

Neil Beales | Chief Custodial Officer |

National Office | Department of Corrections *Ara Poutama Aotearoa* |

44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |

s9(2)(a)

| [xxxx.xxxxxx@xxxxxxxxxxxxx.xxxx.xx](mailto:xxxx.xxxxxx@xxxxxxxxxxxxx.xxxx.xx)

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**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxxx.xx>]

**Sent:** 01 August 2018 8:04 a.m.

**To:** BEALES, Neil (WELLHO)

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; Rachel Groves; SYMONDS, Richard (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Neil,

It occurred to me last night after my previous email that you may not be aware that the decision to replace the Family Court declaration to change the nominated sex on a birth certificate with a statutory declaration process is not a Department of Internal Affairs' (or Minister of Internal Affairs') recommendation. Rather, it is an agreed Government position that reflects the current Government's policy. It was confirmed at Cabinet on 28 May 2018. s9(2)(g)(i)

I enclose a copy of the paper that was circulated to Ministers FYI; this includes details of the new process to update birth certificates, which is now reflected in the Bill (also attached). s9(2)(g)(i)

As discussed yesterday, the BDMRR Bill (which re-enacts the 1995 Act) was introduced on 10 August 2017. The GA Committee report on the Hamblett Petition was tabled on 11 August. The Government response was tabled on 15 February 2018, part way through the select committee process on the Bill. The select committee timetable meant there was no opportunity to go through the usual policy process to formally confirm the Government position (ie, drafting a Cabinet paper, full agency consultation, etc) so the Minister IA circulated the attached paper to her Cabinet colleagues and took an oral item to Cabinet on 28 May 2018. But we did consult some agencies (including Corrections) on a confidential "need to know" basis. The resulting Cabinet decision is the Government position reflected in the Departmental Report. We did receive a query from the Minister of Police's office, but nothing from Corrections. And some further background – the GA Committee sought an extension of the Bill's report back date so we could get that agreed Government position. The current Committee chair, Brett Hudson, was the Deputy Chair of the previous GA Committee when it presented its unanimous report in favour of the Hamblett Petition.

I think we agree the theoretical risk of a gang member or bank robber looking to "game the system" to get placed in a women's prison can be discounted. Nevertheless, the Committee is interested in whether Corrections can ensure all prisoners' safety under a statutory declaration process to update a birth certificate. It appears that the answer to that question is "Yes" even if

it has the potential to give rise to other concerns (eg, complaint about discriminatory treatment, eg, segregation of trans-prisoners currently ineligible for a review of their placement because of past offending). But presumably trans-prisoners unhappy with their placement could already complain to the relevant authorities? Yes? No?

We understand Corrections may have some residual concerns, which DIA is happy to work on with you.

Hoping to see you before the meeting to discuss.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Tuesday, 31 July 2018 4:44 PM

**To:** 'BEALES, Neil (WELLHO)'; 'SYMONDS, Richard (WELLHO)'; s9(2)(a)

**Cc:** 'DONALDSON, Bronwyn (WELLHO)'; Hayden Kerr; 'Anne O'Driscoll'; Rachel Groves

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi all,

Further to our earlier conversation, I think we are in agreement that prisoner safety is a key consideration. I understand that Corrections' policy (based on the 2005 Regulations) would allow a transgender prisoner transferred to a prison that accords with their self-identified gender identity/nominated sex on their birth certificate to be subject to restrictions (eg, segregation) if there was concern about other prisoners' safety. However, Corrections is concerned imposing such restrictions could expose Corrections to complaints to, eg, the Ombudsman or the Human Rights Commission. However, it would seem a restriction based on an objective risk assessment could be defended in the event it was challenged.

I thought it would be interesting to see how other jurisdictions deal with the potential risk posed by the 0.01% compared with the rights of the 99.9%. Malta (which has a similar self-identification process, and which was posited as a model to follow by Allyson Hamblett and the GA Committee in its report on Ms Hamblett's petition) has a prisoner placement policy similar to NZ's including, eg, "accommodation separate from other prisoners". And the UK policy notes (see p 9 of the House of Commons paper):

"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.**" (Emphasis added)

Perhaps we could meet at, say, 9.00 am before the meeting to ensure we are on the same page in focusing on prisoner safety.

Regards.

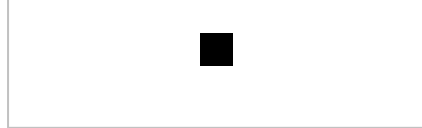
Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

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**From:** Cathy Nijman

**Sent:** Tuesday, 31 July 2018 3:00 PM

**To:** 'BEALES, Neil (WELLHO)'; 'SYMONDS, Richard (WELLHO)'; s9(2)(a)

**Cc:** 'DONALDSON, Bronwyn (WELLHO)'; Hayden Kerr; 'Anne O'Driscoll'

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Neil,

As discussed, I attach DIA's briefings to the Government Administration Committee on Petition 2014/86 of Allyson Hamblett and the Government response.

In practice, the Family Court largely follows a "self-identification" model. As the briefings note, there is no minimum level of medical treatment, and no requirement for some (or any) surgery.

I also attach a copy of the email correspondence relating to the consultation with Corrections on the relevant section in the Departmental Report. This part of the report was drafted following a submitter raising concerns about s9(2)(a). I had a conversation with s9(2)(a), who subsequently confirmed Corrections could not confirm (for privacy reasons) where the offender was housed. I subsequently drafted the "generic" advice for the report (based on Corrections' policy), which s9(2)(a) confirmed was accurate.

It would be useful to talk again before the meeting tomorrow.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Monday, 30 July 2018 4:19 PM

**To:** 'BEALES, Neil (WELLHO)'; SYMONDS, Richard (WELLHO); s9(2)(a)

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; 'Anne O'Driscoll'

**Subject:** RE: BDMRR Bill - Transgender prisoners; Out of scope

Hi all,

Just to confirm the Governance & Administration Committee will be meeting in **Room 2, Bowen House**, on Wednesday.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** BEALES, Neil (WELLHO) [<mailto:xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx>]

**Sent:** Monday, 30 July 2018 3:57 PM

**To:** Cathy Nijman; SYMONDS, Richard (WELLHO); s9(2)(a)

**Cc:** DONALDSON, Bronwyn (WELLHO)

**Subject:** RE: BDMRR Bill - Transgender prisoners; Out of scope

Hi Cathy

s9(2)(a), Principal Custodial Advisor in my team will be joining me as well.

Kind regards

Neil

**Neil Beales** | Chief Custodial Officer |

National Office | Department of Corrections *Ara Poutama Aotearoa* |  
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |

s9(2)(a) | [xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx](mailto:xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx)



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**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxx.xx>]  
**Sent:** 30 July 2018 3:25 p.m.  
**To:** SYMONDS, Richard (WELLHO)  
**Cc:** BEALES, Neil (WELLHO); DONALDSON, Bronwyn (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Thanks, Richard. Much appreciated.

I'll let the Committee clerk know. Still no room allocated for the meeting, but as advised on Friday. It will be at 9.30am in Parliament House.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**  
s9(2)(a)

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**From:** SYMONDS, Richard (WELLHO) [<mailto:xxxxxxx.xxxxxxx@xxxxxxxxxxxxx.xxx.xx>]  
**Sent:** Monday, 30 July 2018 3:22 PM  
**To:** Cathy Nijman  
**Cc:** BEALES, Neil (WELLHO); DONALDSON, Bronwyn (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

I apologise for the delay in responding.

I have been advised that both Neil Beales, Chief Custodial Officer and Bronwyn Donaldson, Director Offender Health, will attend the meeting.

**Richard Symonds** | Manager Custodial Practice |  
s9(2)(a)

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**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxx.xx>]  
**Sent:** 30 July 2018 3:13 p.m.  
**To:** SYMONDS, Richard (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Richard – any update on whether Neil Beales will be available to attend the select committee on Wednesday?

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**  
s9(2)(a)

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**From:** Cathy Nijman  
**Sent:** Friday, 27 July 2018 11:53 AM  
**To:** 'SYMONDS, Richard (WELLHO)'  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Thanks, Richard

Monday is fine to confirm – the letter doesn't have to go to the Committee until Monday pm. I'll forward a copy to Corrections at the same time.

FYI: The Committee Clerk has confirmed the meeting time will be 9.30 on Wednesday 1 August. Room not yet know, but will be in Parliament House.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**  
s9(2)(a)

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**From:** SYMONDS, Richard (WELLHO) [<mailto:xxxxxxx.xxxxxxx@xxxxxxxxxxx.xxx.xx>]  
**Sent:** Friday, 27 July 2018 11:02 AM  
**To:** Cathy Nijman  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Cathy,

I understand that you have spoken to s9(2)(a), my Principal Adviser, and the outstanding query is who will represent the Department.

Neil Beales is our Chief Custodial Officer and is the Departments Spokesperson. As a rule he would represent the Department, but I am not able to confirm this today s9(2)

If I say Neil now, are you comfortable for that to change on Monday should the need arise?

Richard Symonds | Manager Custodial Practice|  
National Office | Department of Corrections *Ara Poutama Aotearoa* |  
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |  
s9(2)(a) | [richard.symonds@corrections.govt.nz](mailto:richard.symonds@corrections.govt.nz) |

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**From:** Cathy Nijman [<mailto:Cathy.Nijman@dia.govt.nz>]

**Sent:** 26 July 2018 3:08 p.m.

**To:** SYMONDS, Richard (WELLHO)

**Subject:** FW: BDMRR Bill - Transgender prisoners Out of scope

**Importance:** High

Hi Richard,

Forwarded to you s9(2)(a)

If you're not the right person, could you forward this on a "needs to know" basis.

Regards

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**  
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**From:** Cathy Nijman

**Sent:** Thursday, 26 July 2018 2:37 PM

**To:** s9(2)(a)

**Cc:** s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

**Importance:** High

Hi s9(2)(a)

The BDMRR Bill and transgender issues – the gift that keeps on giving ...

**The Governance and Administration Committee wants to hear from the Department of Corrections as "sub-advisors" next Wednesday, 1 August 2018**

Further to the message I left yesterday afternoon, we were at select committee yesterday. They were scheduled to deliberate on the Bill. Instead they sought (and obtained) an extension to the report-back date (to 10 August) to allow them to seek "clarification" on some issues relating to proposed changes to the process for changing nominated sex on a birth certificate. I enclose a copy of the Departmental Report **in strict confidence** – this is not public pending the select

committee report back. Can be forwarded on a need-to-know basis only. Briefly, the Report recommends replacing the Family Court process with an administrative process (including a statutory declaration) based on self-identification.

There is a long history to the proposed amendments, which I won't bore you with, but the bottom line is the Departmental Report recommendation reflect an agreed (politically determined) Government position. s9(2)(g)(i)

. We have done our best to put the evidence before the Committee which indicates people just don't do this (not one case internationally that we can find, for example, and EU investigations among member countries: "just doesn't happen").

And this is where the Committee wants "clarification" from Corrections about: How (or if) the proposed change to a self-identification model will Corrections' assessment of prisoners' placement?

**So two things, please – could you let me know by COB tomorrow:**

- If the info I have inserted re Corrections' process for placement of transgender prisoners is accurate; and
- Whom from Corrections is available to attend the GA Committee next Wednesday – could be any time in the morning or early afternoon between 1.00pm and 2.00pm – won't know until Monday or Tuesday.

Apologies for the very tight timeframe but we are not in control of the timetable. We need to get the supplementary advice, including confirmation of Corrections' availability, by midday Monday.

Please give me a call if there is anything you are unclear about, or if you want some more background info.

Thanks again for your help. I look forward to hearing from you.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** s9(2)(a)

**Sent:** Thursday, 3 May 2018 3:04 PM

**To:** Cathy Nijman

**Cc:** s9(2)(a)  
**Subject:** FW: BDMRR Bill - Transgender prisoners

Hi Cathy,

Confirming the response you have prepared is accurate and Corrections is happy for DIA to provide to the Committee.

Thanks,  
s9(2)(a)

s9(2)(a) | Principal Policy Adviser

Service Development | Department of Corrections Ara Poutama Aotearoa  
Mayfair House, 44 – 52 The Terrace, Wellington | PO Box 1206, Wellington 6140

s9(2)(a)

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**From:** SYMONDS, Richard (WELLHO)  
**Sent:** 03 May 2018 2:57 p.m.  
**To:** s9(2)(a)  
**Subject:** RE: BDMRR Bill - Transgender prisoners

This is an accurate description of our current policy and practice and I have no concerns about it, in it's current form.

Richard Symonds | Manager Custodial Practice  
s9(2)(a)

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**From:** s9(2)(a)  
**Sent:** 03 May 2018 2:44 p.m.  
**To:** SYMONDS, Richard (WELLHO)  
**Subject:** FW: BDMRR Bill - Transgender prisoners

Hi Richard, response prepared by DIA attached as discussed.

Cheers  
s9(2)(a)

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**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxxx.xx>]  
**Sent:** 03 May 2018 2:38 p.m.  
**To:** s9(2)(a)  
**Subject:** BDMRR Bill - Transgender prisoners

As discussed.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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Released under the Official Information Act 1982

**From:** [Cathy Nijman](#)  
**To:** [SENIOR, Derek \(WELLHO\)](#)  
**Subject:** RE: Signed copy of B3782  
**Date:** 03 December 2018 02:42:02 p.m.  
**Attachments:** [image001.png](#)  
[image006.png](#)  
[image008.png](#)  
[BDMRR Bill - Supplementary advice for Governance and Administration Committee \(December 2018\).docx](#)  
**Importance:** High

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Hi Derek,

Draft advice for the GA Committee attached for your consideration. Could I please have any feedback by midday tomorrow. Please note this draft has not been sent to the Minister IA so any reference to amendments to the Bill including possible SOPs, is a work in progress – depends on the actual decisions made.

I have essentially included an edited version of the info in the joint briefing. I haven't commented on the benefit of revoking the birth certificate rule for those prisoners who choose not to be placed in a women's prison as I don't think the Committee is interested in that? Their concerns focus on the "safety of vulnerable women prisoner issue". If we do get to brief the Committee on the 19th, we can include this other benefit in back pocket info to discuss if the situation presents.

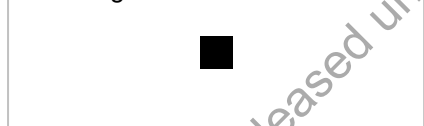
Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Taiwhenua**

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**From:** Cathy Nijman  
**Sent:** Thursday, 29 November 2018 8:41 AM  
**To:** 'SENIOR, Derek (WELLHO)'  
**Subject:** RE: Signed copy of B3782

Thanks for your help. Time will tell where this lands.

It is possible the Minister IA will instruct us NOT to brief the GA Committee this year. We may not know for sure either way until late next week, or the following week. I'll let you know as soon as I know. Meanwhile, we are continuing to prepare as if the Committee briefing will go ahead as scheduled.

Regards.

Cathy N.



Cathy Nijman | Senior Policy Analyst | Policy Group  
The Department of Internal Affairs Te Tari Taiwhenua

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**From:** SENIOR, Derek (WELLHO) [mailto:Derek.Senior@CORRECTIONS.GOV.T.NZ]  
**Sent:** Thursday, 29 November 2018 8:25 AM  
**To:** Cathy Nijman  
**Subject:** FW: Signed copy of B3782

The briefing was signed by our Minister yesterday and is being passed along to your Minister's office  
☺

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |  
Department of Corrections Ara Poutama Aotearoa | 44-52 The Terrace, Wellington 6000

s9(2)(a) | [derek.senior@corrections.govt.nz](mailto:derek.senior@corrections.govt.nz) |



THINK BEFORE YOU PRINT

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**From:** JONES, Robert (WELLHO)  
**Sent:** 29 November 2018 8:07 a.m.  
**To:** SENIOR, Derek (WELLHO)  
**Subject:** Fwd: Signed copy of B3782

Sent from my Samsung device

----- Original message -----

**From:** s9(2)(a)

**Date:** 29/11/18 8:00 AM (GMT+12:00)

**To:** "JONES, Robert (WELLHO)" <Robert.Jones@corrections.govt.nz>

**Subject:** FW: Signed copy of B3782

FYI has also been forwarded to Hon Martin.

s9(2)(a) | Manager Ministerial Services, Corporate Services | National Office |  
Department of Corrections Ara Poutama Aotearoa  
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140

s9(2)(a)



XX December 2018

Brett Hudson  
Chairperson  
Governance and Administration Committee  
Parliament Buildings  
Wellington

Dear Mr Hudson

This briefing responds to the Governance and Administration Committee's request for an update on concerns raised in the New Zealand National Party's minority view in the Committee's report on the Births, Deaths, Marriages, and Relationships Registration Bill (the Bill) relating to the implications of self-identification of nominated sex (clauses 22A–22J and consequential amendments). Concerns were raised about:

- proceeding with reform before amendments to Corrections Regulations 2005 (the Regulations) are determined;
- the broad scope of the definition of health professional;
- the absence of defined criteria to determine the “best interests” of applicants under age 18; and
- the absence of a defined test to confirm an eligible adult truly understands the consequences of applying to change their nominated sex.

In addition, the briefing outlines an amendment to clause 147A to provide the statutory review of the self-identification clauses can commence earlier than the five years currently specified, if appropriate.

### **Placement of transgender prisoners (and other human rights concerns)**

The Minister of Internal Affairs and the Minister of Corrections have approved complementary amendments to the Bill and to the Regulations to address concerns that the self-identification process may not be sufficiently robust for Corrections' purposes:

- revoke the “birth certificate rule” in the Regulations (r 65(3)); and
- amend clause 22I of the Bill (the general law clause) to confirm it does not limit Corrections' right to determine what prison an offender should be placed in.

The Minister of Internal Affairs has approved a further amendment to clause 22I in response to concerns raised by some about the implications of the new self-identification clauses on other's (and especially women's) human rights including, for example, access to women's only spaces, sex-based discrimination in employment, and sex-specific services.

## ***Corrections Regulations 2005***

### *Status quo, including the “birth certificate rule”*

Sections 65A–65E of the Regulations (**Appendix A**) determine how Corrections manages prisoners of different sexes. The rules concerning the placement of transgender prisoners apply equally to trans-women (born male but who identify as female) and trans-men (born female but who identify as male). However, questions over whether a prisoner is female or male, and what prison they should be housed in, are rare.

As at 7 November 2018, 36 prisoners out of a total of approximately 10,000 identified as transgender. All are male to female trans-women. Seven are currently being held in a women’s prison, and one has expressed an interest in moving to a women’s prison. Seventeen have chosen not to apply to be transferred to a women’s prison. Ten are ineligible to apply for transfer to a women’s prison previous sexual offending against female victims, and are being held in men’s prisons.

If a prisoner provides a copy of their birth certificate, the Regulations require Corrections to place the prisoner in a prison that accords with the sex on the birth certificate. Corrections do not have any discretion.<sup>1</sup> The birth certificate overrides all other considerations, including a prisoner’s offending history and their personal preference about being housed in a men’s or women’s prison.

The “birth certificate rule” has never been used. The process in the Regulations provides an alternative, simpler way (ie, simpler than the Family Court process) for a transgender prisoner to seek a change in their determined sex to enable them to be placed in a prison that reflects their preferred gender identity.

### *What revoking the “birth certificate rule” will achieve*

Revoking the “birth certificate rule” directly addresses concerns that allowing individuals to complete a statutory declaration to change their nominated sex will constrain Corrections’ ability to house and manage transgender prisoners in order to ensure all prisoners’ safety. In addition, revoking the “birth certificate rule” will “send a signal” that addresses the theoretical risk that non-bona fide male applicants will attempt to “game the system” to get access to a women’s prison.<sup>2</sup>

A transgender prisoner would still be able to include a new birth certificate with their nominated sex in support of an application to be transferred to a prison that matches their self-identified gender identity. However, the birth certificate would no longer be determinative.

On an application for review, Corrections would determine a prisoner’s sex for the purposes of placement in a women’s or men’s prison in accordance with the existing criteria in the Regulations. This means all serious sexual offenders would be ineligible to apply for a review of their determined sex, irrespective of whether they had changed the nominated sex on their birth certificate.

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<sup>1</sup> Corrections Regulations 2005, r 65(3). This mandatory requirement (the “birth certificate rule”) applies to both the initial determination of a prisoner’s sex and any subsequent review. It applies whether the sex on the birth certificate is the sex recorded at birth or if reflects a later change of nominated sex (via a Family Court declaration).

<sup>2</sup> This theoretical risk is not supported by the evidence. Several countries have adopted similar self-identification laws over the last 10 years without problems. Neither the Department nor Corrections has been able to identify a single instance of a non-bona fide application by a male offender changing the nominated sex on their birth certificate to try and get access to a women’s prison.



Revoking the “birth certificate rule” will not affect existing transgender prisoners as none has presented a birth certificate in support of a review of their determined sex. If a prisoner whose sexual offending history makes them ineligible to apply for a review did change their nominated sex on their birth certificate they would remain ineligible (and would remain in a men’s prison).

### ***Amendments to clause 221 (the general law clause)***

The Minister of Internal Affairs has approved the following amendments to clause 221, which will be included in a Supplementary Order Paper at the Committee of the Whole House:

#### **221 New information not to affect general law**

- (1) Despite sections 22B to 22G and section 23, the sex of every person must continue to be determined by reference to the general law of New Zealand
- (2) *Nothing in sections 22B to 22G and section 23 affects the ability of the chief executive of the department responsible for the administration of the Corrections Act 2004 to determine a prisoner’s sex for the purposes of their placement in a men’s or women’s prisons or quarters.*
- (3) *Nothing in sections 22B to 22G and section 23 affects any provision in Part 2 of the Human Rights Act 1993 that sets out an exception to a prohibited ground of discrimination.*

#### *Transgender prisoners*

New clause 221(2) addresses Corrections’ concern there could a legal challenge if it made a determination of a prisoner’s sex that did not accord with the prisoner’s self-identified gender identity and/or their registered birth record. In addition, like the revocation of the “birth certificate rule” in the Regulations, this amendment “sends a signal” that addresses the theoretical risk non-bona fide male applicants will attempt to “game the system” to get access to a women’s prison.

#### *Human rights concerns*

New clause 221(3) is a reminder that the Human Rights Act 1993 (HRA 1993) already includes a wide range of grounds and situations where it is possible to justify discrimination on the grounds of sex.<sup>3</sup> The change to the process by which an individual can change the nominated sex on their birth certificate does not affect the operation of the New Zealand Bill of Rights Act 1990 (NZBORA) or the HRA 1993. For completeness, the Department notes:

- the Attorney-General has confirmed the self-identification clauses are consistent with the rights and freedoms affirmed in NZBORA (**Appendix B**);
- the Human Rights Commission and the National Council for Women support trans-women’s right to be recognised as women; they would not be supporting self-identification if there was any reason to be concerned about the impact on (other) women’s rights, or their personal safety;

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<sup>3</sup> “Sex discrimination” includes gender identity: [Crown Law opinion on transgender discrimination](#) (23 August 2006). The Human Rights Commission believes any remaining legal uncertainty could (should) be addressed by making gender identity, gender expression, and sex characteristics explicit prohibited grounds of discrimination ([Briefing to the Incoming Minister of Justice](#), 17 November 2017) at [68].

- a birth certificate is not and will not be a “passport to entry” to women’s (or men’s) changing rooms, sports events, etc, any more than a passport or driver licence is now; and
- a change to the registered sex that appears on a person’s birth certificate is not an indication they are more or less likely to commit a crime.

### **Definition of health professional**

The definition is based on the definition in the Substance Addiction (Compulsory Assessment and Treatment) Act 2017. In addition to medical practitioners and registered psychologists, it includes appropriately qualified counsellors and social workers who must be a member of an approved professional body. The approved bodies listed are those whose members have a relevant area of practice, including personal relationships, sexual orientation and gender identity, and working with families.

A counsellor or social worker who has supported a young person and their family deal with questions about the young person’s gender identity is well-placed to offer an opinion on whether a change of nominated sex is in the young person’s best interests.

The definition is not limited to “relevant medical or health practitioners under the Health Practitioners Competence Assurance Act 2003” to avoid any suggestion the health professional’s supporting recommendation must include medical evidence. The definition reflects both:

- the intention behind the recommendations in the Departmental Report; and
- the Committee’s request, following presentation of the Departmental Report on 13 June 2018, for confirmation that no-one applying to change their nominated sex would be required to provide medical evidence. The Department’s supplementary advice of 28 June 2018 refers.

### **Determining the “best interests” of an eligible child or an eligible 16- or 17-year old**

*The approach to “best interests” in the Bill reflects the current law ...*

The requirement for independent confirmation that an application on behalf of an eligible child, or by an eligible 16- or 17-year old, in the individual’s best interests reflects the current law.

Section 29 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the 1995 Act) provides the Family Court may issue a declaration to change a child’s (under 18 year old’s) nominated sex if it is in the child’s best interests. “Best interests” is not defined; it requires a case-by-case assessment by the Court.

Clauses 22B(3)(b)(ii) and 22C(2)(c)(i) of the Bill provides for the independent, case assessment of an under 18-year old’s “best interests” to be undertaken by a health professional (as defined). Clause 22C(2)(c)(ii) (relating to an application on behalf of eligible child) provides the health professional’s recommendation may include other relevant information “including the age, views, and maturity of the child and the extent to which the child understands the consequences of the application.”

*... and is consistent with the approach taken in other legislation, including the Care of Children Act 2004*

Eighty-one other Acts of Parliament refer to the “best interests” (of a child, individual, or body corporate) as a relevant assessment and decision-making criterion. None define “best interests”. However, section 5 of the Care of Children Act 2004 (CoCA 2004) includes a non-exhaustive list of matters or principles relating to a child’s welfare and best interests (**Appendix C**).



The Supreme Court has confirmed the CoCA 2004 principles require a case-by-case assessment of the particular child's "best interests" relating to that child's particular circumstances.<sup>4</sup> This is consistent with the current approach in the 1995 Act, which is carried forward in the Bill.

### ***Relationship between the Bill and the Care of Children Act***

There are several direct links between the Bill and CoCA 2004. For example:

- the CoCA principles relating to a child's "best interests" (**Appendix C**) include "a child's identity (including, without limitation, his or her culture, language, and [religion] ..."; an individual's gender identity (which may or may not accord with their sex recorded at birth) is a key aspect of identity;
- clause 4 of the Bill defines guardian as a guardian within the meaning of CoCA 2004;
- matters such as a child's name/name change, or change of nominated sex are an "important matter affecting the child" under section 16 of CoCA 2004; if guardians disagree over an application, or if the guardian/s of an eligible 16- or 17-year old refuse consent for an application, the Bill provides for a right of appeal to the Family Court; and
- clause 63 of the Bill re-enacts the requirement that the Registrar-General must give effect to a decision under the CoCA 2004 relating to a child's registered name. Clause 22G is an equivalent provision relating to disputes concerning a child's registered sex.

The Department notes the existing "best interests" requirements in the 1995 Act and CoCA 2004 have been in place for many years without causing any problems. An attempt to define and/or limit what constitutes a child's or an eligible 16- or 17-year old's "best interests" for the purposes of an application to change their nominated sex is likely to conflict with CoCA 2004. It could also lead to internal inconsistencies in the Bill.

For completeness, the Department notes in August 2018 the Minors (Court Consent to Relationships) Legislation Act 2018 made changes to three Acts, including section 46A of CoCA 2004 (**Appendix C**), relating to a 16- or 17-year old's ability to enter into a legal relationship.<sup>5</sup> Each refers, without definition or limitation, to the child's understanding of the consequences of the application, and the intended relationship being in their interests. The factors a Family Court judge may take into account in considering an application "include, without limitation" the child's views, their age and maturity, and their guardian/s' views. Clause 22C(2)(c)(ii) of the Bill takes a similar approach.

### **Determining an individual understands the consequences of applying to change their nominated sex**

The Bill does not define what those consequences may be as individual circumstances will vary. A defined list of what may or may not be relevant to an individual application would be inconsistent with a process based on self-identification. It would also be inconsistent with international best-practice and the approach adopted in related New Zealand legislation (as discussed in the preceding section).

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<sup>4</sup> *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1. Blanchard, Tipping, and McGrath JJ note at [18] (emphasis added): "By its references to 'particular child' and 'particular circumstances' s 4(2) underlines the case-specific nature of the inquiry. That inquiry must focus on the particular circumstances of the individual case **with no presumption of what the welfare and best interests of the child may require** or what influence the s 5 principles may have on that question."

<sup>5</sup> See also Marriage Act 1955, s 18; Civil Union Act 2004, s 19.

The Department considers the most appropriate way to ensure applicants think carefully about the consequences of changing the nominated sex on their birth certificate is through information and guidance before an application is lodged. The Department's existing guidance for transgender applicants takes a similar approach. This includes, for example, highlighting that a change of sex (and name) on a birth certificate can create situations where a person has differing registrations.<sup>6</sup>

The guidance for transgender applicants also notes a change of nominated sex on a birth certificate does not apply to all areas of life (eg, ability to join a club or to participate in a sport), or the law. If another area of the law (including other legislation) has a different test for sex, showing the sex on the birth certificate may not be enough to meet that test. This will remain the law—clause 221 of the Bill refers.

### **Clause 147A – Minister of Internal Affairs' review of the self-identification clauses**

The Minister of Internal Affairs has approved the following amendment to clause 147A, which will be included in a Supplementary Order Paper at the Committee of the Whole House:

#### **147A Review of certain provisions relating to changes to registered sex**

- (1) The Minister must, as soon as practicable, *no sooner than the expiry of 3 years, but before the expiry of 5 years*, from the commencement of this Act,—
  - (a) commence a review of the operation of the following provisions ...

The amendment acknowledges some remain concerned about the implications of the self-identification clauses. It means the Minister of Internal Affairs will be able to start the statutory review earlier than the five years currently specified, if appropriate.

The lower three-year timeframe reflects the need to have at least two years of “normal operations” to establish a baseline for the review. The Department is aware there is an unmet need among trans and gender diverse individuals who want to update the nominated sex on their birth record without going to the Family Court. Consequently, an initial spike in the number of applications could impact the validity of a review undertaken too close to the original implementation date.

Officials from the Department and Corrections will be available to answer any questions Committee members may have, and to provide further information as required.

Yours sincerely

**Rachel Groves**  
Director Policy Services  
Department of Internal Affairs

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<sup>6</sup> For example, if a person entered into a civil union before obtaining a Family Court declaration, the civil union registration would continue to show their original name and sex even after the birth registration is updated. Name changes can be recorded on the civil union but appear as a list and the original name and sex are not removed.



## Appendix A: Corrections Regulations 2005

### Part 7 Prisoner treatment and welfare

#### *Accommodation*

##### **65 Accommodation of male and female prisoners**

- (1) Male and female prisoners must be detained—
  - (a) in separate prisons; or
  - (b) within the same prison in separate quarters that are secured by different locking systems.
- (2) Where there is doubt about whether a prisoner is male or female, the chief executive must determine whether the prisoner is a male or female prisoner for the purpose of subclause (1).
- (3) If a prisoner supplies a copy of the prisoner's birth certificate that records the prisoner's sex as female or male, the determination under subclause (2) must be made in accordance with that sex.
- (4) If a prisoner supplies a copy of the prisoner's birth certificate that records the prisoner's sex as indeterminate, or records no sex, the chief executive must—
  - (a) undertake a review of the determination made under subclause (2); and
  - (b) inform the prisoner that a review is being undertaken.
- (5) If a prisoner is not satisfied with the determination made under subclause (2), the prisoner may make an application for review under regulation 65B.

Regulation 65: replaced, on 10 February 2014, by regulation 4 of the Corrections Amendment Regulations (No 2) 2013 (SR 2013/489).

##### **65A Interpretation**

In regulations 65B to 65D,—

**nominated sex** means the sex, whether male or female, nominated by a prisoner

**sentence expiry date** has the same meaning as in section 4(1) of the Parole Act 2002

**serious sexual offence** means a sexual offence under Part 7 of the Crimes Act 1991 that is punishable by a period of imprisonment of 7 years or more.

Regulation 65A: inserted, on 10 February 2014, by regulation 4 of the Corrections Amendment Regulations (No 2) 2013 (SR 2013/489).

##### **65B Prisoner may apply for review of determination as to sex**

- (1) A prisoner may apply to the chief executive for a review of the determination made under regulation 65(2).
- (2) However, a prisoner may not make an application under subclause (1) if the prisoner—
  - (a) is serving a sentence of imprisonment for a serious sexual offence against a person of the prisoner's nominated sex; or
  - (b) is remanded in custody charged with, or awaiting sentence for, a serious sexual offence against a person of the prisoner's nominated sex; or
  - (c) has served a sentence of imprisonment for a serious sexual offence against a person of the prisoner's nominated sex, and the sentence expiry date is 7 years or less before the date on which the application is made.



- (3) An application must state the prisoner's nominated sex for the purpose of regulation 65(1).

Regulation 65B: inserted, on 10 February 2014, by regulation 4 of the Corrections Amendment Regulations (No 2) 2013 (SR 2013/489).

**65C Review of determination as to sex**

- (1) This regulation applies if—
- (a) a prisoner applies under regulation 65B for a review of a determination made under regulation 65(2); or
  - (b) the chief executive is required by regulation 65(4) to undertake a review of the determination made under regulation 65(2).
- (2) The chief executive must review the determination as soon as is reasonably practicable and—
- (a) confirm the original determination that the prisoner is a male or female prisoner; or
  - (b) determine that the prisoner should be recognised as being of the opposite sex to that originally determined.
- (3) In reviewing a determination, the chief executive must consider the following matters:
- (a) the prisoner's nominated sex; and
  - (b) any evidence provided by the prisoner about whether, and, if so, for how long, the prisoner has lived as a person of the nominated sex; and
  - (c) any evidence provided by the prisoner about whether the prisoner intends to live permanently as a person of the nominated sex; and
  - (d) the advice of—
    - (i) a senior employee of the department who has responsibility for custodial services; and
    - (ii) a senior employee of the department who has responsibility for health services for prisoners; and
    - (iii) any other person that the chief executive considers has relevant expertise; and
  - (e) any advice from a medical practitioner who has seen the prisoner; and
  - (f) any evidence provided by the prisoner about whether the prisoner has undergone, or is undergoing, medical treatment to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
  - (g) the safety and well-being of the prisoner; and
  - (h) the safety and well-being of other prisoners (of either sex) with whom the prisoner may be accommodated; and
  - (i) the security of the prison; and
  - (j) whether any determination could make it more likely that the prisoner will be segregated from other prisoners in accordance with section 57 to 60 of the Act; and

- (k) the likely effect of any determination on the prisoner's rehabilitation, including the prisoner's access to special treatment programmes; and
- (l) any other matters raised by the prisoner.

Regulation 65C: inserted, on 10 February 2014, by regulation 4 of the Corrections Amendment Regulations (No 2) 2013 (SR 2013/489).

#### **65D Further review where birth certificate inconclusive**

- (1) Where the chief executive has made a determination under regulation 65C(2) in any case to which regulation 65C(1)(b) applies, a prisoner may apply to the chief executive for a further review of the determination.
- (2) Regulation 65C applies with any necessary modifications to the further review.

Regulation 65D: inserted, on 10 February 2014, by regulation 4 of the Corrections Amendment Regulations (No 2) 2013 (SR 2013/489).

#### **65E Expiry of determination**

- (1) A determination made under regulation 65(2) or 65C(2) in respect of a prisoner applies until the date on which the prisoner is first released from prison following the determination (excluding any temporary release from custody or temporary removal from prison under section 62 of the Act).
- (2) However, if the determination was made under regulation 65C(2) following an application for a review under regulation 65B, the chief executive must revoke the determination if—
  - (a) the prisoner supplies a copy of the prisoner's birth certificate and requests to be recognised in accordance with the sex (if male or female) recorded on the birth certificate; or
  - (b) the prisoner is charged with a serious sexual offence against a person of the same sex as the prisoner's nominated sex; or
  - (c) the chief executive determines, on reasonable grounds, that 1 or more of the factors on which the determination was based have changed to such an extent that the determination is no longer appropriate.
- (3) If the chief executive revokes a determination under subclause (2), the original determination that applied to the prisoner before the prisoner applied for a review under regulation 65B is reinstated.

Regulation 65E: inserted, on 10 February 2014, by regulation 4 of the Corrections Amendment Regulations (No 2) 2013 (SR 2013/489).

Released under the Official Information Act 1982

Released under the Official Information Act 1982

Released under the Official Information Act 1982



## Appendix C: Care of Children Act 2004

### 4 Child's welfare and best interests to be paramount

- (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
  - (a) in the administration and application of this Act, for example, in proceedings under this Act; and
  - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) Any person considering the welfare and best interests of a child in his or her particular circumstances—
  - (a) must take into account—
    - (i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
    - (ii) the principles in section 5; and
  - (b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.
- (3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.
- (4) This section does not—
  - (a) limit section 6 or 83 or subpart 4 of Part 2; or
  - (b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

Section 4: replaced, on 31 March 2014, by section 4 of the Care of Children Amendment Act (No 2) 2013 (2013 No 74).

## 5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

Section 5: replaced, on 31 March 2014, by section 4 of the Care of Children Amendment Act (No 2) 2013 (2013 No 74).

## 46A Consent for de facto relationship

- (1) A child aged 16 or 17 who wishes to obtain consent for his or her de facto relationship must make an application to the Family Court for the consent of a Family Court Judge.
- (2) A Family Court Judge may, on an application of a child made under subsection (1), consent to the de facto relationship only if the Judge is satisfied that—
  - (a) the child has made the application voluntarily, free of undue influence or coercion; and
  - (b) the child understands the consequences of the application and wants the Judge to consent to the de facto relationship; and
  - (c) the de facto relationship is in the child's interests.
- (3) In determining whether the de facto relationship is in the child's interests, the matters that the Judge must take into account include, without limitation,—
  - (a) the age and maturity of the child; and
  - (b) the child's views; and
  - (c) any views of the child's parents and guardians that can reasonably be ascertained; and
  - (d) any other information available to the court relevant to the child's application.

Section 46A: replaced, on 14 August 2018, by section 20 of the Minors (Court Consent to Relationships) Legislation Act 2018 (2018 No 22).

**From:** s9(2)(a)  
**To:** CAMERON, Michael (WELLHO)  
**Subject:** HPRM: FW: BDMRR Bill - Transgender prisoners: Out of  
**Date:** 01 August 2018 01:20:00 p.m.  
**Attachments:** image003.png  
image002.png

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Note Mr Kerr called Neil again and there shouldn't be any more emails pending.

s9(2)(a) Principal Custodial Adviser  
s9(2)(a)

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**From:** Cathy Nijman [mailto:Cathy.Nijman@dia.govt.nz]  
**Sent:** 01 August 2018 12:33 p.m.  
**To:** KENNEDY, Suzanne (WELLHO)  
**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; 'Anne O'Driscoll'; SYMONDS, Richard (WELLHO); s9(2)(a); s9(2)(a) BEALES, Neil (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Meeting cancelled because Suzanne has made it clear Corrections will not be in a position to agree consequential amendments to the Corrections Regulations by COP tomorrow.

s9(2)(h)

I understand Corrections need to be careful, but there will not be any further opportunity for Corrections to advise the Committee. The Committee timetable requires the Bill to be deliberated on next week. It must be reported back by Friday 10 August. We will proceed with the proposed amendment to cl 110(4) of the Bill to provide for the R-G's ability to share restricted sex information with individuals in Corrections' custody

Happy to work with Corrections on next steps after the Bill is reported back, including any advice for the Minister of Corrections and/or possible amendments to the Corrections Regulations.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)  
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newdialogo

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**From:** Cathy Nijman  
**Sent:** Wednesday, 1 August 2018 10:55 AM  
**To:** KENNEDY, Suzanne (WELLHO)  
**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; SYMONDS, Richard (WELLHO); s9(2)(a); s9(2)(a) BEALES, Neil (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Suzanne,



Neil has nominated you as the first point of contact.

s9(2)(g)(i) [REDACTED]. The upshot is the Committee want DIA and Corrections to work together on consequential amendments to the Bill and the Corrections Regulations (which would be included as a consequential amendment in Schedule 3). The aim is address potential prisoner safety concerns associated with any easing in the ability of transgender individuals to update the nominated sex on their birth certificate. The good and bad news is we need to agree on what to do and how to do it by COB tomorrow at the latest, so Parliamentary Counsel can be instructed to make the necessary changes. The Committee is due to deliberate on the Bill next Wednesday so the final deliberation version needs to be with the Committee by midday Monday.

Briefly, the changes proposed (or rather the effect that needs to be achieved) are:

- An amendment to cl 110(4) of the Bill, to allow the Registrar-General to share restricted sex information (about a change of nominated sex) with Corrections (and we may need to include NZ Police) so Corrections have access to all the information they need to carry out prisoner safety assessments, etc. Currently, cl 110(4) provides the Registrar-General can share restricted sex information with government agencies that have an interest in ensuring an individual doesn't have more than one identity (this is the current law, too).
- A consequential amendment to the Corrections Regulations so 65 (3)—prisoner placement determined by the sex on their birth certificate—is, in effect, trumped by 65B(2), which currently prohibits those convicted of serious sexual offences from making an application.

Given the extremely short timeframe, I think the best way to achieve the desired outcome is for Corrections to take today to think about the changes it thinks need to be made to the regulations so the 65B(2) criteria effectively override 65(3). We should then meet tomorrow, together with Parliamentary Counsel to agree on the consequential amendments. PCO can then draft on Friday (may be; sorry Anne!).

I am going to send a meeting invite for tomorrow afternoon. However, if Corrections wants to host/propose an alternative time, please let me know ASAP.

Please give me a call if you have any questions.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a) [REDACTED]  
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newdialogo

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**From:** BEALES, Neil (WELLHO) [<mailto:xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx>]

**Sent:** Wednesday, 1 August 2018 8:53 AM

**To:** Cathy Nijman

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; Rachel Groves; SYMONDS, Richard (WELLHO); s9(2)(a); KENNEDY, Suzanne (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Thank you Cathy

It is not my intention to contradict Government policy, however I have been asked a question and have a responsibility to respond accurately and appropriately from an operational perspective. As stated, in broad terms we are supportive of the proposal, however there is a risk that we need to explore in more detail in regards to the current processes/regulations that makes someone who identifies as transgender in prison but ineligible to apply due to current/previous convictions.

Regards

Neil

**Neil Beales | Chief Custodial Officer |**

National Office | Department of Corrections *Ara Poutama Aotearoa* |

44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |

s9(2)(a) | [xxxx.xxxxxx@xxx.xxxx.xx](mailto:xxxx.xxxxxx@xxx.xxxx.xx)

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**From:** Cathy Nijman [<mailto:xxxx.xxxxxx@xxx.xxxx.xx>]

**Sent:** 01 August 2018 8:04 a.m.

**To:** BEALES, Neil (WELLHO)

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; Rachel Groves; SYMONDS, Richard (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Neil,

It occurred to me last night after my previous email that you may not be aware that the decision to replace the Family Court declaration to change the nominated sex on a birth certificate with a statutory declaration process is not a Department of Internal Affairs' (or Minister of Internal Affairs') recommendation. Rather, it is an agreed Government position that reflects the current Government's policy. It was confirmed at Cabinet on 28 May 2018. s9(2)(g)(i)

I enclose a copy of the paper that was circulated to Ministers FYI; this includes details of the new process to update birth certificates, which is now reflected in the Bill (also attached). s9(2)(g)(i)

As discussed yesterday, the BDMRR Bill (which re-enacts the 1995 Act) was introduced on 10 August 2017. The GA Committee report on the Hamblett Petition was tabled on 11 August. The Government response was tabled on 15 February 2018, part way through the select committee process on the Bill. The select committee timetable meant there was no opportunity to go

through the usual policy process to formally confirm the Government position (ie, drafting a Cabinet paper, full agency consultation, etc) so the Minister IA circulated the attached paper to her Cabinet colleagues and took an oral item to Cabinet on 28 May 2018. But we did consult some agencies (including Corrections) on a confidential “need to know” basis. The resulting Cabinet decision is the Government position reflected in the Departmental Report. We did receive a query from the Minister of Police’s office, but nothing from Corrections. And some further background – the GA Committee sought an extension of the Bill’s report back date so we could get that agreed Government position. The current Committee chair, Brett Hudson, was the Deputy Chair of the previous GA Committee when it presented its unanimous report in favour of the Hamblett Petition.

I think we agree the theoretical risk of a gang member or bank robber looking to “game the system” to get placed in a women’s prison can be discounted. Nevertheless, the Committee is interested in whether Corrections can ensure all prisoners’ safety under a statutory declaration process to update a birth certificate. It appears that the answer to that question is “Yes” even if it has the potential to give rise to other concerns (eg, complaint about discriminatory treatment, eg, segregation of trans-prisoners currently ineligible for a review of their placement because of past offending). But presumably trans-prisoners unhappy with their placement could already complain to the relevant authorities? Yes? No?

We understand Corrections may have some residual concerns which DIA is happy to work on with you.

Hoping to see you before the meeting to discuss.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Tuesday, 31 July 2018 4:44 PM

**To:** 'BEALES, Neil (WELLHO)'; 'SYMONDS, Richard (WELLHO)'; s9(2)(a)

**Cc:** 'DONALDSON, Bronwyn (WELLHO)'; Hayden Kerr; 'Anne O’Driscoll'; Rachel Groves

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi all,

Further to our earlier conversation, I think we are in agreement that prisoner safety is a key consideration. I understand that Corrections’ policy (based on the 2005 Regulations) would allow a transgender prisoner transferred to a prison that accords with their self-identified gender

identity/nominated sex on their birth certificate to be subject to restrictions (eg, segregation) if there was concern about other prisoners' safety. However, Corrections is concerned imposing such restrictions could expose Corrections to complaints to, eg, the Ombudsman or the Human Rights Commission. However, it would seem a restriction based on an objective risk assessment could be defended in the event it was challenged.

I thought it would be interesting to see how other jurisdictions deal with the potential risk posed by the 0.01% compared with the rights of the 99.9%. Malta (which has a similar self-identification process, and which was posited as a model to follow by Allyson Hamblett and the GA Committee in its report on Ms Hamblett's petition) has a prisoner placement policy similar to NZ's including, eg, "accommodation separate from other prisoners". And the UK policy notes (see p 9 of the House of Commons paper):

"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.**" (Emphasis added)

Perhaps we could meet at, say, 9.00 am before the meeting to ensure we are on the same page in focusing on prisoner safety.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Tuesday, 31 July 2018 3:00 PM

**To:** 'BEALES, Neil (WELLHO)'; 'SYMONDS, Richard (WELLHO)'; s9(2)(a)

**Cc:** 'DONALDSON, Bronwyn (WELLHO)'; Hayden Kerr; 'Anne O'Driscoll'

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Neil,

As discussed, I attach DIA's briefings to the Government Administration Committee on Petition 2014/86 of Allyson Hamblett and the Government response.

In practice, the Family Court largely follows a “self-identification” model. As the briefings note, there is no minimum level of medical treatment, and no requirement for some (or any) surgery.

I also attach a copy of the email correspondence relating to the consultation with Corrections on the relevant section in the Departmental Report. This part of the report was drafted following a submitter raising concerns about s9(2)(a) [REDACTED]. I had a conversation with s9(2) [REDACTED], who subsequently confirmed Corrections could not confirm (for privacy reasons) where the offender was housed. I subsequently drafted the “generic” advice for the report (based on Corrections’ policy), which s9(2)(a) [REDACTED] confirmed was accurate.

It would be useful to talk again before the meeting tomorrow.

Regards.

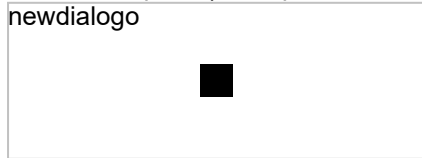
Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a) [REDACTED]

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**From:** Cathy Nijman

**Sent:** Monday, 30 July 2018 4:19 PM

**To:** 'BEALES, Neil (WELLHO)'; SYMONDS, Richard (WELLHO); s9(2)(a) [REDACTED]

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; 'Anne O'Driscoll'

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope [REDACTED]

Hi all,

Just to confirm the Governance & Administration Committee will be meeting in **Room 2, Bowen House**, on Wednesday.

Regards.

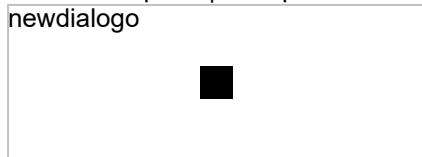
Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a) [REDACTED]

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**From:** BEALES, Neil (WELLHO) [<mailto:xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx>]

**Sent:** Monday, 30 July 2018 3:57 PM  
**To:** Cathy Nijman; SYMONDS, Richard (WELLHO); s9(2)(a)  
**Cc:** DONALDSON, Bronwyn (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Cathy

s9(2)(a), Principal Custodial Advisor in my team will be joining me as well.

Kind regards  
Neil

**Neil Beales | Chief Custodial Officer |**  
National Office | Department of Corrections *Ara Poutama Aotearoa* |  
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |  
s9(2)(a) | [xxxx.xxxxxx@xxxxxxxxxxxxx.xxxx.xx](mailto:xxxx.xxxxxx@xxxxxxxxxxxxx.xxxx.xx)

---

**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxxx.xx>]  
**Sent:** 30 July 2018 3:25 p.m.  
**To:** SYMONDS, Richard (WELLHO)  
**Cc:** BEALES, Neil (WELLHO); DONALDSON, Bronwyn (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Thanks, Richard. Much appreciated.

I'll let the Committee clerk know. Still no room allocated for the meeting, but as advised on Friday. It will be at 9.30am in Parliament House.

Regards.

Cathy N.

**Cathy Nijman | Senior Policy Analyst | Policy Group**  
**The Department of Internal Affairs Te Tari Taiwhenua**

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**From:** SYMONDS, Richard (WELLHO) [<mailto:xxxxxxxx.xxxxxxx@xxxxxxxxxxxxx.xxxx.xx>]  
**Sent:** Monday, 30 July 2018 3:22 PM  
**To:** Cathy Nijman  
**Cc:** BEALES, Neil (WELLHO); DONALDSON, Bronwyn (WELLHO)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

I apologise for the delay in responding.

I have been advised that both Neil Beales, Chief Custodial Officer and Bronwyn Donaldson, Director Offender Health, will attend the meeting.

Richard Symonds | Manager Custodial Practice |

s9(2)(a)

---

**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxx.xx>]

**Sent:** 30 July 2018 3:13 p.m.

**To:** SYMONDS, Richard (WELLHO)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Richard – any update on whether Neil Beales will be available to attend the select committee on Wednesday?

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Friday, 27 July 2018 11:53 AM

**To:** 'SYMONDS, Richard (WELLHO)'

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Thanks, Richard

Monday is fine to confirm – the letter doesn't have to go to the Committee until Monday pm. I'll forward a copy to Corrections at the same time.

FYI: The Committee Clerk has confirmed the meeting time will be 9.30 on Wednesday 1 August. Room not yet know, but will be in Parliament House.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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Please give me a call if you have any questions.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** BEALES, Neil (WELLHO) [mailto:xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx]

**Sent:** Wednesday, 1 August 2018 8:53 AM

**To:** Cathy Nijman

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; Rachel Groves; SYMONDS, Richard (WELLHO); WALKER, Megan (WELLHO); KENNEDY, Suzanne (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Thank you Cathy

It is not my intention to contradict Government policy, however I have been asked a question and have a responsibility to respond accurately and appropriately from an operational perspective. As stated, in broad terms we are supportive of the proposal, however there is a risk that we need to explore in more detail in regards to the current processes/regulations that makes someone who identifies as transgender in prison but ineligible to apply due to current/previous convictions.

Regards

Neil

**Neil Beales** | Chief Custodial Officer |

National Office | Department of Corrections *Ara Poutama Aotearoa* |

44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |

s9(2)(a)

| [xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx](mailto:xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx)

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**From:** [KENNEDY, Suzanne \(WELLHO\)](#)  
**To:** [SENIOR, Derek \(WELLHO\)](#); [JONES, Robert \(WELLHO\)](#); s9(2)(a) [BEALES, Neil \(WELLHO\)](#)  
**Cc:** [FIELD, Jo \(WELLHO\)](#)  
**Subject:** HPRM: Fwd: BDMRR Bill - Transgender prisoners: Out of  
**Date:** 04 October 2018 12:39:23 p.m.  
**Attachments:** [image001.png](#)  
[image009.png](#)  
[image012.png](#)  
[4877820 Advice re implications of the BDMRR Bill.DOCX](#)

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can we meet urgently to discuss preparing a min briefing

Sent from Samsung tablet.

s9(2)(h)

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**From:** Cathy Nijman [mailto:Cathy.Nijman@dia.govt.nz]  
**Sent:** Monday, 1 October 2018 14:38  
**To:** KENNEDY, Suzanne (WELLHO)  
**Cc:** s9(2)(a) [ATKINSON, Beith \(WELLHO\)](#); [ELKIN, Katie \(WELLHO\)](#); s9(2)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope  
**Importance:** High

Suzanne,

Could you please advise as a matter of urgency whether s9(2)(h) [has been](#)

received, and, if so, if Corrections is in a position to discuss next steps. Minister Martin is to meet with the Deputy PM on 16 October to discuss.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Thursday, 30 August 2018 10:22 AM

**To:** 'CAMERON, Michael (WELLHO)'

**Cc:** s9(2)(a) ATKINSON, Beith (WELLHO); ELKIN, Katie (WELLHO); s9(2) KENNEDY, Suzanne (WELLHO); Anne O'Driscoll

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

FYI: Finalised briefing.

Thanks for your input at such short notice.

Regards.

Cathy N.

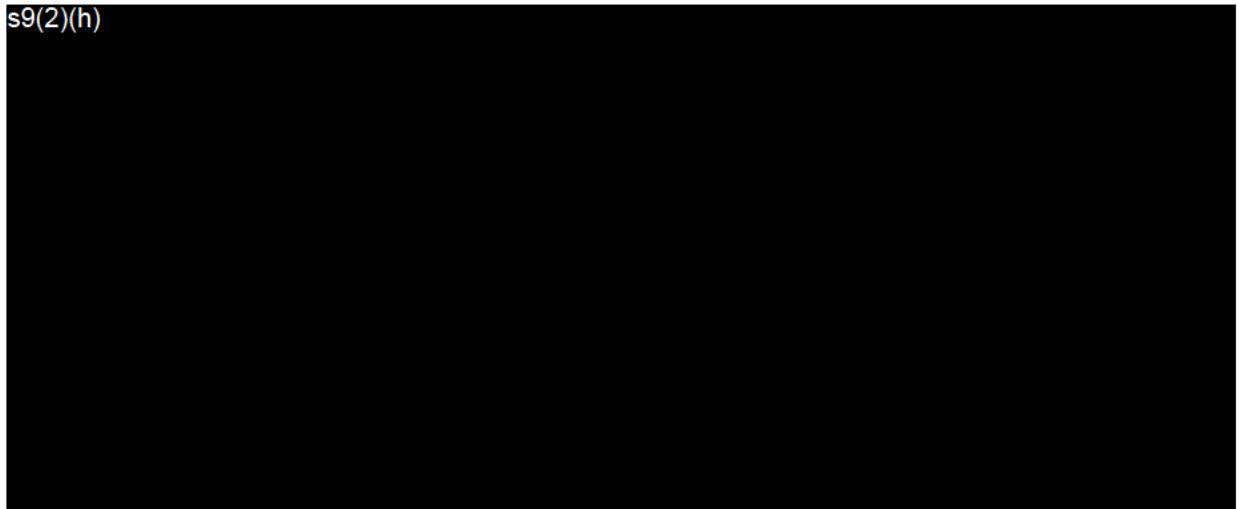
**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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s9(2)(h)





s9(2)(h)

---

**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxx.xx>]

**Sent:** 28 August 2018 4:33 p.m.

**To:** s9(2)(a)

**Cc:** KENNEDY, Suzanne (WELLHO); Anne O'Driscoll

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

**Importance:** High

Hi s9(2)

s9(2)(a) could you please urgently review the attached 2-page (No 2) briefing to the Minister IA to confirm I have correctly represented Corrections' position (and operational policy, as outlined in the POM).

Happy to discuss if you have any questions, but a reply by COB tomorrow would be appreciated as the briefing is due on Thursday.

Thanks and regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Monday, 27 August 2018 1:58 PM

**To:** 'KENNEDY, Suzanne (WELLHO)'

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Suzanne,

Attached FYI, in confidence, is a copy of a briefing the Minister IA requested on the transgender prisoner issue.

s9(2)(h)

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
The Department of Internal Affairs Te Tari Taiwhenua

s9(2)(a)

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**From:** KENNEDY, Suzanne (WELLHO) [<mailto:Suzanne.KENNEDY@corrections.govt.nz>]

**Sent:** Wednesday, 8 August 2018 12:04 PM

**To:** Cathy Nijman

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; SYMONDS, Richard (WELLHO); s9(2)(a) s9(2)(a) BEALES, Neil (WELLHO); ELKIN, Katie

(WELLHO); CAMERON, Michael (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Cathy

Thank you for your email. s9(2)(h)

Thanks Suzanne

Suzanne Kennedy | Chief Policy Adviser |

Service Development | Department of Corrections Ara Poutama Aotearoa |

Mayfair House, 44-52 The Terrace, Wellington | PO Box 1206, Wellington 6140 |

s9(2)(a)

[suzanne.kennedy@corrections.govt.nz](mailto:suzanne.kennedy@corrections.govt.nz) |

---

**From:** Cathy Nijman [<mailto:Cathy.Nijman@dia.govt.nz>]

**Sent:** 08 August 2018 10:43 a.m.

**To:** KENNEDY, Suzanne (WELLHO)

**Cc:** DONALDSON, Bronwyn (WELLHO); s9(2)(a); SYMONDS, Richard (WELLHO);

s9(2)(a) s9(2)(a) BEALES, Neil (WELLHO); ELKIN, Katie

(WELLHO); CAMERON, Michael (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Suzanne,

Just a quick update on this morning's select committee meeting.

s9(2)(g)(i)

s9(2)(g)(i)

(the main focus of the last two supplementary briefings) and what, if anything, Corrections needs to do to change its 2005 Regulations concerning placement of transgender prisoners. To that end, the Committee has asked for a further briefing from the DIA when Corrections has made a decision about what, if anything needs to be done, and when that could happen. Technically, the briefing won't be related to the BDMRR Bill, as that item of business will be closed. But the Committee can ask for a briefing as a separate item of business.

Please let me know if you have any questions.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman

**Sent:** Thursday, 2 August 2018 9:32 AM

**To:** 'KENNEDY, Suzanne (WELLHO)

**Cc:** DONALDSON, Bronwyn (WELLHO); Hayden Kerr; Anne O'Driscoll; SYMONDS, Richard (WELLHO); s9(2)(a); s9(2)(a) BEALES, Neil (WELLHO); ELKIN, Katie

(WELLHO); CAMERON, Michael (WELLHO); s9(2)(a)

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Suzanne,

Further to our conversation yesterday, I attach a copy of the letter responding to the Committee's questions/instructions for your info. If you have any comment about the part relating to the to-be-completed work on the Corrections regulations, could you please get back to me by midday today. We have to send the advice to the Committee tomorrow.

I'm happy to review/comment on your s9(2)(h) to ensure we are on the same page about how best to respond to the issues the Committee raised concerning the Corrections Regulations.

Regards.

Cathy N.

s9(2)(h)

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s9(2)(h)

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s9(2)(h)

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**From:** [KENNEDY, Suzanne \(WELLHO\)](#)  
**To:** [SENIOR, Derek \(WELLHO\)](#); [JONES, Robert \(WELLHO\)](#); s9(2)(a); [BEALES, Neil \(WELLHO\)](#); [CAMERON, Michael \(WELLHO\)](#)  
**Subject:** HPRM: FW: BDMRR Bill - Transgender prisoners: Out of  
**Date:** 05 October 2018 10:57:49 a.m.  
**Attachments:** [image001.png](#)  
[UK Parliament - House of Commons Briefing Paper - Transgender Prisoners \(September 2018\).pdf](#)  
[image007.png](#)  
[image012.png](#)

---

fyi

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**From:** Cathy Nijman [mailto:xxxxx.xxxxxx@xxx.xxx.xx]  
**Sent:** 05 October 2018 10:55 a.m.  
**To:** KENNEDY, Suzanne (WELLHO)  
**Cc:** Rachel Groves; Hayden Kerr; Raj Krishnan  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Yes, thanks– have you seen this? Hot off the press from the UK House of Commons – two-yearly update on placement of transgender prisoners.

Ms White’s offending involved what NZ would class as indecent assaults, which is not to minimise the impact on the victims.

The problem in this case was the UK Prisons Service didn’t follow its own rules an assessing a prisoner’s risk before transferring them to a prison based on their asserted gender identity. For completeness, I note Ms White had not (has not) taken any steps (beginning with obtaining a Gender recognition Certificate) to update her birth record.

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** KENNEDY, Suzanne (WELLHO) [mailto:xxxxxxx.xxxxxxx@xxxxxxxxxxxxx.xxx.xx]  
**Sent:** Friday, 5 October 2018 10:20 AM  
**To:** Cathy Nijman  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Cathy

Thanks for your email. Have you seen this article?

<https://www.theguardian.com/uk-news/2018/sep/09/sexual-assaults-in-womens-prison-reignite-debate-over-transgender-inmates-karen-white>

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**From:** Cathy Nijman

**Sent:** Thursday, 30 August 2018 10:22 AM

**To:** 'CAMERON, Michael (WELLHO)'

**Cc:** s9(2)(a) ATKINSON, Beith (WELLHO); ELKIN, Katie (WELLHO); s9(2) KENNEDY, Suzanne (WELLHO); Anne O'Driscoll

**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

FYI: Finalised briefing.

Thanks for your input at such short notice.

Regards.

Cathy N.

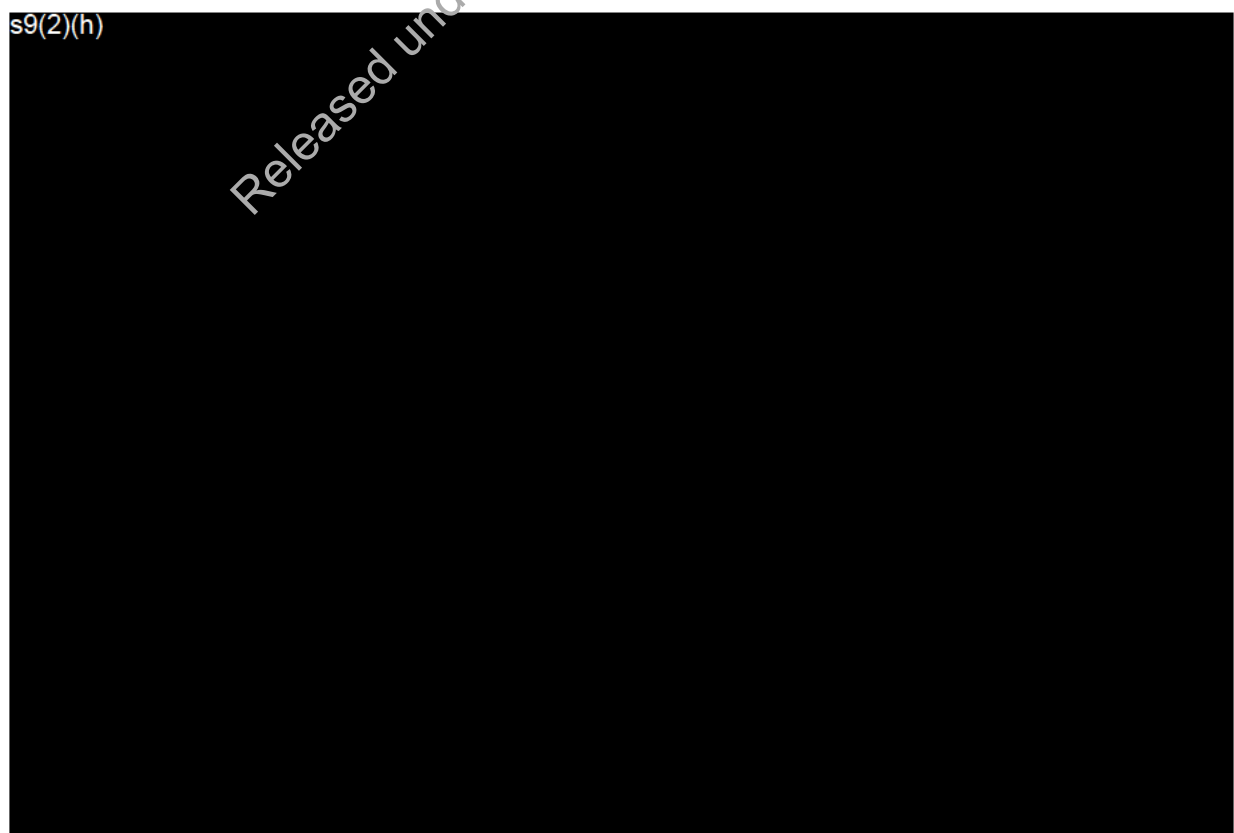
**Cathy Nijman** | Senior Policy Analyst | Policy Group

The Department of Internal Affairs Te Tari Taiwhenua

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**From:** Cathy Nijman [<mailto:xxxxx.xxxxxx@xxx.xxx.xx>]  
**Sent:** 28 August 2018 4:33 p.m.  
**To:** s9(2)(a)  
**Cc:** KENNEDY, Suzanne (WELLHO); s9(2)(a)  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope  
**Importance:** High

Hi s9(2)

s9(2)(a) could you please urgently review the attached 2-page (No 2) briefing to the Minister IA to confirm I have correctly represented Corrections' position (and operational policy, as outlined in the POM).

Happy to discuss if you have any questions, but a reply by COB tomorrow would be appreciated as the briefing is due on Thursday.

Thanks and regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

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**From:** Cathy Nijman  
**Sent:** Monday, 27 August 2018 1:58 PM  
**To:** 'KENNEDY, Suzanne (WELLHO)'  
**Subject:** RE: BDMRR Bill - Transgender prisoners: Out of scope

Hi Suzanne,

Attached FYI, in confidence, is a copy of a briefing the Minister IA requested on the transgender prisoner issue.

s9(2)(h)

Regards.

Cathy N.

**Cathy Nijman** | Senior Policy Analyst | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**



**BRIEFING PAPER**

Number 07420, 19 September 2018

# Transgender Prisoners

By Jacqueline Beard



**Inside:**

1. The law
2. Transgender prisoners in England and Wales
3. Transgender prisoners in Scotland
4. Transgender prisoners in Northern Ireland

# Contents

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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 Dinenge, 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

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>

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

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.

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.

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

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 2120 (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 PPO 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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s9(2)(h)

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**From:** [SENIOR, Derek \(WELLHO\)](#)  
**To:** [s9\(2\)\(a\)](#); [CAMERON, Michael \(WELLHO\)](#)  
**Cc:** [KENNEDY, Suzanne \(WELLHO\)](#); [JONES, Robert \(WELLHO\)](#)  
**Subject:** HPRM: Transgender prisoners paper  
**Date:** 05 October 2018 04:16:59 p.m.  
**Attachments:** [Managing transgender prisoners paper.docx](#)  
[image008.png](#)  
**Importance:** High

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Hi guys

Following on from the discussion on Wednesday (and many since) about the impact of the DIA Bill on how we manage transgender prisoners, I've started writing a paper, which Jo Field is going to take a look at this weekend. It's still very draft (especially the options at the back, given I did them all today, [s9\(2\)\(h\)](#)). That said, I'd be appreciative if you could take a look and come back to me with comments.

In particular, I'm interested in anything that might be factually incorrect, or where there's something missing that we might want to include.

I'm pretty sure the options are going to move around quite a bit on Monday, but happy to consider any thoughts you have on those as well.

Thanks  
Derek

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |  
Department of Corrections *Ara Poutama Aotearoa* | 44-52 The Terrace, Wellington 6011 |

[s9\(2\)\(a\)](#) | [xxxxx.xxxxxx@xxxxxxxxxxx.xxx.xx](#) |

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**From:** [SENIOR, Derek \(WELLHO\)](#)  
**To:** s9(2)(a)  
**Subject:** HPRM: Managing transgender prisoners paper  
**Date:** 08 October 2018 12:38:52 p.m.  
**Attachments:** [Managing transgender prisoners paper.docx](#)

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Hi s9(2)

Here's an updated copy of the trans paper – mostly polishing the options up a bit more.

I would be good to get your feedback on this later today if I can. I'm in a workshop until 3pm but will be around after that

Cheers  
Derek

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**From:** [SENIOR, Derek \(WELLHO\)](#)  
**To:** s9(2)(a)  
**Subject:** HPRM: RE: Managing transgender prisoners paper  
**Date:** 08 October 2018 12:49:58 p.m.  
**Attachments:** [image006.png](#)  
[image012.png](#)

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Depends on the feedback. Whatever is easier for you

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |  
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---

**From:** s9(2)(a)  
**Sent:** 08 October 2018 12:49 p.m.  
**To:** SENIOR, Derek (WELLHO)  
**Subject:** RE: Managing transgender prisoners paper

Would it be easiest if I came to your desk?

Or do you want tracked changes (ugh)?

s9(2)(a) | **Principal Custodial Adviser**  
s9(2)(a)

---

**From:** SENIOR, Derek (WELLHO)  
**Sent:** 08 October 2018 12:49 p.m.  
**To:** s9(2)(a)  
**Subject:** RE: Managing transgender prisoners paper

Any time after 9.30 should be fine. I've been asked to lodge this for SDLT by midday

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |  
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**From:** s9(2)(a)  
**Sent:** 08 October 2018 12:48 p.m.  
**To:** SENIOR, Derek (WELLHO)  
**Subject:** RE: Managing transgender prisoners paper

Hi Derek,

Today's a bit tricky, what of tomorrow morning?

s9(2)(a) | **Principal Custodial Adviser**  
s9(2)(a)

---

**From:** SENIOR, Derek (WELLHO)  
**Sent:** 08 October 2018 12:39 p.m.  
**To:** s9(2)(a)  
**Subject:** Managing transgender prisoners paper

Hi s9(2)

Here's an updated copy of the trans paper – mostly polishing the options up a bit more.

I would be good to get your feedback on this later today if I can. I'm in a workshop until 3pm but will be around after that

Cheers  
Derek

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**From:** s9(2)(a)  
**To:** [SENIOR, Derek \(WELLHO\)](#)  
**Subject:** HPRM: Management of trans prisoners - ELT paper - Appendix C  
**Date:** 09 October 2018 11:19:00 a.m.  
**Attachments:** [Management of trans prisoners - ELT paper - Appendix C.docx](#)  
[image008.png](#)

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Hi again Derek,

NOTE these are from 2016 – but for reference.

s9(2)(a) Principal Custodial Adviser  
Corrections Services | National Office | Department of Corrections *Ara Poutama Aotearoa* |  
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140, New Zealand |

s9(2)(a)

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## Appendix A

## Comparison of the management of trans prisoners in New Zealand and other jurisdictions

Management aspect	Country	Operational policy	New Zealand comparison
Reception and induction	New South Wales, Australia	<ul style="list-style-type: none"> <li>➤ During induction screening transgender prisoners are kept separate from other prisoners in their own cell and have access to their own shower and toilet in private.</li> <li>➤ A full “social history” is taken for all transgender prisoners during induction. It is used to determine their particular needs, their placement and programme pathway.</li> </ul>	<ul style="list-style-type: none"> <li>➤ There is no specific mention of transgender prisoners in the induction guidelines apart from the guidance relating to initial determination of a prisoner’s gender and placement decision</li> </ul>
	Scotland	<ul style="list-style-type: none"> <li>➤ Guidance states that a transgender prisoner’s treatment should not be dependent on whether the prisoner has formal recognition of their acquired gender under the Gender Recognition Act or not, or whether they are applying. They must still be treated as a transgender prisoner for all purposes.</li> <li>➤ On reception the prisoner is to be rubbed down as per normal procedure. However, a transgender prisoner is to be rubbed down in accordance with their social gender (the gender in which they live day to day). If there is uncertainty the prisoner is to be asked which gender they wish to be searched by, this conversation is to be recorded and the search conducted accordingly.</li> <li>➤ At risk of self harm and suicide status is to be assessed on an individual basis. There is acknowledgement that transgender prisoners are at higher risk than the general population of self harm and suicide but the risk assessment must be individual.</li> <li>➤ Only in “exceptional circumstances” can restrictions be placed on unsupervised access to additional gender reassignment related property. Where these exceptional circumstances do apply, for example if the prisoner is determined to be at risk of self harm or suicide, they must still have supervised access to these items for association.</li> <li>➤ Scotland has “first night accommodation” to settle prisoners into prison. Transgender prisoners are permitted longer stays in “first night accommodation” than other received prisoners.</li> </ul>	
Case management and management plans	Scotland	<ul style="list-style-type: none"> <li>➤ Scotland has implemented a particular form of multi-disciplinary case management for transgender prisoners. It can be integrated into regular case management so long as the relevant issues are addressed.</li> <li>➤ The MDT includes, among others, the prisoner, their personal officer,</li> </ul>	<ul style="list-style-type: none"> <li>➤ There is no specific mention of different case management or safety planning for transgender prisoners.</li> </ul>

Note: this document does not look at policies which relate to the placement of transgender prisoners

		<p>representatives from transgender organisations if wanted by the prisoner and the local equality and diversity manager.</p> <ul style="list-style-type: none"> <li>➤ A case conference is held within 7 days of the reception of the transgender prisoner, or within 7 days of becoming aware that the prisoner has a different gender identity to their biological identity.</li> <li>➤ Case conferences are to be held monthly for three months, then quarterly. If issues are resolved the conferences can then be held 6 monthly.</li> <li>➤ The purpose of the case conferences is to examine all the circumstances of the transgender prisoner's case, and to gather the prisoner's views and wishes in relation to their management. The case conference is required to seek expert opinions from the medical specialist treating the transgender prisoner at the NHS Gender Identity Clinic.</li> <li>➤ Full risk assessments are conducted and decisions are made to ensure that: <ul style="list-style-type: none"> <li>○ the prisoner's safety, dignity and privacy are ensured, especially as the prisoner progresses through their transition. This including ensuring safety, dignity and privacy through accommodation and searching decisions;</li> <li>○ the prisoner is provided with access to necessary additional property;</li> <li>○ the prisoner's access to gender reassignment services under the NHS;</li> <li>○ the prisoner has access to social support and contact and mental health support;</li> <li>○ the prisoner has equitable access to mainstream services;</li> <li>○ inter-prison transfers are managed appropriately if necessary; and</li> <li>○ reintegration is appropriately managed.</li> </ul> </li> </ul>	
	England and Wales	<ul style="list-style-type: none"> <li>➤ Transgender prisoners must have a management care plan outlining how their safety will be managed. Advice must be sought from the NOMS Equalities Group or Women's Team.</li> <li>➤ Transgender prisoners are encouraged to enter an individualised voluntary compact (agreement) with the prison which details how they will be managed while in prison. The compact covers: <ul style="list-style-type: none"> <li>○ Accommodation</li> </ul> </li> </ul>	

## Appendix A

## Comparison of the management of trans prisoners in New Zealand and other jurisdictions

		<ul style="list-style-type: none"> <li>○ Showers</li> <li>○ Laundry</li> <li>○ Dress code</li> <li>○ Employment</li> <li>○ Offending behaviour</li> <li>○ Facilities list</li> <li>○ Monthly review</li> <li>○ Named liaison/personal officers/key workers</li> <li>○ Support</li> <li>○ Searching</li> </ul> <p>➤ Transgender prisoners can apply to have their recorded name changed.</p>	
Cell accommodation	New South Wales, Australia	<ul style="list-style-type: none"> <li>➤ Access to the same accommodation and classification system as their identified gender.</li> <li>➤ Single cell accommodation is to be made available unless case management indicates that shared accommodation is required.</li> <li>➤ Transgender prisoners must be provided with separate toilet facilities and allowed to shower separately.</li> <li>➤ Transgender prisoners are to be “clustered” where possible and separate accommodation may be provided so long as they continue to have equitable access to services and programmes.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Guidance currently states that transgender prisoners may be placed in shared cell accommodation with another transgender prisoner, or in single cell accommodation. If the prisoner chooses and it is safe to do so they may be accommodated with a prisoner who is not transgender.</li> <li>➤ In May 2016 a direction went out to Prison Directors from the Chief Custodial Officer that transgender prisoners were only to be accommodated in cells with other transgender prisoners</li> </ul>
	Scotland	<ul style="list-style-type: none"> <li>➤ Must be placed in single cell accommodation unless the Unit Manager has carefully assessed that shared cell accommodation is sufficiently safe and provides sufficient privacy for the transgender person and the person they are sharing a cell with.</li> <li>➤ Association restrictions are to be avoided where possible.</li> <li>➤ Case management of transgender prisoners is intensive with conferences required at intervals. All case management decisions are discussed including cell accommodation. More detail is provided on this process is provided above.</li> </ul>	
	England and Wales	<ul style="list-style-type: none"> <li>➤ Cell sharing is permitted. There is a commitment that the accommodation provided will afford “the maximum amount of privacy possible whilst still providing access to a full regime.”</li> <li>➤ Cell sharing will be done on an individual risk assessment basis which</li> </ul>	

**Note: this document does not look at policies which relate to the placement of transgender prisoners**

## Appendix A

## Comparison of the management of trans prisoners in New Zealand and other jurisdictions

		includes consideration of specific vulnerabilities.	
	United Nations Handbook on prisoners with special needs	<ul style="list-style-type: none"> <li>➤ Transgender prisoners should be placed in whatever environment that best protects their safety.</li> <li>➤ Transgender prisoners should never be in cells with prisoners who may pose a risk to their safety.</li> <li>➤ The prisoner's views and concerns should be taken into account when making placement decisions</li> <li>➤ Protective segregation should be immediately available when requested</li> </ul>	
Person searching	New South Wales, Australia	<ul style="list-style-type: none"> <li>➤ All searching and urinalysis must be performed by officers of the prisoner's gender identification "except in the cases of emergency."</li> </ul>	<ul style="list-style-type: none"> <li>➤ There is no specific guidance relating to transgender prisoners</li> <li>➤ Section 94 of the Corrections Act 2004 requires that rub down searches and strip searches are only carried out by a person of the same sex as the person to be searched, and no strip search may be carried out in view of any person who is not of the same sex as the person being searched. In practice, this is currently interpreted in relation to the prison that the transgender prisoner is held in as opposed to their gender identity or their biological sex/genital appearance. Therefore, if the transgender prisoner is held in a men's prison their personal searches will be conducted by men. If they are held in a women's prison their personal searches will be conducted by a women.</li> <li>➤ Section 94 also stipulates that a person who carried out a scanner search, rub down search, strip search or x-ray search must conduct the search with decency and sensitivity and in a manner that affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search.</li> </ul>
	Scotland	<ul style="list-style-type: none"> <li>➤ Case management conference will review the prisoner's individual circumstances to determine appropriate and safe searching of the prisoner and discuss staff training requirements if necessary.</li> <li>➤ Prior to the first case management conference searching must occur in accordance with the prisoner's social gender. If there are any difficulties experiences or concerns expressed during this time by the prisoner or staff the Unit Manager should decide how best to temporarily deal with the difficulties and record this outcome. Advice can be sought from the headquarters Equality and Diversity Team.</li> <li>➤ The general principles to guide case conference decisions are: <ul style="list-style-type: none"> <li>○ Searching should happen in accordance with the prisoner's "social gender". A prisoner's social gender is the one they live in day to day. If the If the prisoner's social gender is unclear staff are directed to ask them in a discrete manner (this should have happened by the time of the case conference).</li> <li>○ Genital appearance should not be used to determine search requirements.</li> <li>○ If a prisoner is going to be searched not in accordance of their social gender, the rationale must be recorded.</li> </ul> </li> <li>➤ Staff are guided that: <ul style="list-style-type: none"> <li>○ Any physical variation is to be responded to professionally and respectfully</li> <li>○ Extra items worn by transgender prisoners to assist their gender appearance, such as prosthetics and chest bindings, are to be searched carefully</li> </ul> </li> </ul>	

**Note: this document does not look at policies which relate to the placement of transgender prisoners**



		<ul style="list-style-type: none"> <li>○ Sufficient time is to be provided at the end of searches to replace the items required for their identified gender appearance and a mirror is to be provided if required.</li> <li>➤ Staff concerns about performing searches on transgender people should be initially addressed through staff training and information about gender reassignment and equality requirements.</li> <li>➤ A guide about strip searching transgender prisoners has been drafted for provision to staff in the first instance.</li> </ul>	<p><b>New Zealand Police and New Customs</b></p> <ul style="list-style-type: none"> <li>➤ NZ Police also have powers to conduct personal searches. Their policy is to ask the transgender person which gender they would feel comfortable with conducting the search. If the person does not express a preference they determine the person's sex on the basis of appearance and clothing and conduct the search accordingly. Biological or birth gender is not the determinative factor.</li> <li>➤ New Zealand Customs also has powers to conduct personal searches. Where the person is transgender, they may specify the gender of the searcher.</li> </ul>
England and Wales	<ul style="list-style-type: none"> <li>➤ Transgender prisoners are encouraged to enter a voluntary "compact" (agreement) with the prison in respect of their searching arrangements. This happens as part of a wider consultative approach to case management of transgender prisoners. The prisoner's wishes must be sought and taken into account as well as appropriate external advice.</li> <li>➤ The Governor of the prison must decide if the agreed compact is suitable taking into account legal considerations, whether the prisoner has a gender recognition certificate, the sex characteristics of the prisoner, the views of the prisoner and staff and the likelihood of the prisoner cooperating with the voluntary compact. There is guidance on drawing up a compact, the most important factors are whether the prisoner is in receipt of a gender recognition certificate and at what stage in their transition the transgender prisoner is.</li> <li>➤ A guidance table for the drawing up of the compact is attached. Essentially, the first step is a consultative approach with the prisoner. As a final resort, if the prisoner insists on being searched by officers of their acquired or identified gender that will normally occur.</li> </ul>		
Canada	<ul style="list-style-type: none"> <li>➤ Individualised arrangements are put in place for searching transgender prisoners through consultation with the prisoner.</li> <li>➤ These arrangements are written down in a protocol. A sample protocol is provided for reference.</li> </ul>		
United Nations Handbook on special needs prisoners	<ul style="list-style-type: none"> <li>➤ There should <i>always</i> be a justification for carrying out a strip search on any prisoners</li> <li>➤ Transgender prisoners should be provided with a choice regarding the gender of the person conducting the search. Prison authorities must ensure the search is conducted by the appropriate gender of officer to ensure minimum interference with personal dignity.</li> </ul>		

## Appendix A

## Comparison of the management of trans prisoners in New Zealand and other jurisdictions

Clothing and other personal items	New South Wales, Australia	<ul style="list-style-type: none"> <li>➤ Transgender prisoners have the right to dress at all times in clothing appropriate to their gender identification, whatever prison they are housed in.</li> <li>➤ Corrections are obliged to provide the transgender prisoner with appropriate clothing for their identified gender, including gender specific underwear.</li> <li>➤ If the prisoner is housed as per their biological gender, they are able to purchase the same “personal care” items as prisoners of their identified gender.</li> </ul>	<p><b>Clothing</b></p> <ul style="list-style-type: none"> <li>➤ There are no specific national guidelines on the transgender prisoners’ clothing.</li> <li>➤ Remand accused prisoners cannot be required to wear clothing or footwear required by the prison (regulation 68(3)). By implication transgender remand accused prisoners have a right wear their gender appropriate clothing, including underwear.</li> <li>➤ In addition, if the prisoner’s own clothing is generally insufficient or unfit for use, the manager of the prison must require the prisoner to wear clothing provided by the prison. There is nothing to specify that this clothing should be gender appropriate when provided.</li> <li>➤ Prison issued clothing is unisex and women’s underwear is provided to women’s prisons through donations. Christchurch Women’s Prison sews their own when there is a need.</li> <li>➤ The authorised property rules do not make gendered distinctions for clothing.</li> <li>➤ There is potential for local policies relating to transgender women housed in men’s prisons to prohibit their use of gender appropriate clothing and underwear.</li> </ul> <p><b>Personal items</b></p> <ul style="list-style-type: none"> <li>➤ There is no specific allowance for transgender prisoners to possess items needed to present convincingly in their identified gender (such as breast binders/prosthesis) in the authorised property rules.</li> <li>➤ Personal grooming and health care items are available to purchase through the</li> </ul>
	Scotland	<ul style="list-style-type: none"> <li>➤ Suitable access is to be provided to additional property items required to maintain their acquired gender appearance. It is specified that this is not to be viewed as “special treatment” but is an accessibility requirement.</li> <li>➤ An list of example items the transgender prisoner may require is provided, but is specified as not exhaustive: <ul style="list-style-type: none"> <li>○ clothing and underwear</li> <li>○ sanitary wear</li> <li>○ shaving equipment</li> <li>○ hair removal cream</li> <li>○ facial cosmetics</li> <li>○ breast binders</li> <li>○ wigs and hair pieces</li> <li>○ prosthetics (breasts/genitals)</li> <li>○ dilation medical supplies</li> </ul> </li> <li>➤ Case management of transgender prisoners is intensive with conferences required at intervals. All case management decisions are discussed including clothing and personal items.</li> </ul>	
	England and Wales	<ul style="list-style-type: none"> <li>➤ Transgender prisoners are permitted to dress appropriately for their nominated gender. Female prisoners in England and Wales do not wear prison uniforms but wear their own clothes. This means that transgender women in men’s prisons do not wear prison uniform.</li> <li>➤ Items required to present as their identified gender are permitted and can only be prohibited where it can be demonstrated that they present a security risk which cannot be mitigated.</li> <li>➤ All transgender prisoners can use make up to present more</li> </ul>	

**Note: this document does not look at policies which relate to the placement of transgender prisoners**

## Appendix A

## Comparison of the management of trans prisoners in New Zealand and other jurisdictions

		convincingly as their identified gender, this access cannot be restricted.	<p>P119 system. The women's P119 has the following items which are not on the men's P119:</p> <ul style="list-style-type: none"> <li>○ Facial wash</li> <li>○ Hair ties</li> <li>○ Emery board</li> <li>○ Tweezers</li> <li>○ Mascara (black)</li> <li>○ Lipstick (baby pink and pink blast)</li> <li>○ Hair dye (black, chocolate brown, medium blonde)</li> <li>○ Women's razors and razor blades (only for women housed in low security units)</li> </ul> <p>➤ Prison Directors have permitted (in the week of 16 May 2016) adding the facial wash and emery board to the men's P119. They declined to add the other items.</p>
Escorts and transfers	New South Wales, Australia	<ul style="list-style-type: none"> <li>➤ During the induction screening process transgender prisoners must be kept separate on escorts</li> <li>➤ Male to female transgender prisoners in women's prisons and female to male transgender prisoners in women's prisons may be escorted with other women, so long as there are no safety and security concerns</li> <li>➤ Male to female transgender prisoners housed in men's prisons and female to male transgender prisoners housed in men's prisons must be kept separate during escorts <i>"to avoid the risk of physical or sexual assault by other inmates"</i>.</li> </ul>	<ul style="list-style-type: none"> <li>➤ The prisoner separation matrix specifies that transgender prisoners may only be escorted with other transgender prisoners. Transgender is listed under "female" prisoners who need to travel "like with like."</li> </ul>
	Scotland	<ul style="list-style-type: none"> <li>➤ No specification regarding escorts</li> <li>➤ If it is proposed that the prisoner is to be transferred the case conference will explore how the transfer would be accommodated and considerations are given to make this determination. Where the case conference has concerns about the transfer they must seek clarification of the reasons for the transfer and determine strategies to prevent the transfer from occurring.</li> </ul>	

**Note: this document does not look at policies which relate to the placement of transgender prisoners**

Miscellaneous and general	New South Wales, Australia	<p><b>Equitable access, sensitivity and respect</b></p> <ul style="list-style-type: none"> <li>➤ Transgender prisoners are to be provided with equitable access to rehabilitative and reintegrative services.</li> <li>➤ Transgender prisoners are to be provided with access to services to meet specific needs, for example access to community transgender and legal services with specialised transgender knowledge.</li> <li>➤ Transgender prisoners must be referred to by their identified gender name and corresponding pronouns. All unit records must reflect their identified gender name and corresponding pronouns. This is regardless of the name that appears on their file</li> </ul>	<ul style="list-style-type: none"> <li>➤ The bulk of the guidance we have about transgender prisoners related to their prison placement. There is no guidance above and beyond the regular guidance about vulnerable grounds and ensuring safety and security.</li> <li>➤ Limited staff training is provided on issues of diversity.</li> </ul>
	Scotland	<p><b>Information sharing and confidentiality</b></p> <ul style="list-style-type: none"> <li>➤ Clear guidance is provided on information sharing in relation to the prisoner's gender identity. The guidance states that such information should only be shared with staff with the permission of the prisoner, or without the permission of the prisoner if it is essential to "manage the risk of crime."</li> <li>➤ Guidance is provided on information sharing with other agencies. An integrated approach is encouraged with the court service and police indicating that it is good practice for those services to notify prisons in advance if they are likely to receive a transgender prisoner. Services should take the opportunity to co-ordinate their response to ensure consistency in terms of respecting the prisoner's name, consistency of medical assistance, property provision, and mental health care and risk assessments.</li> </ul> <p><b>Sensitivity and respect</b></p> <ul style="list-style-type: none"> <li>➤ The guidance is prefaced on six values: belief that people can change, respect for individual's needs and their rights, integrity, openness, courage and humility.</li> <li>➤ The guidance states that professionalism and sensitivity are to be maintained at all times in response to transgender prisoners.</li> <li>➤ The prisoner's gender identity and corresponding name must be used and respected.</li> </ul> <p><b>Staff training</b></p> <ul style="list-style-type: none"> <li>➤ Staff training on transgender and associated issues is recommended.</li> </ul> <p><b>Requests for assistance</b></p> <ul style="list-style-type: none"> <li>➤ Prisoner requests for assistance in relation to their gender identity must</li> </ul>	

		be taken seriously. The prisoner must be urgently provided with the opportunity to discuss their issues in private and away from others in custody.	
	England and Wales	<p><b>Sensitivity and respect</b></p> <ul style="list-style-type: none"> <li>➤ Statement at the beginning of the guidance that prisons must permit prisoners who consider themselves transgender and wish to live in their identified gender to do so permanently.</li> <li>➤ Must refer to transgender prisoners with their identified name and corresponding pronouns.</li> </ul> <p><b>Harassment and staff training</b></p> <ul style="list-style-type: none"> <li>➤ Prisons must put measures in place to manage transphobic harassment</li> <li>➤ The guidance advises that it is helpful for staff to have education and training about gender reassignment and prevention of transphobia for staff</li> </ul>	
	United Nations Handbook on prisoners with special needs	<p><b>Policies and strategies</b></p> <ul style="list-style-type: none"> <li>➤ Prison authorities need to develop policies and strategies to ensure the maximum possible protection of transgender prisoners and which facilitate their social reintegration in an effective manner.</li> <li>➤ Management guidelines need to make absolutely clear that discrimination on the basis of actual or perceived gender identity will not be tolerated.</li> </ul> <p><b>Information sharing</b></p> <ul style="list-style-type: none"> <li>➤ Guidance should emphasise the right to confidentiality regarding gender identity</li> </ul> <p><b>Consultation</b></p> <ul style="list-style-type: none"> <li>➤ Community representatives of LGBT groups should be consulted on any policies and strategies</li> </ul> <p><b>Monitoring</b></p> <ul style="list-style-type: none"> <li>➤ Measureable standards should be developed to assess and evaluate the outcome of strategies and practices</li> </ul> <p><b>Staff training</b></p> <ul style="list-style-type: none"> <li>➤ Prison authorities should have staff training which includes awareness raising about transgender prisoners and the special needs that they may have</li> </ul>	

		<p><b>Equitable access</b></p> <ul style="list-style-type: none"> <li>➤ Equitable access to programmes should be provided and in those programmes the prisoner should be protected from violence or abuse</li> <li>➤ Rape prevention programmes should be established</li> <li>➤ Counselling programmes for transgender prisoners should be established</li> <li>➤ Community organisations should be encouraged to visit and implement programmes, including to raise awareness of transgender prisoners and issues among other prisoners and staff. Support should also be sought from these organisations, especially if prisoners do not have contact with their families</li> </ul> <p><b>Complaints</b></p> <ul style="list-style-type: none"> <li>➤ An effective, accessible and confidential complaints system is a key component to ensure the safety of transgender prisoners</li> </ul>	
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**From:** s9(2)(a)  
**To:** s9(2)(a)  
**Subject:** RE: BDMRR Bill  
**Date:** 09 October 2018 11:38:00 a.m.  
**Attachments:** [image001.png](#)

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Come on then, meet you at bins...

s9(2)(a) | Principal Custodial Adviser  
s9(2)(a)

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**From:** s9(2)(a)  
**Sent:** 09 October 2018 11:38 a.m.  
**To:** s9(2)(a)  
**Subject:** RE: BDMRR Bill

Yeah s9(2)(h)

The version that had a comment addressed to you asking whether SACRA was still called SACRA.

s9(2)(a)

Could come down and catch up over one now though ?

s9(2)(a) | Principal Adviser | Custodial Practice |  
s9(2)(a)

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**From:** s9(2)(a)  
**Sent:** 09 October 2018 11:26 a.m.  
**To:** s9(2)(a)  
**Subject:** RE: BDMRR Bill

Just met with Derek re the briefing paper, another meeting with DIA this Friday, s9(2)(h)  
...sometimes it feels like the only thing I do....

What is the bin times schedule today anyway?

s9(2)(a) | Principal Custodial Adviser  
s9(2)(a)

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**From:** s9(2)(a)  
**Sent:** 09 October 2018 11:24 a.m.  
**To:** s9(2)(a)  
**Subject:** FW: BDMRR Bill

s9(2)(a) | Principal Adviser | Custodial Practice |  
s9(2)(a)

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**From:** SYMONDS, Richard (WELLHO)  
**Sent:** 09 October 2018 10:49 a.m.  
**To:** s9(2)(a)  
**Subject:** FW: BDMRR Bill

FYI

Richard Symonds | Manager Custodial Practice |

s9(2)(a)

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**From:** KENNEDY, Suzanne (WELLHO)  
**Sent:** 05 October 2018 10:23 a.m.  
**To:** Service Development SLT  
**Subject:** FW: BDMRR Bill

fyi

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**From:** KENNEDY, Suzanne (WELLHO)  
**Sent:** 05 October 2018 9:56 a.m.  
**To:** 'Rachel Groves'  
**Cc:** 'Ruth Pearson'; 'Cindy Down'; 'Hayden Kerr'; s9(2)(a)  
CAMERON, Michael (WELLHO); BEALES, Neil (WELLHO); SENIOR, Derek (WELLHO); s9(2)(a)  
**Subject:** RE: BDMRR Bill

<https://www.theguardian.com/uk-news/2018/sep/09/sexual-assaults-in-womens-prison-reignite-debate-over-transgender-inmates-karen-white>

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**From:** KENNEDY, Suzanne (WELLHO)  
**Sent:** 05 October 2018 9:55 a.m.  
**To:** 'Rachel Groves'  
**Cc:** Ruth Pearson; Cindy Down; Hayden Kerr; s9(2)(a)  
CAMERON, Michael (WELLHO); BEALES, Neil (WELLHO); SENIOR, Derek (WELLHO); s9(2)(a)  
**Subject:** RE: BDMRR Bill

Hi Rachel

We are very happy to meet next week to discuss further. I have spoken to s9(2)(a) again this morning and s9(2)(h).

We are also happy to share our policy advice and discuss with you as we develop it.

You will see from the attached article that the concern in the UK is not about a theoretical gaming of the system but an actual risk.

Happy to discuss further next week.

Thanks Suzanne

Suzanne Kennedy | Chief Policy Adviser |

Service Development | Department of Corrections Ara Poutama Aotearoa |  
Mayfair House, 44 – 52 The Terrace, Wellington | PO Box 1206, Wellington 6140 |  
s9(2)(a) [suzanne.kennedy@corrections.govt.nz](mailto:suzanne.kennedy@corrections.govt.nz) |

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**From:** Rachel Groves [<mailto:Rachel.Groves@dia.govt.nz>]  
**Sent:** 05 October 2018 9:33 a.m.  
**To:** KENNEDY, Suzanne (WELLHO)



**Cc:** Ruth Pearson; Cindy Down; Hayden Kerr  
**Subject:** BDMRR Bill

Kia ora Suzanne

I am the director of policy services at DIA. As you know, we have been working with you on the Births, Deaths...Amendment Bill. I was hoping to meet with you and Hayden Kerr, the manager responsible for the Bill, early next week. In particular I'd like to discuss Corrections' view on whether any UK inmates have 'gamed' the system.

Ruth/Cindy – could you please find a time that works for us next week?

Thanks, Rachel

**Rachel Groves** | Director Policy Services | Policy Group  
**The Department of Internal Affairs Te Tari Taiwhenua**

s9(2)(a)

45 Pipitea Street | PO Box 805, Wellington 6140, New Zealand | [www.dia.govt.nz](http://www.dia.govt.nz)

cid:image001.png@01D35C82.21A483D0



Released under the Official Information Act 1982

**From:** [SENIOR, Derek \(WELLHO\)](#)  
**To:** [s9\(2\)\(a\)](#) [CAMERON, Michael \(WELLHO\)](#)  
**Subject:** HPRM: Updated transgender paper  
**Date:** 09 October 2018 03:11:21 p.m.  
**Attachments:** [SDSLT - Managing transgender prisoners paper.doc](#)  
[image008.png](#)

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Here's an updated version of the paper, which has now been lodged to go to SDLT on Thursday.

Expecting this might form the basis of our discussion with DIA on Friday

Cheers  
Derek

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |  
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[s9\(2\)\(a\)](#) | [xxxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx](#) |

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**From:** [KENNEDY, Suzanne \(WELLHO\)](#)  
**To:** [BEALES, Neil \(WELLHO\)](#); s9(2)(a)  
**Subject:** HPRM: FW: Transgender paper - for comments by COP Thursday  
**Date:** 11 October 2018 01:00:55 p.m.  
**Attachments:** [image008.png](#)

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fyi

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**From:** KENNEDY, Suzanne (WELLHO)  
**Sent:** 11 October 2018 12:59 p.m.  
**To:** s9(2)(a); SENIOR, Derek (WELLHO)  
**Cc:** Service Development SLI  
**Subject:** RE: Transgender paper - for comments by COP Thursday

Hi

As discussed, I think you raise very good points. What we are trying to do is to ensure that our Minister/Cabinet are aware of the implications of the BDMR bill on Corrections and given options and make an **informed and conscious** choice here.

The legislative process has been rushed and the BDMR bill that was consulted on with the public was completely different that what has been reported back to the House. The original bill would have enshrined more rigour and greater protections (from a Corrections perspective) in changing identity.

At a high level our options are to **do nothing** and Corrections needs to develop processes, etc., to manage men who self-identify in womens prisons (including those who are currently ineligible to apply as they are not on hormone treatment and/or have sexually offended against women/men) or Option 2 - that Minister's want an alternative approach, such as allowing the BDMR changes but having a legislative or regulatory safety override/exemption for the Corrections environment.

Here are some concerns in UK.

<https://www.theguardian.com/uk-news/2018/sep/09/sexual-assaults-in-womens-prison-reignite-debate-over-transgender-inmates-karen-white>

Do you have a view on the ability of Corrections to manage this in women's prisons? What do you think?

Thanks Suzanne

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**From:** s9(2)(a)  
**Sent:** 11 October 2018 12:28 p.m.  
**To:** SENIOR, Derek (WELLHO)  
**Cc:** KENNEDY, Suzanne (WELLHO)  
**Subject:** RE: Transgender paper - for comments by COP Thursday

Hi Derek

Thanks for the memo. I have no feedback other than it could be perceived that option 3 is essentially doing the opposite as the law intended and could be an infringement of human rights.

Are we backing option 2 or 3? As s9(2) articles highlighted it is very murky waters.

s9(2)

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**From:** SENIOR, Derek (WELLHO)  
**Sent:** 10 October 2018 2:24 p.m.  
**To:** s9(2)(a); BARSON, Rebecca (WELLHO); s9(2)(a)

COULTER, Eamon (WELLHO); s9(2)(a) DONALDSON, Bronwyn  
(WELLHO); s9(2)(a) FAGAN, Darius (WELLHO); JOHNSTON, Peter (WELLHO);  
KENNEDY, Suzanne (WELLHO); RYAN, Juanita (WELLHO); SYMONDS, Richard (WELLHO)  
**Cc:** FIELD, Jo (WELLHO); s9(2)(a) JONES, Robert (WELLHO)  
**Subject:** Transgender paper - for comments by COP Thursday  
**Importance:** High

Hi everyone

The attached paper discusses an issue that has come up in relation to the Births, Death, Marriages, and Relationships Bill (2017), which is currently making its way through parliament, and has implications for the way we manage transgender prisoners.

This has been shifted to next week's SDSLT meeting, however we are meeting with DIA on Friday to discuss potential responses to the issue, and we may need to get advice to our Minister (and others) before next week's meeting depending on the process related to this.

Given that, I'm keen to get any initial feedback you might have by **COP tomorrow**, so this can be considered. Happy to discuss in person if you prefer

Thanks

Derek

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |  
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## Service Development Senior Leadership Team

<b>SLT Meeting Date</b>	18 October 2018		
<b>Title</b>	Addressing implications of the Births, Death, Marriages, and Relationships Bill (2017) for transgender prisoners		
<b>Author</b>	Derek Senior – Principal Policy Adviser		
<b>Team</b>	Corrections Policy		
<b>Noting / Visibility</b>	<input type="checkbox"/>	<b>Approval / Endorsement</b>	<input type="checkbox"/>

### Author Sign-off

<b>Name</b>	Derek Senior	<b>Title</b>	Principal Policy Adviser	
<b>Signature</b>		<b>Extn</b>	██████	<b>Date</b> 9 October

### Sponsoring Manager Sign-off

<b>Name</b>	Suzanne Kennedy	<b>Title</b>	Chief Policy Adviser	
<b>Signature</b>		<b>Extn</b>	s9(2)	<b>Date</b> 9 October

### Consultation

<input type="checkbox"/> <b>Business Solutions</b>	<input type="checkbox"/> <b>Case Management</b>	<input type="checkbox"/> <b>Chief Custodial Officer</b>
<input type="checkbox"/> <b>Chief Policy Adviser</b>	<input type="checkbox"/> <b>Chief Probation Officer</b>	<input type="checkbox"/> <b>Chief Psychologist</b>
<input type="checkbox"/> <b>Community &amp; Employer Partnerships</b>	<input type="checkbox"/> <b>Corporate Services</b>	<input type="checkbox"/> <b>Corrections Services</b>
<input type="checkbox"/> <b>Director Maori</b>	<input type="checkbox"/> <b>Finance Technology &amp; Commercial</b>	<input type="checkbox"/> <b>Legal</b>
<input type="checkbox"/> <b>Offender Health</b>	<input type="checkbox"/> <b>Programme Manager Maori Strategy &amp; Practice</b>	<input type="checkbox"/> <b>Programmes &amp; Interventions</b>
<input type="checkbox"/> <b>Quality &amp; Performance</b>	<input type="checkbox"/> <b>Research and Analysis</b>	<input type="checkbox"/> <b>Service Design &amp; Implementation</b>
<input type="checkbox"/> <b>External (please specify) MoJ, Police, MBIE, MSD, HNZA, TPK</b>		

### Recommendations

It is recommended that the Senior Leadership Team:

a)	<b>note</b> that this briefing will form the basis of advice to Ministers on an issue that has been identified in relation to the Births, Death, Marriages, and Relationships Bill (2017)	<b>Yes / No</b>
b)	<b>provide feedback</b> on this paper at SDSLT on 18 October	<b>Yes / No</b>

## **Addressing implications of the Births, Death, Marriages, and Relationships Bill (2017) on the way the Department of Corrections manages transgender prisoners**

### **Purpose**

1. This paper outlines an issue that has arisen as a product of the Births, Death, Marriages and Relationships Bill (2017), which is currently before parliament, and includes a provision which would allow people to self-identify the sex that is shown on their birth certificate.
2. This change would impact the way Corrections makes decisions about which prisons some transgender prisoners are placed into, and in particular, how a small group of transgender prisoners with a history of sexual offending against girls and women are managed.

### **Background**

3. The Births, Death, Marriages and Relationships Bill (the Bill) was introduced to parliament in August 2017, with the Minister of Internal Affairs currently having responsibility for it. The Bill is set to replace the current Births, Deaths, Marriages, and Relationships Registration Act (1995), providing much of the previous Bill in a more modern and accessible form. It also includes a small number of policy changes, including one that has implications for the way Corrections manages transgender prisoners.
4. The Governance and Administration Committee (the Committee) considered the Bill earlier this year, and has recommended it to parliament with a significant amendment to the process for changing a person's sex on their birth certificate. The previous version of the Bill would have re-enacted provisions from the current Act, which require an individual to obtain a declaration from the Family Court to change the sex recorded on their birth certificate.
5. The new version of the Bill<sup>1</sup> would replace the Family Court process with a purely administrative process, where people can self-identify the sex that should be recorded on a birth certificate. Allowing self identification of sex in official records would be a significant change for New Zealand, addressing concerns expressed by transgender people both locally and internationally.
6. Local transgender groups have argued that because birth certificates are a common form of identity document, being able to amend the sex indicator will allow transgender people to have identification that matches their lived identity, and reduce the potential for these people to be 'outed' when they use this document to access services. This can also be seen as an official acknowledgement by the state, recognising the legitimacy of a person's lived identity.
7. There has been a lot of recent attention around the recognition and rights of transgender people internationally, and this is likely to remain a fluid area of public policy over coming years. In recommending this change, a majority of the Select Committee noted that a change to self-identification will make New Zealand more consistent with global developments in this space.

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<sup>1</sup> Current text of the Bill is available from:

<http://www.legislation.govt.nz/bill/government/2017/0296/latest/whole.html#LMS55955>



8. However, it is worth noting that support for the self-identification of sex in official documents is far from universal. Opposition to self-identification comes from individuals and groups with both socially conservative, and some feminist perspectives. Arguments put forward against allowing self-identification of sex include:
- that self-identification ignores a range of structural inequalities between females and males, including women being disproportionately likely to experience sexual and domestic violence perpetrated by men
  - that self-identification of sex replaces a robust and shared biological definition of sex with a socially constructed notion based on gender
  - that this undermines sex-based protections in society – specifically those created for women as a way of protecting them from the actions and behaviours of some men
  - that this will result in men impinging on woman-only spaces including changing rooms, women’s refuges, gyms, hostels and prisons, and accessing woman-only resources and services
  - that this creates opportunities for ‘predatory’ non-transgender men to find ways to abuse such access to reach vulnerable women.

### **The current situation**

9. Under the current Births, Deaths, Marriages, and Relationships Registration Act (1995), an individual can apply to the Family Court, to amend their birth certificate to show their “nominated sex.” In order to grant a change of this nature, the Court must be satisfied the applicant has assumed (or always had) and intends to maintain the gender identity of their nominated sex.
10. In most cases the Court must also be satisfied, on the basis of expert medical evidence, that the applicant:
- has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons such as the applicant to acquire a physical conformation that accords with the gender identity of their nominated sex, and
  - will, as a result of the medical treatment, maintain a gender identity of their nominated sex.
11. The way Corrections manages prisoners of different genders is determined by sections 65A–65E of the Corrections Regulations 2005<sup>2</sup>. The regulations state that male and female prisoners must be detained in separate prisons, or in separate quarters secured by different locking systems within the same prison.
12. They require that where there is uncertainty about whether a prisoner is male or female, a determination is to be made, with the prisoner able to apply for a review by the Chief Executive if they are dissatisfied. When Corrections undertakes a review of the determined sex of a prisoner, it is required to consider a range of factors including:
- the prisoner’s wishes

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<sup>2</sup> Full text of the regulations can be found at:

<http://www.legislation.govt.nz/regulation/public/2005/0053/latest/DLM315417.html>

- whether and for how long the prisoner has lived in their nominated sex
  - advice from custodial, prisoner health experts and medical practitioners
  - whether the prisoner has undergone, or is undergoing, medical treatment to acquire a physical conformation that accords with the gender identity of their nominated sex
  - the safety and well-being of the prisoner, and other prisoners with whom they may be accommodated, and the security of the prison
  - the possibility of the prisoner being segregated
  - the likely effect on the prisoner's rehabilitation, including access to special treatment programmes.
13. Under the regulations a prisoner is not able to apply for a review of their determined sex if they are on remand for, or serving a sentence of imprisonment for a serious sexual offence against a person of their nominated sex, or if they have previously served a sentence of imprisonment for a serious sexual offence that ended within the past seven years.
14. Where a prisoner supplies a birth certificate, the regulations require Corrections to determine their sex according to the nominated sex on it. This means that the nominated sex on a birth certificate can effectively override the review process outlined above. If the birth certificate records someone's nominated sex as indeterminate or no sex, a review must be conducted by Corrections to make a determination.
15. As at 28 September there were 34 people in prison who Corrections had identified as transgender. Transgender prisoners in the prison system are predominately people who were born biologically male, but identify as female, though this isn't always the case.
16. Of these 34 prisoners identified as transgender:
- 16 were being held in male prisons, and had not sought to be transferred to a female prison – some transgender prisoners have indicated that they prefer living in a male prison
  - 7 were being held in female prisons – having either previously applied for a change in determination so they could move to a female prison, or been placed there when they entered the prison system
  - One was being held in a male prison, but had applied for a change in determination so they can move to a female prison (a review of this prisoner's determined sex is currently underway)
  - 10 were being held in male prisons, and are not eligible to seek a change in determination due to previous serious sexual offending against girls and women.
17. To date, the provision which requires Corrections to determine a prisoner's sex in line with the nominated sex on their birth certificate has not been used. This is because no prisoner has presented a birth certificate to the Department of Corrections as a means to seek a different determination of their sex. This is probably because: