



## BRIEFING PAPER

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# Transgender Prisoners

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## Summary

In November 2016, the National Offender Management Service (NOMS) published a revised policy on transgender prisoners.<sup>1</sup> NOMS had initiated a review of the issue early in 2015. However, late in 2015 its scope was broadened following the deaths of two transgender inmates, and another case where a transgender woman was first sent to a male prison, but was later transferred to a women's prison after a public petition.

2011 policy guidelines for England and Wales had stated that prisoners should normally be located in the prison estate of their gender as recognised by UK law. For transgender prisoners, a Gender Recognition Certificate (GRC) would normally be necessary before a person could be placed in a prison corresponding to their acquired gender. However there was some flexibility for trans prisoners who were "sufficiently advanced in the gender reassignment process".

The Women and Equalities Committee looked at the issue of transgender prisoners as part of their wider report on [Transgender Equality](#), published in January 2016. The Committee said there was a "clear risk of harm" where trans prisoners are not located in a prison "appropriate to their acquired/affirmed gender".

The Government published a report on their policy review in November 2016 which acknowledged that the treatment of transgender people in the criminal justice system had not kept pace with wider social views. Whilst earlier 2011 guidelines had emphasised the role of GRCs and medical interventions, the report noted that many transgender people successfully lived their lives without these. The new policy needed to "take as its starting presumption a wish to respect someone in the gender in which they identify".

The new policy guidelines, [Prison Service Instruction 17/2016](#) state that "all transgender prisoners (irrespective of prison location) must be allowed to express the gender with which they identify". Such prisoners must be asked their view of the part of the prison estate that reflects this; however a decision to locate them in a prison which does not accord with their legal gender can only be made following a Transgender Case Board. Those who wish to be placed in a prison location which is not consistent with their legally recognised gender must provide evidence of living in the gender with which they identify. Assessments will be made on a case by case basis.

Also in November 2016, the Ministry of Justice published the first official statistics on transgender prisoners. A data collection exercise in March/April 2016 showed that there were 70 transgender prisoners in 33 of the 123 public and private prisons in England and Wales.

A Ministry of Justice report published in November 2017 said there were 125 transgender prisoners in England and Wales who had had a local transgender case board when data was collected in March/April 2017. 47 of the prisons in England and Wales said that they had 1 or more transgender prisoners.

In Scotland, policy guidelines state that the social gender in which the prisoner is living should be fully respected, regardless of whether or not they have a GRC.

The Northern Ireland Prison Service has no recent record of any prisoners who have self-identified as transgender. Their needs would be considered on a case by case basis, to include arrangements for where they would be accommodated and how they would engage in the prison regime.

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<sup>1</sup> On 1 April 2017 NOMS became Her Majesty's Prison and Probation Service (HMPPS)

# 1. The law

## 1.1 The Equality Act 2010

[Section 149](#) of the Equality Act 2010 creates a duty for public authorities to have due regard, in the exercise of their functions, to the need to:

- eliminate discrimination, harassment, victimisation and other prohibited conduct
- advance equality of opportunity between people who share a “protected characteristic” and those who do not
- and foster good relations between people who share a “protected characteristic” and those who do not.

Gender reassignment is a “protected characteristic” under the *Equality Act 2010*

Protected characteristics are listed in [section 4](#) and include sex, sexual orientation and gender reassignment.<sup>2</sup> The Equality and Human Rights Commission has published resources on the [Public Sector Equality Duty](#) under the *Equality Act 2010*.

## 1.2 Gender Recognition Act 2004

Under the [Gender Recognition Act 2004](#), people across the UK may apply to the Gender Recognition Panel for legal recognition of their acquired gender.<sup>3</sup> Applicants who fulfil the legal requirements will receive a full Gender Recognition Certificate (GRC). There are various routes to this (see [Apply for a Gender Recognition Certificate](#) on the Gov.UK website) but essentially the certificates are mainly given on the basis of having (or having had) gender dysphoria and living in the acquired gender; it is not necessary to have had surgery or hormone therapy.

People can apply for a Gender Recognition Certificate. However not all transgender people do this.

Not all transgender people who live in the gender they identify with will have obtained this legal recognition. Many transgender people spend years without a GRC.<sup>4</sup>

<sup>2</sup> The following characteristics are protected characteristics—age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation

<sup>3</sup> Commons Library Research Paper 04/15 [Gender Recognition Bill \[HL\]](#) (17 February 2004) discusses the Bill that became the Act.

<sup>4</sup> Michelle O’Toole, [“Ministry of Justice declines to intervene after trans woman sent to male prison”](#), *Pink News*, 27 October 2015

## 2. Transgender prisoners in England and Wales

### 2.1 How many transgender people are in prison?

Until recently there were no official statistics on the number of transgender prisoners. In November 2016, however, the Ministry of Justice published the results of a data collection exercise conducted in March/April 2016.<sup>5</sup> At this time there were 70 reported transgender prisoners held in 33 prisons in England and Wales.

The Ministry of Justice now provides an annual estimate of the number of transgender prisoners. The November 2017 report states that a data collection exercise in March/ April 2017 found there were 125 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. 47 of the 124 public and private prisons (38%) in England and Wales said that they had 1 or more transgender prisoners.<sup>6</sup> The Ministry of Justice report says that these estimated figures are likely to underestimate the true number of transgender prisoners, noting that there may be some transgender prisoners who have not declared that they are transgender or had a local transgender case board, and some who have a Gender Recognition Certificate.

A Ministry of Justice report says that in March/April 2017 there were 125 transgender prisoners in 47 prisons in England and Wales

### 2.2 2011 policy guidance

Prison Service Instruction on Care and Management of Transsexual Prisoners (PSI 07/2011) said that in most cases, prisoners must be located according to their gender as recognised by UK law. So, generally, it was necessary for a transgender prisoner to have a GRC to be accommodated in a prison of their acquired gender. However, the guidance allowed for discretion. Even if the law did not yet recognise the trans-prisoner's acquired gender, they could be placed in the estate of that gender if they were "sufficiently advanced in the gender reassignment process".

The guidance also provided that:

- prisoners wishing to undergo gender reassignment had to be allowed to live permanently in their preferred gender, including access to clothes and make up;
- a change of name which is genuine and permanent must be allowed.

If a transgender prisoner did not have a GRC, there would have to be a case conference.

The 2011 guidance said that most prisoners should be located according to their legally recognised gender, but it allowed for some flexibility.

<sup>5</sup> Ministry of Justice [Prisoner transgender statistics: March to April 2016](#), 9 November 2016

<sup>6</sup> Ministry of Justice, Statistics Bulletin: [National Offender Management Service Annual Offender Equalities Report 2016/17](#), 30 November 2017

## 2.3 Cases reported in the media in 2015

In October 2015, the media reported the case of Tara Hudson, a transgender woman who was at first sent to Bristol, a male prison, but, after a public petition and remarks from the judge at her appeal against sentence, was later transferred to a women's prison.<sup>7</sup> It was later reported that Ms Hudson had been released early.<sup>8</sup>

Cat Smith asked the then prisons minister Andrew Selous why it had taken so long to transfer Ms Hudson to a women's prison. In reply, he declined to discuss Ms Hudson's case in detail but referred to NOMS's commitment to equality and diversity and the room for discretion in the policy guidelines:

I cannot comment on the details of Ms Hudson's case, but I can assure the House that she is being held in an appropriate environment and is receiving the care that she needs for legal reasons. The National Offender Management Service incorporates equality and diversity in everything that it does and treats offenders with decency and respect. The guidelines allow some room for discretion in such cases, and senior prison management review the circumstances in the light of medical and other expert opinion to ensure that we get these issues right. More generally, prisoners who are in transition to their acquired gender are entitled to live in that gender.<sup>9</sup>

Not long after this, the media reported the case of Vicky Thompson, a transgender woman who had been found dead in Leeds (Armley) prison.<sup>10</sup> In December 2015, it was reported that a transgender woman, Joanne Latham, had been found unresponsive and had subsequently died at Woodhill prison's Close Supervision Centre.<sup>11</sup>

All deaths in prison custody are investigated by the [Prisons and Probation Ombudsman](#)

## 2.4 Review of policy guidance

In November 2015, Caroline Dinéage, then a junior justice minister, reiterated the existing policy and confirmed that it was under review:

Prisoners are normally placed according to their legally recognised gender. However, the guidelines allow room for discretion and senior prison staff will review the circumstances of every case in consultation with medical and other experts in order to protect the physical and emotional wellbeing of the person concerned along with the safety and wellbeing of other prisoners.

A review of the current policy on transgender and transsexual prisoners began earlier this year and revised policy guidance will be issued to reflect NOMS' responsibilities to transgender offenders in

Two transgender prisoners died in 2015; a third was the subject of a public protection which resulted in her being transferred from a male to a female prison.

<sup>7</sup> ["Transgender woman Tara Hudson moved to female prison"](#), *BBC News*, 30 October 2015

<sup>8</sup> Michelle O'Toole, ["Trans woman sent to men's prison secures early release"](#), *Pink News*, 30 November 2015

<sup>9</sup> [HC Deb 4 November 2015 c872](#)

<sup>10</sup> ["Transgender woman Vicky Thompson found dead at Armley jail"](#), *BBC News*, 19 November 2015

<sup>11</sup> Eric Allison and Helen Pidd, ["Second transgender prisoner found dead in male jail"](#), *Guardian*, 1 December 2015

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the community as well as in custody. The intention is to implement the guidance early in the New Year.<sup>12</sup>

On 8 December 2015, the Ministry of Justice announced that the review's scope had been widened.<sup>13</sup> It would work to ensure that the care and management of transgender prisoners was fit for purpose and a balance was struck between the needs of the individual, managing risk and safeguarding all prisoners:

The Review will develop recommendations for a revised approach to cover the future shape of prison and probation services for transgender prisoners and offenders in the community. It will also consider the approach for transgender offenders in the youth justice system.

It will include exploring the current case conference procedures, and make recommendations about revisions to PSI 7/2011.<sup>14</sup>

Answering a Question in the Commons, Caroline Dinenage said that the management and care of transgender prisoners was "complex":

We take every death in custody very seriously. The management and care of transgender people in prison is complex, and the Government take it very seriously.<sup>15</sup>

The scope of an ongoing Government review was broadened following the cases reported in the media.

### 2.5 The Women and Equalities Committee

The Women and Equalities Committee published a report on [Transgender Equality](#) in January 2016.<sup>16</sup> [Paragraphs 300-321](#) covered prisons and probation. It noted the Prison Reform Trust's description of the 2011 guidance as a "significant achievement" but said they had heard evidence of "significant inconsistency in the actual application of the Instruction."<sup>17</sup>

The Committee argued that there was a "clear risk or harm" where trans prisoners are *not* located in a prison "appropriate to their acquired gender".<sup>18</sup> It also said that holding trans prisoners in "solitary confinement" was not fair or appropriate:

320. While the safety and welfare of all offenders is paramount, caring for and managing trans offenders appropriately is crucial. There is a clear risk of harm (including violence, sexual assault, self-harming and suicide) where trans prisoners are not located in a prison or other setting appropriate to their acquired / affirmed gender. Neither is it fair or appropriate for them to end up in solitary confinement solely as a result of their trans status.

321. We welcome the revision of the Prison Service Instruction on Care and Management of Transsexual Prisoners to make it more flexible and to extend it to prisoners on remand and offenders in statutory contact with the National Probation Service. *The Ministry*

The Committee said there was a "clear risk of harm" where a trans-prisoner was not located in a prison appropriate to their acquired gender.

<sup>12</sup> [PQ 14703 Prisoners: Gender Recognition, 9 November 2015](#)

<sup>13</sup> [HC Deb 8 December 2015 c 858](#)

<sup>14</sup> Ministry of Justice, [Review of care and management of transgender offenders: Terms of Reference](#), 8 December 2015

<sup>15</sup> [HC Deb 8 December 2015 c 858](#)

<sup>16</sup> Women and Equalities Committee, [Transgender Equality](#) HC 390 2016-16, 14 January 2016

<sup>17</sup> *Ibid*, paragraph 306

<sup>18</sup> *Ibid*, [page 67](#)

*of Justice, National Offender Management Service and National Probation Service must urgently clarify what the situation is pending the publication of the new Instruction. When the new Instruction is published, they must ensure that staff are trained on it and that its implementation is monitored*

## 2.6 The new approach

### Response to the Women and Equalities Committee

The Government's response to the Committee's report indicated a shift of policy:<sup>19</sup>

A Ministry of Justice review of the care and management of transgender offenders was announced on 8 December 2015. The review concluded that treating offenders in the gender which they identify with is the most effective starting point for safety and reducing reoffending, where an assessment of all known risks can be considered alongside the offender's views.

Currently, if someone is living in an establishment different to the gender in which they identify, they will be entitled to live and present in the gender in which they identify and to be provided with the items that enable their gender expression.

The National Offender Management Service is working to make sure that a new instruction on transgender prisoners (as well as those supervised in the community or appearing in court) will follow the conclusions of the review.

To ensure that any new operational policy is fit for purpose and being correctly implemented (including training), an advisory group on transgender people in custody or subject to community supervision is proposed, initially for three years

### Review on the Care and Management of Transgender Offenders

The results of the Ministry of Justice's review were published on 9 November 2016.<sup>20</sup> This noted that the treatment of transgender offenders had not kept up with social values:

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.

The key shift in policy is that, in the majority of cases, the prison service will try to accommodate prisoners in the **gender with which they identify**, even if they are not seeking medical interventions or GRCs:<sup>21</sup>

The Government's review resulted in a shift in policy to acknowledge that many trans people do not seek medical interventions or a Gender Recognition Certificate.

<sup>19</sup> Government Equalities Office, [Government Response to the Women and Equalities Committee Report on Transgender Equality](#), July 2016

<sup>20</sup> Ministry of Justice, [Review on the Care and Management of Transgender Offenders](#), 9 November 2016

<sup>21</sup> Ibid p 4



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.

However, there will be a minority of cases where this will not be possible.<sup>22</sup>

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.

### The new guidance

Prison Service Instruction 17/2016 [The Care and Management of Transgender Offenders](#)<sup>23</sup> uses the term “transgender” rather than “transsexual” because this “places emphasis on gender identity of the ‘whole person’ rather than sexual functioning”.<sup>24</sup> This “refreshed policy approach” includes “offenders who have a more fluid or neutral approach to their gender identity (including individuals who identify as non-binary, gender fluid and/or transvestite.”<sup>25</sup> In brief:

- Arrangements must be in place to determine the legal gender of all offenders at the first point of contact
- When making initial prison location decisions, transgender offenders must be asked their view of the part of the prison estate (i.e. male or female) that reflects the gender with which they identify
- If the prisoner’s view accords with their legally recognised gender they must be located accordingly, although there are exemptions for women offenders “where the risk posed to other offenders and/or staff prevents location on the female estate”
- Decisions to locate in part of the estate which is not in accordance with their legal gender can only be made following a local Transgender Case Board

Most trans prisoners can be accommodated in line with the gender in which they identify, although in a minority of cases this will not be possible.

Transgender offenders will be asked their view of the part of the prison estate which reflects the gender with which they identify.

<sup>22</sup> Ibid

<sup>23</sup> PSI 17/2016, AI 13/2016, PI 16/2016

<sup>24</sup> page 3

<sup>25</sup> Para 43.4

- Where a transgender offender expresses a view of prison location which is not consistent with their legally recognised gender “the offender must be asked to provide evidence of living in the gender with which they identify”. The strength of this evidence will be considered alongside all known risk factors before a decision is made

The guidance acknowledges that there may be “exceptional cases” where it is necessary to refuse to locate a male to female prisoner in the women’s estate:

6.1 Prison Rule 12(1) provides that “Women prisoners shall normally be kept separate from male prisoners”. Unless there are exceptional circumstances, as determined by any type of Transgender Case Board expressly convened for the purpose of determining the most appropriate location, prisoners must be located according to their legal gender.

6.2 Women offenders who present a high risk of harm to other women are managed safely in the female estate. Transgender women who pose similar risks should be managed in a similar way in the female estate. In a judicial review of September 2009 (R (on the application of AB) v Secretary of State for Justice [2009] EWHC 2220 (Admin)) the judge held that a male to female transsexual prisoner with a GRC had to be transferred to the female estate even though one of her index offences was attempted rape of a woman.

6.3 There may be exceptional cases where it is necessary to refuse a transfer to the female estate for a transgender (male to female) prisoner with a GRC. This can only happen if the risk concerns surrounding the prisoner are sufficiently high that other women with an equivalent security profile would also be held in the male estate. If a transfer is refused, the prisoner will be a female prisoner in the male estate. She must be held separately and according to a female prisoner regime as set out in PSO 4800. This provision exists as the male estate has greater capacity to manage prisoners who pose an exceptionally high risk to others.

6.4 A female to male transgender offender with a GRC must not be refused a transfer to the male estate. This is because there are no security grounds that can prevent location in the male estate.

In January 2017 the Prisons and Probation Ombudsman published a Learning Lessons bulletin on transgender prisoners. The bulletin notes that many of the lessons it outlines are reflected in the new guidance.<sup>26</sup>

In 2018 there was renewed attention on the 2016 guidance when the media reported that a transgender prisoner had sexually assaulted other prisoners after transferring to a women’s prison. The Ministry of Justice apologised regarding mistakes made in the particular case and said previous offending history had not been taken into account.<sup>27</sup>

If the prisoner’s view does not accord with their legally recognised gender, they will have to provide evidence of living in the gender with which they identify.

There may be exceptional cases where a male to female prisoner cannot be located in the female estate because of risk factors.

<sup>26</sup> Prisons and Probation Ombudsman, Learning lessons bulletin, PPO investigations, issue 3, [Transgender Prisoners](#), January 2017

<sup>27</sup> [Sexual assaults in women's prison reignite debate over transgender inmates](#), Guardian, 9 September 2018

### 3. Transgender prisoners in Scotland

Policy in Scotland is set out in a document published in 2014 by the Scottish Prison Service and the Scottish Transgender Alliance. The foreword to the document describes the policy as

one of the most comprehensive of its type [representing] the culmination of years of dedicated partnership work by a diverse group of criminal justice sector and equality sector organisations.<sup>28</sup>

The policy document states that prisoners do not need a GRC for their acquired gender to be fully respected:

The social gender in which the person in custody is living should be fully respected regardless of whether or not the person in custody provides any evidence of having a gender recognition certificate under the Gender Recognition Act 2004. **Applying for a gender recognition certificate is optional and is not required in order to have protection from gender reassignment discrimination.**<sup>29</sup>

The policy document goes on to outline the key principles for the care and custody of transgender people in prison:

Professionalism and sensitivity, as always, should be maintained at all times. The person in custody's gender identity and corresponding name and pronouns must be respected.

The accommodation provided must be the one that best suits the person in custody's needs and should reflect the gender in which the person in custody is currently living

(...)

People in custody who are already undergoing gender reassignment must be allowed to continue receiving gender reassignment hormone treatment which began prior to imprisonment.

People in custody who are seeking to undergo gender reassignment must be allowed to access specialist assessment and treatment via the NHS Scotland Gender Reassignment Protocol. People in custody must be allowed access to gender reassignment hormone treatment, hair removal and/or surgeries they have been medically approved for via the NHS Scotland Gender Reassignment Protocol.

Where, for reasons of safety and risk management, a decision must be taken which differs from the person in custody's preferences in regard to their gender identity or gender reassignment status, the reasons for the decision must be clearly recorded on the PR2 system and then reviewed at the person in custody's next gender reassignment case conference.<sup>30</sup>

The Scottish Transgender Alliance (STA) gave evidence to the previous Equal Opportunities Committee (now the Equalities and Human Rights

In Scotland, 2014 policy guidance emphasises that a GRC is optional, and not a requirement for protection against gender reassignment discrimination.

<sup>28</sup> Scottish Prison Service and Scottishtrans.org, "[Gender Identity and Gender Reassignment Policy for those in our Custody 2014](#)", 2014

<sup>29</sup> Scottish Prison Service and Scottishtrans.org, "[Gender Identity and Gender Reassignment Policy for those in our Custody 2014](#)", 2014: section 3.3

<sup>30</sup> Scottish Prison Service and Scottishtrans.org, "[Gender Identity and Gender Reassignment Policy for those in our Custody 2014](#)", 2014: section 1.3

Committee) on 4 February 2016. In his evidence the STA's James Morton described the approach in Scotland:<sup>31</sup>

For several years, we have worked successfully in partnership with the Scottish Prison Service. It takes a self-declaration approach. If someone identifies and lives as female, they would be treated as a female in the custodial process, and the SPS would do an individualised risk assessment and place them and supervise them appropriately within the female estate.

If someone identifies as non-binary, the SPS looks at their individual circumstances. It recognises that it has only male and female estates, but it looks at the person's circumstances holistically, works with them and identifies which of the two options is the closer fit. The custodial system already responds to non-binary people, and that works quite smoothly. Having an X on their birth certificate would not make that any more complex. It is about looking at the individual and considering, with the limited options that are available, how their needs can best be met.

(...)

We are very pleased that the Scottish Prison Service has a more progressive and humane policy around trans people than the English prison service has, and that it places them in the gender estate that they identify with, even if their paperwork is not yet in order. That is not to say that the prison service in Scotland does everything perfectly, because there are still discriminatory attitudes among prison staff and difficulties in terms of making sure that people are not misgendered while they are in the prison estate.

A response from the Scottish Prison Service to a freedom of information request published in January 2018, stated that as at November 2017 there were 18 transgender prisoners in Scotland.<sup>32</sup>

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<sup>31</sup> [SPOR Equal Opportunities Committee](#) 4 February 2016, c13 and c15

<sup>32</sup> Scottish Prison Service, [Freedom of Information Request, FOI 5435, Transgender Population](#), published 9 January 2018

## 4. Transgender prisoners in Northern Ireland

In response to a freedom of information request in 2015, the Northern Ireland Prison Service has confirmed that, although it has no recent record of any prisoners who have self-identified as transgender, their needs would be considered on a case by case basis, to include arrangements for where they would be accommodated and how they would engage in the prison regime:

There have been no transgender (or transsexual) inmates recorded on the Prisoner Record & Information System (PRISM) between 11th November 2011 and 11<sup>th</sup> November 2015.

In Northern Ireland individuals are given the opportunity to self-identify their sex at committal. If a person so identifies themselves the Northern Ireland Prison Service will consider their specific needs on a case by case basis.

Specific arrangements can be made in respect of where the person is accommodated and how they access services in prison to ensure that they can fully engage in the regime.

As part of the committal process any specific healthcare needs can be assessed by the South Eastern Health and Social care Trust.<sup>33</sup>

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<sup>33</sup> Northern Ireland Prison Service, [FOI case ref 15:350](#), 4 December 2015

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