

Guidance on Prisoners who are Transgender

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Document History

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1. Purpose of this guidance

1.1 The purpose of this guidance is to:

- Assist Parole Board members in achieving equality of outcome for prisoners who are transgender
- Provide a definition of relevant terms
- Provide practical guidance for cases involving prisoners who are transgender
- Signpost HM Prison and Probation Service (HMPPS) policy in the care and management of transgender prisoner
- Indicate some relevant legislation
- Suggest sources of additional advice

2. Key Messages

2.1 The key messages conveyed by this guidance are:

- The decision to transition to a different gender is not taken lightly and is a legitimate life choice
- Transgender individuals can face discrimination, prejudice and bullying
- Being transgender is a protected characteristic under the 2010 Equality Act; it is, therefore, against the law for prisoners who are transgender to be treated less favourably than other prisoners within the parole process as a result of this characteristic¹
- The protected characteristic (gender reassignment) relates to any person who is undergoing, proposing to undergo or has undergone a process (or part of a process) of reassigning their sex/gender. This definition has a broad scope under the 2010 Equality Act, as it refers to a personal process of moving from the birth sex to the preferred gender, rather than to a medical process
- An individual is not required to have undertaken medical or surgical interventions, or have gained a Gender Recognition Certificate, to acquire their new gender and/or protection under the 2010 Equality Act

¹ Please refer to the Parole Board Guidance on Protected Characteristics for further information on the Equality Act 2010.

- Any assessment of the significance of gender dysphoria or transitioning for risk and risk management must focus on the relevant factors in an individual case not an individual's identity as transgender
- In the parole process, prisoners must be addressed by their preferred title and name
- Gender appropriate language must be used for prisoners both in hearings and in writing

3. Relevant Definitions and Terminology

Acquired gender	A legal term referring to the gender that a person who is transgender lives in and presents to the world (one not formally assigned at birth)
Affirmed gender	The acquired gender to which a person has transitioned through formal gender reassignment, usually by attaining a Gender Recognition Certificate
Body dysmorphic disorder	An obsessive preoccupation that some aspect of appearance is severely flawed, this is not the same as gender dysphoria
Cisgender	People where gender perception is congruent with sex appearance and gender assigned at birth
Cross-dresser	Someone who dresses in a way that is congruent with a male or female appearance at odds with their gender
Dysmorphia	See body dysmorphic disorder
Dysphoria	See gender dysphoria
Gender binary	Categorising people as male or female without allowing for or recognising other experiences of gender
Gender dysphoria	Psychological distress due to a mismatch between biologically determined sex (assigned at birth) and personal gender identity
Gender fluidity	Variation in gender identity over time: see also gender variance and polygender.
Gender identity	Sense of self as a male, female, non-binary person or another gender
Gender reassignment (gender confirmation)	The process of transitioning from one gender to another: "gender confirmation" may be a preferred term
Gender Recognition Certificate	Legal recognition in the acquired gender under the Gender Recognition Act 2004
Gender variance	Behaviours and interests outside those considered "normal" for an assigned or biologically determined sex: see also gender fluidity

Hermaphrodite	Not a term to be used: see intersex.
Intersex	Physical characteristics intermediate between the sexes or underdeveloped sex characteristics
Misgendering	Not correctly reflecting the gender with which someone identifies: using an unsuitable pronoun or form of address
Non-binary person, gender neutral, non-gender, third gender, gender queer, gender non-conforming	Description of someone not subscribing to a binary approach to gender, who identifies as neither male nor female or relates to both or neither
Polygender	Experience of multiple gender identities, either simultaneously or varying over time: see also gender fluidity
Sex (physical sex)	Category (male or female) in which a person is registered at birth on the basis of external genitalia
Trans	The full spectrum of gender variance, gender non-conformance, gender diversity and atypical identities
Prisoners who are transgender	Umbrella term for prisoners who experience gender dysphoria, express themselves beyond their assigned sex, and show a consistent desire to live permanently in the gender with which they identify
Transsexual	Another term for the legally protected characteristic of being transgender. However, this term is not used as it implies anatomical characteristics and fails to acknowledge a whole-person perspective or experience
Transition	Social and/or medical journey taken by a person who is transgender from assigned to acquired gender
Transvestite person	Someone who adopts an appearance normally associated with the other sex (not necessarily all the time) but who does not desire to live permanently in that gender: see also cross-dresser

4. Practice Guidance for Parole Board Members

Background

- 4.1 Prisoners who are transgender may be at any stage of transition when they are subject to the parole process. Acknowledgement of transgender identity does not depend on physical interventions having been undertaken or on any particular stage of transition having been achieved. Although individuals may have expressed a consistent desire to live permanently in the gender with which they identify, and have been formally recognised by the prison (and probation) authorities as being transgender, they may not have had interventions such as hormone treatment or surgery and may not wish to do so.
- 4.2 During childhood, adolescence and/or adulthood, some individuals experience gender dysphoria: that is a sense of discomfort or distress because there is a

mismatch between the sex assigned at birth and the individual's gender identity. This is sometimes known as gender identity disorder, gender incongruence or transgenderism. Sometimes this is described as people who are transgender feeling that they are living 'in the wrong body'. 'Gender identity disorder' is no longer a preferred term as it implies a pathology or psychological abnormality. ACAS (2017) points out that: *gender dysphoria is a recognised medical condition in the 5th edition of Diagnostic and Statistical Manual of Mental Disorders (DSM-V).*² *Some criticise this because they think it conflates gender disorder with a pathological disorder.* The Parole Board at present views gender dysphoria as a psychological condition and not an exclusively psychiatric or medical state. Gender dysphoria is not recognised as mental illness by the World Health Organisation.

- 4.3 Gender dysphoria is not the same as body dysmorphic disorder which is classed as a psychiatric disorder. Gender dysphoria is a fundamental experience of being in 'the wrong body' while body dysmorphic disorder involves cognitive distortions in relation to one part of anatomy or body shape.
- 4.4 Some individuals may decide that gender dysphoria is best resolved by changing their identity and appearance to live in the other gender. The experience of gender dysphoria can be confusing and psychologically difficult – as can trying to fit into the 'wrong gender'. The decision to change gender is a profound one: relationships with family and friends may be affected; there are many practical and legal consequences; medical treatments, if taken, can have unpleasant side-effects. In short, this is not a decision that is taken lightly.
- 4.5 The process of changing gender is referred to as 'transitioning' as the person moves from their assigned gender to what is referred to in law as their 'acquired gender'. Sometimes this gender will be legally 'affirmed' by the acquisition of a Gender Recognition Certificate. Medical, or surgical, interventions do not have to have been completed for a different gender to be acquired or affirmed. Surgical interventions are not permitted in custody.
- 4.6 A transgender woman (or trans woman) is a person who was assigned in the male sex at birth and who has a female gender identity. A transgender man (or trans man) is a person who was assigned in the female sex at birth who has a male gender identity. These definitions apply whether or not surgery has been or is actively sought. Parole Board members might come across the shorthand FtM and MtF for female-to-male and male-to-female transgender status but these terms are regarded as disrespectful. Trans man and trans woman are preferred.
- 4.7 During the MCA process or in preparing for an oral hearing, Parole Board members may recognise offenders who are transgender if they are shown to have elected to change their legal name or are noted in the dossier as pursuing legal recognition of the gender they identify with. However, for a prisoner who has already achieved a Gender Recognition Certificate, records should already have been updated to reflect the legal name. If an offender has legal protection under the Gender Recognition Act 2004 but has provided written consent for disclosure of previous gender, original names may remain on the record.

² Gender Identity: Terminology (ACAS August 2017)

4.8 Members may also be made aware of transgender status by reports in the dossier indicating that the prisoner is undergoing transition or referring to the person in a name inconsistent with birth sex (as signified by the name on the case record). The Parole Board may not have the full information concerning identity, intentions or stage of transition. Out of courtesy and respect, however, the assumed name and form of address indicated in the dossier should be used. The consequences of doing otherwise may prove significant in terms of apparent unfairness, perceived prejudice and/or procedural challenge.

Writing decisions and directions

4.9 When drafting written directions or reasons, Parole Board members will communicate respect for transgender individuals' identity. This applies at any stage of transition once the criminal justice system has recognised the prisoner's wish to be treated in the acquired gender. Parole Board Members will therefore:

- Always draft directions or reasons in the appropriate form of address by using Ms for trans women or Mr for trans male prisoners
- Where the case continues to be logged and tracked in the prisoner's original name and prison number, use a convention in document headings and filenames such as Peter Jackson/Penny Jones or Peter Jackson aka Penny Jones
- If writing about the prisoner in the third person, consistently use pronouns appropriate to the acquired gender and double-check documents for drafting errors
- Avoid using inverted commas (for example, "Ms Smith") as to do so could be taken to imply scepticism, prejudice or discourtesy concerning transgender status
- Avoid referring to transgender status in decision letters, unless the offender's gender identity is essential to the case

4.10 In directing psychiatric or psychological assessments to aid the Parole Board panel in risk assessment and considering the question of risk management, gender dysphoria, or its links with transgender status, should not be the focus of the directions as though this itself were a pathology or mental illness. As in any other case, the directions will focus on the purpose and desired outcome of the assessment requested in terms of risk. In the event of uncertainty, Members directing reports can seek the advice of co-panellists, experienced colleagues, or specialist members of the Parole Board who have been nominated to offer guidance.

4.11 Very exceptionally, and only where a prisoner's transgender status or progress in transition is at question and is firmly central to the question of risk, a Member

may direct that reports are submitted by the gender clinic where the individual has been registered. This is unlikely to be necessary because HMPPS will have carefully categorised the prisoner's current status and should be able to report on treatment matters. An individual's consent is needed for the release of medical information.

- 4.12 If application is made under transparency arrangements for explanation of a panel decision, consideration may need to be given to whether there should be reference to transgender status. In such cases, it is essential that the Parole Board does not disclose protected information acquired in an official capacity about the gender history of the holder of a Gender Recognition Certificate to a third party without the consent of the person who is transgender. Personal information about the offender, such as the fact of transitioning or having transitioned during a custodial sentence, should be considered as protected information.

Conducting Hearings

- 4.13 Concerns for the safe management of prisoners who are transgender may lead to them being located in the Vulnerable Prisoner Unit (VPU) of the prison. Parole Board members and particularly oral hearing chairs will be attentive to implications for staging the hearing (including arrangements the establishment will make in getting the prisoner to and from the hearing room). The panel will also need to take account in its decision-making of any limitations on access to employment, visits or offending behaviour interventions caused by location on a VPU.
- 4.14 When addressing the prisoner at a hearing, the conventions outlined in the previous section should be used. If there is any doubt, the panel should take the opportunity to check with the prisoner in person what form of name and term of address is preferred. This may require:
- Confirming at the appropriate point during introductions, how the prisoner wishes to be addressed in the hearing, then using the chosen name and gender-appropriate form of address
 - Being prepared for the prisoner to possibly look and sound different to your preconceptions of how a person of that gender would usually appear
 - Asking sensitively what the prisoner would prefer to be called formally in Parole Board decision letters or adjournment notices
- 4.15 During hearings, Parole Board Members will additionally be concerned to:
- Show no negative reaction to the prisoner's choice in relation to gender
 - Avoid questioning the prisoner's choice in relation to gender identity or the implications of that choice
 - Adhere to the preferred form of address throughout the hearing whether talking, or referring, to the prisoner

- If needed, correct any colleague or other participant at the hearing to ensure all present adhere to the chosen form of address
- If possible and appropriate, check with the prisoner whether family members, victims and others are aware of a change of name or identity and whether formal consent is given to use or disclose an acquired identity in future Parole Board correspondence and documentation
- Embed the prisoner's answers and preferences clearly and appropriately in the panel's reasons to guide colleagues and officials in future
- Avoid expressions such 'suffering from', 'facing' or 'battling' gender dysphoria as such expressions imply pathology and can undermine the individual's experience
- Avoid phrases such as 'wishes to be seen as' or 'prefers to be called' as these could imply that the prisoner's experience of having been assigned to the wrong gender is not genuine
- Use the adjective "transgender" rather than 'transgendered', as the latter suggests being subject to an externally imposed process

4.16 To avoid unfair treatment and adversely affecting the quality of evidence the prisoner gives, Parole Board Members will also avoid:

- Challenging someone's conviction that the sex they were assigned at birth was wrong for them
- Defining someone's condition or experience for them
- Referring to, asking or speculating about physical anatomy
- Asking directly whether people consider themselves male or female or to what gender they assign themselves as though binary systems *must* apply to gender
- Enquiring about sexual interests, intentions in relation to transitioning or onset of gender dysphoria – unless seen to be directly related to the assessment of risk of serious harm

4.17 If a panel member makes a mistake by referring to someone by using a pronoun or form of address that does not correctly reflect their acquired gender, an immediate, simple apology is appropriate.

4.18 There will often be no link between a prisoner's transgender status and factors that increase the likelihood of reoffending or risk of serious harm. However, Parole Board panels may exceptionally have to address a prisoner's transgender status

if they consider this has a direct bearing on risk. For example, the evidence may indicate that the risk of serious harm significantly increases when the prisoner's emotional state is heightened within the process of transition or increases in the acquired gender. In these circumstances, the focus will be on the risk factors and the circumstances in which these might increase, not on the prisoner's transgender identity as such.

- 4.19 Gender dysphoria may co-exist with symptoms of personality disorder, mental illness, self-harm, substance abuse and poor emotional regulation. Parole Board panels will be concerned to separate out the issues in such cases and only explore those that relate to risk assessment and management.
- 4.20 Panels can expect that, in proposing risk management plans, the probation service will take account of any additional elements required by those who are transgender, for example: whether exclusion zones need adjustment for attendance at medical appointments or whether facilities and interventions are gender-specific.

5. HMPPS Practice

- 5.1 According to the HMPPS Offender Equalities Annual Report (2018/2019)³, in 2019 there were 163 prisoners who are transgender (an increase on the figure of 139 recorded in 2018). Of those, 129 prisoners reported their legal gender as male, 32 as female and two did not state their legal gender. There were ten prisoners who are transgender from a BAME background. The Report also provides the following as a result of a data collection exercise in April and May 2019:
- *"62 of the 121 public and private prisons (51%) in England and Wales said that they had 1 or more transgender prisoner.*
 - *There were 163 prisoners currently living in, or presenting in, a gender different to their sex assigned at birth and who have had a local transgender case board.*
 - *Of these, 129 reported their legal gender as male, 32 reported their legal gender as female and 2 did not state their gender. When asked about the gender with which the prisoner identified, 130 identified as female, 20 as male and 13 did not provide a response.*
 - *Prisoners were asked to specify another identity and 88 gave a response. 15 identified as gender-fluid, 8 as Transvestite, 7 as intersex, 6 as non-binary and the remaining 51 gave preferred not to say.*
 - *10 of the 163 prisoners reported their ethnic group as Black, Asian and Minority Ethnic Group and 152 as White, with 1 unknown.*

³ The HMPPS Offender Equalities Annual Report (2018/2019) was published in November 2019. The annual data collection exercises can be found in the HMPPS Annual Offender Equalities Report. Due to Covid-19 figures were not provided for the Annual Report 2019/2020.

- *There were 34 transgender prisoners in women’s prisons: 30 reported their legal gender as female and 4 as male. When asked about the gender with which the prisoner identified, 11 identified as female, 20 as male and 3 did not provide a response.*
- *There were 129 transgender prisoners in men’s prisons: 2 reported their legal gender as female and 125 as male, with 2 not providing a response. When asked about the gender with which the prisoner identified, 119 identified as female, 0 as male and 10 did not provide a response.*
- *Based on this exercise, there were 2 transgender prisoners reported per 1,000 prisoners in custody”.*

- 5.2 The HMPPS has a Policy Framework - The Care and Management of Individuals who are Transgender⁴ (The Policy Framework). In January 2020, HMPPS issued The Care and Management of Individuals who are Transgender: Operational Guidance. The Policy Framework replaces and builds on PSI 17/2016. A link to the HMPPS Policy and Operational Guidance is provided in section 7 below.
- 5.3 A core component of the Policy Framework is the Local Board process. All individuals in the care of HMPPS who disclose their transgender status must have an initial Local Case Board which aims to address their care and their management. Where risks are identified, an individual’s case may be escalated to a Complex Case Board.
- 5.4 The Operational Guidance (see paragraph 5.2) states that, *“...All transgender individuals, irrespective of whether they are located in the estate which matches the gender with which they identify, must be allowed to express the gender with which they identify. However, decisions to locate individuals who are transgender in prisons that do not match their legal gender can be made only on the recommendation of a Complex Case Board. This board will take into account risk factors to the individual and risk to others”⁵.*
- 5.5 Under the Operational Guidance, prisoners who are transgender must be able to dress in clothes consistent with their acquired gender. This may be subject to risk, operational and security assessments. Establishments are also encouraged to provide prisoners who are transgender access (subject to risk assessments) to special garments or prosthetics to help them present in a more feminine/masculine appearance.
- 5.6 Under the Policy Framework, establishments, *“Must ensure that individuals who have been diagnosed with gender dysphoria have access to the same quality of care (including counselling, pre-operative and post-operative care and continued access to hormone treatment) that they would expect to receive from the NHS if they had not been sent to prison or youth custody”⁶*

⁴ Implemented on 31st October 2019

⁵ Please see section 1 of the HMPPS Operation Guidance

⁶ Paragraph 4.78 of the Policy Framework.

- 5.7 Local Case Boards are held where a Pre-sentence Report (PSR) is being prepared if possible or otherwise within 14 calendar days from the point an individual discloses their transgender status and/or at any point a prison or Approved Premises (AP) receives someone into their care. Review Boards are held at predetermined points or if there is a significant change in circumstances or risk. As stated above, only Complex Case Boards can authorise a transfer to a part of the opposite gender estate. The Policy Framework sets out: factors to be taken into account by Boards in assessing the potential risks to the individual and presented by the individual; circumstances in which an individual's previous gender can be disclosed; and recording practice in relation to legally recognised gender.

6. Relevant Legislation

6.1 European Convention on Human Rights

Article 8 ECHR asserts the right to respect for private life. Private life has been stated by the European Court of Human Rights to encompass physical and psychological integrity; physical, personal and social identity; gender identification; name; sexual life and sexual orientation; personal autonomy and lifestyle. Case law indicates the right to self-determination includes entitlement to shape and definition of one's identity through personal choices.

Article 14 ECHR requires that all rights and freedoms set out in the Convention must be protected and applied without discrimination. This means not being treated less favourably than another person in a similar situation when this treatment cannot be objectively and reasonably justified. For example, a prisoner at a parole hearing who is misgendered or otherwise feels procedures or decisions have been skewed by gender issues may feel discriminated against by the Parole Board panel.

6.2 Human Rights Act 1998

Article 12 of the European Convention on Human Rights states men and women of marriageable ages have the right to marry and to found a family. Together with Article 8, this prevents the criminal justice system seeking to interfere with a person's personal autonomy and preventing that person from living fully in the gender with which they identify, even if they are not seeking legal identification through a Gender Recognition Certificate. The case of *Goodwin and I v UK* (2002) ruled that refusal to recognise a person's acquired gender constituted a violation of Articles 8 & 12 and may contravene the Human Rights Act. However, obstruction may be lawful as long as it is in pursuit of a legitimate and lawful aim and is necessary and proportionate.

6.3 *Equality Act 2010*

The Act aims to safeguard people with protected characteristics. Section 149 created a Public Sector Equality Duty on public authorities to have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; and to advance equality of opportunity and foster good relations between persons who have a relevant protected characteristic and those who do not share it. Protected characteristics include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. People who are transgender have the protected characteristic of gender reassignment through proposing to undergo, undergoing or having undergone a process (or part of a process) of transition by changing physiological or other attributes of sex. Please refer to the Guidance on Protected Characteristics for more information.

6.4 *Gender Recognition Act 2004*

The case of *Goodwin v UK (2002)* precipitated the Gender Recognition Act 2004 and creation of the UK system of gender recognition panels and certification. The Act provides a mechanism to allow people to obtain legal confirmation of their acquired gender in a Gender Recognition Certificate which is used to create a new birth certificate. The Gender Recognition Certificate provides legal proof of gender change. To obtain certification, you must have reached age 18, been diagnosed with gender dysphoria, lived in the gender you identify with in the UK for at least two years, and have an intention to live in that gender for life. The process is lengthy, costly and not a necessity for day-to-day living. It also requires divorce, dissolution or annulment of any existing marriage or civil partnership.

Section 22 of the Gender Recognition Act 2004 created a criminal offence of unauthorised disclosure of protected information. This refers to information acquired in an official capacity about the gender history of the holder of a Gender Recognition Certificate which is disclosed to a third party without the consent of a person who is transgender. There are exceptions to this rule – such as disclosing information for medical purposes or for obtaining legal advice – but these do not impinge on the Parole Board.

The Government undertook a review and public consultation about changes to the Gender Recognition Act during 2018.

6.5 *Data Protection Act 2018*

Details relating to a prisoner's gender transition or transgender status are likely to be sensitive personal data as defined in legislation. The 1998 Act set out the circumstances in which sensitive personal data can be used or transmitted. This includes information about an individual's gender history or gender reassignment. Explicit consent from the prisoner would be required for that data to be shared without restriction unless a condition in schedule 3 applies. The prison service uses the Equality Information Form to record prisoners' consent. The 2018 Act updated and repealed the 1998 legislation, bringing provisions into the digital age and

empowering people to take control of their data and resist inappropriate requests for personal information. It parallels but does not fully equate to the EU's General Data Protection Regulation which was also enacted in May 2018. The Regulation and the 2018 Act grant rights to be informed and have access to recorded data with entitlements to rectify, erase or restrict processing of relevant information.

6.6 *Relevant case law*

In the case of *R (E) v Ashworth Hospital Authority (2001)*, the court ruled that the hospital had the implied statutory powers to decide what detained patients wore. The institution had valid security concerns and therefore a legitimate aim to place restrictions on freedom to dress and assume the appearance of a woman.

In the case of *R (Green) v SS for Justice 2003*, the court held that the prison governor had acted reasonably in forbidding access to various female items in a male prison (including wigs and prosthetic devices) because of justifiable security considerations.

7. Further Reading

Parole Board Members may find the following links helpful in seeking further information about sources of support for transgender prisoners.

- Ministry of Justice - The Care and Management of Individuals who are Transgender (implemented on 31st October 2019) Policy Framework and the Operational Guidance (January 2020).

<https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>

- Prisoners' Advice Service: A Prisoners Guide to Trans Rights

<http://www.prisonersadvice.org.uk/wp-content/uploads/2020/11/PAS-TRANSGENDER-TOOLKIT-PDF-VERSION.pdf>