to the minister in the Ministry of Justice responsible for equalities on the implementation of new instructions, trends and recent developments, and matters involving other departments and services outside the Ministry of Justice. The Advisory Board's remit should cover issues where we think further policy attention needs to be trained because our current understanding is limited; specifically the experiences of transgender young people in the youth justice system or at risk of offending, and intersex and non-binary people.



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