



THE CANADIAN  
BAR ASSOCIATION  
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June 13, 2017

Via email: [GEN-NHQ-Policy-Politi@csc-scc.gc.ca](mailto:GEN-NHQ-Policy-Politi@csc-scc.gc.ca)

Larry Motiuk  
Assistant Commissioner, Policy Sector  
Correctional Service Canada  
340 Laurier Avenue West  
Ottawa, ON K1A 0P9

Dear Mr. Motiuk:

**Re: Trans Inmates Policy**

I am writing on behalf of the Canadian Bar Association's Sexual Orientation and Gender Identity Community Forum and the Criminal Justice Section (the CBA Sections) in response to the consultation on policy changes related to gender identity and expression.

The CBA is a national association representing over 36,000 jurists, including lawyers, Québec notaries, law professors and students, with a mandate to improve the law and promote equality in the justice system. The Sexual Orientation and Gender Identity Community Forum addresses legal issues relating to sexual orientation and gender identity. The Criminal Justice Section members include prosecutors, defense counsel, and legal academics specializing in criminal law.

The CBA Sections welcome this important step in the development of Correctional Service of Canada (CSC) policy. Bill C-16 brings clarity and public acknowledgement of gender identity and expression rights in Canada – rights long recognized implicitly in all jurisdictions in Canada. The proposed amendments to the policy suite represent a considerable advance in recognizing gender identity and expression rights in the federal corrections environment. We offer our comments to further strengthen the proposals.

**A note about language**

The CBA Sections appreciate the care that has been taken in the consultation materials to adopt gender neutral language.

The proposed policy suite would adopt the phrase “inmates with gender considerations” to include “offenders whose current gender (i.e., identity or expression) has changed at any time since birth, or whose current gender does not match the gender usually associated with their current sex (anatomy). It also includes individuals whose gender or sex is non-binary.” The term “gender considerations” is found in an array of research literature, although it is often intended to convey a broader set of concepts than are proposed in the CSC definition. The CBA Sections have not developed a standard vocabulary around gender identity or expression; however, CBA policy refers to trans individuals (including transgender, transsexual, non-binary, transitioned or two-spirit), and we have adopted that approach in this submission.

The CBA Sections do not take a principled stand in support of or against the proposed language. As a matter of law, it must be interpreted consistently with the *Canadian Human Rights Act*, the *Canadian Charter of Rights and Freedoms* and other human rights obligations. The true test of this approach will be in its ease of understanding and application by corrections staff and inmates alike.

### **CD 705-7 – Security Classification and Penitentiary Placement**

The proposed amendments would place trans inmates in men’s or women’s institutions according to their preference. This is subject to the caveat, “unless there are over-riding health and/or safety concerns which cannot be resolved.”

Placement according to gender identity or expression is a basic human right. Under the *Canadian Human Rights Act*, rights must be accommodated to the point of undue hardship, considering health, safety and cost, in the individual circumstances. We recommend additional criteria in the policy to ensure it is implemented consistently and in keeping with the objectives of Bill C-16. We further recommend a robust mechanism for documenting and reporting situations where this exception is activated. We believe this would enhance accountability and help to identify systemic gaps in the application of the policy.

### **CD550 – Inmate Accommodation; Double-Bunking Cell Placement Assessment – User Guide**

Revisions to the institutional placement policy should mitigate some of the risk of violence experienced by trans inmates. However, risks are also associated with cell placement, even where institutional placement accords with the inmate’s preference.

The proposed policy applies a “first come, first served” approach for single-occupancy accommodation, subject to the Institutional Head’s discretion to make exceptions for inmates with a precarious medical condition, a known mental health problem or “other factors to ensure a safe and secure environment”. The risk assessment for double-bunking adds “the unique and particular needs of inmates with gender considerations” to the vulnerability criteria to be considered.

We recommend:

- That the risk assessment for double-bunking require input from the trans inmate.
- That the policy specifies that trans inmates who are housed according to their birth-assigned sex or who have been refused a transfer for health or safety reasons shall not be required to share a cell.
- That the policy specifies that all consultations with trans inmates on accommodation – institutional or cell placement – shall be conducted in private.
- That the policy require access to private toilet and shower for all trans inmates.

### **CD 566-7 – Searching of Offenders**

We support the proposed policy of individualized search protocols for trans inmates. We would emphasize the need to seek guidance from inmates about how those searches should be conducted and suggest particular attention to issues related to gender-affirming items (e.g., prosthetics).

### **CD-566-10 – Urinalysis Testing**

We support the specific consideration of trans inmates in the proposed policy. We recommend the language be adjusted to state that the collector will normally be of the same gender identity as the inmate, rather than sex as is currently stated. This is consistent with language changes in CD 566-7.

### **CD 566-12 – Personal Property of Offenders**

We encourage the CSC to move away from gendered Lists of Personal Property. An integrated list would enhance privacy and provide more flexible options, particularly for inmates who are gender non-binary or who choose not to publicly identify as trans.

We suggest paragraph 51(b) be amended to include gender identity or expression in the definition of hate material.

### **CD 567-1 – Use of Force**

We welcome the introduction of an individualized approach for trans inmates.

### **CD 577 – Staff Protocol in Women Offender Institutions**

The *Canadian Human Rights Act* requires federal employers to establish a bona fide occupational requirement before they are permitted to engage in what would otherwise be a discriminatory practice.

The comment in renumbered paragraph 2(f) on the Emergency Response Team, and other references through the document refer to female staff. We recommend consultation with the Canadian Human Rights Commission and employee representatives on the rights of and accommodations to be made for trans employees.

### **CD 705-1 – Preliminary Assessment and Post-Sentence Community Assessments**

We encourage several changes to the assessment report, primarily to provide a gender-affirming experience for inmates.

For the Preliminary Assessment, we recommend:

- Options should be added for trans inmates to include names that do not accord with legal identification. These should not be confused with ‘aliases’.
- It is unclear why separate entries are needed for current gender and current sex. We suggest the relevant information is current gender and whether it is different from birth-assigned sex.
- Specific instructions should be noted for the strip search on admission, including the split option. In addition, questions should be asked about preferences for searches of personal items (e.g., prosthetics).
- Information should be added about legal identification that does not accord with the inmate’s gender identity and whether assistance is required to obtain new documents consistent with gender identity.

For the Post-Sentence Community Assessment, we recommend:

- Clarification that, for LGBTQ2 inmates, the relevant reference point may be ‘family of choice’ rather than legal or biological family.

### **CD 705-3 – Immediate Needs Identification and Admission Interviews**

We understand that the proposed changes facilitate better coordination within the CSC. We reiterate our recommendation that all information-seeking interviews with trans inmates – including the immediate needs identification interview and the admission interview – must be conducted in private.

We recommend that the policy provide clear instructions that a trans person’s preferred name and gender be respected at all times, regardless of their legal identification. The relevant information should be entered in the Casework Record and flagged for the entire case management team.

In Annex C, we suggest adding to the Gender Alerts:

- The option of split searches
- Instructions on handling personal items (e.g., prosthetics)

We do not understand the rationale – even for exceptional situations - for addressing a trans inmate by both their preferred and legal names. In no circumstances should this be done other than in private.

### **Guideline 800-5 – Gender Dysphoria; CD 800 – Health Services**

We welcome the revocation of the policy on gender dysphoria and the proposal in paragraph 22 to include gender dysphoria as essential health care. We understand the National Essential Health Service Framework is still in development. We encourage the CSC to ensure that it provides a nuanced awareness of the health needs of trans inmates. For example, WPATH has highlighted the importance of an individualized approach to determining medically necessary treatments, which could include electrolysis, voice therapy, prosthetic devices, etc.<sup>1</sup>

### **CD 709 – Administrative Segregation**

The CBA Sections acknowledge that a separate stakeholder consultation has been underway to address the CSC’s administrative segregation policy (CD 709).

LGBTQ2 individuals, in particular trans women, are often placed in segregation as a form of protective custody.<sup>2</sup> Although the proposed revisions to the CSC’s placement policy for trans inmates may mitigate their exposure to discrimination and violence, the underlying culture will likely persist for some time. Thus, trans inmates may continue to be placed in protective custody. The CBA Sections recommend that CD 709 be reviewed specifically to address the segregation of inmates for reasons related to gender identity or expression.

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<sup>1</sup> WPATH, available [online](http://ow.ly/gb1c30cr2o8) (http://ow.ly/gb1c30cr2o8); WPATH, available [online](http://ow.ly/diW430cr2st) (http://ow.ly/diW430cr2st).

<sup>2</sup> Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, available [online](http://ow.ly/Q6IE30cyAzC) (http://ow.ly/Q6IE30cyAzC).

**Training**

The CSC Policy Bulletin does not address training to support the proposed policy changes. The CBA Sections recommend a comprehensive training program, developed and delivered in cooperation with the trans community. That training should be provided to both staff and inmates.

**Data Collection**

It is essential to track the number of trans inmates in the correctional system, and to document the application of proposed policy changes that affect them. This will contribute to accountability and assist in determining whether the proposed changes are meeting objectives. The CBA Sections recommend that the CSC report this information annually.

**Effective review mechanisms**

The policy suite builds in many opportunities for the exercise of discretion by corrections officials. The issues identified in this consultation profoundly impact the lives of trans inmates. If the policy is to achieve its goal of compliance with Bill C-16, it will be essential for inmates to have access to procedurally fair and timely review mechanisms that include opportunities to provide input at multiple points in the decision-path. This will ensure that CSC officials have the opportunity to consider robust information and arguments before locking into a final decision.

This will be particularly important for decisions to refuse placement in the institution of the trans inmate's choice. We encourage the CSC to design relevant forms and other documents to support these objectives, for example, by including a section for the specific information about the overriding health and safety considerations involved in refusing a transfer request, as well as a section for an inmate to comment in writing on recommendations for decision.

Thank you for including the CBA Sections in this consultation. We would also like to thank the CSC staff who met with us on May 26<sup>th</sup> to discuss these issues. Please don't hesitate to follow up if we can provide any further assistance as these proposed changes move forward. Our contact person is [Tina Head](mailto:tinahe@cba.org) (tinahe@cba.org), 613-237-2925, ext. 164.

Yours truly,

*(original letter signed by Tina Head for Brian Yuen and Loreley Berra)*

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c.c. Jack Botwinik, Portfolio Manager, Strategic Policy