

## *Report / Rapport*

# **Vulnerable Targets: Trans Prisoner Safety, the Law, and Sexual Violence in the Prison System**

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*Au Canada, les détenus transgenres sont extrêmement exposés à diverses formes de violence physique, spirituelle, émotionnelle et psychologique pendant leur incarcération. L'Ontario et la Colombie-Britannique appliquent des politiques structurées qui permettent aux détenus transgenres d'être placés dans un établissement provincial en fonction de l'identité de genre auquel ils et elles s'identifient. Le Service correctionnel du Canada (SCC) n'a pas institué ce genre de politique. Bien que le SCC ait commencé à évaluer les demandes de placement pénitentiaire et de mesures d'adaptation au cas par cas en publiant le Bulletin de politique provisoire 584, aucune politique permanente officielle n'a été établie pour aider les établissements à mettre en œuvre ou à évaluer ce plan. La présente étude porte sur les instruments internationaux pertinents et sur les lois nationales liées à l'incapacité du SCC d'élaborer des politiques claires pour régir le traitement des détenus transgenres. L'absence de telles politiques a entraîné une violation des droits fondamentaux et constitutionnels des détenus transgenres. L'abolition, ou la non-incarcération, est présentée comme la proposition idéale pour lutter contre la discrimination et devrait être sérieusement envisagée par les législateurs et les décideurs politiques. Jusqu'à ce que l'abolition devienne une option réaliste, l'auteure recommande des façons dont le SCC peut mieux protéger ses détenus transgenres dans le respect des cadres nationaux et internationaux actuels.*

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*Trans prisoners in Canada are extremely vulnerable to various forms of physical, spiritual, emotional, and psychological abuse while incarcerated. Ontario and British Columbia operate structured policies that allow trans prisoners to be placed in prisons in the gender they identify with. Correctional Service Canada (CSC) does not. While CSC has begun to assess prisoners' placement and accommodation requests on an individual basis through the introduction of Interim Policy Bulletin 584, no formal permanent policy has been established to guide how penitentiaries implement or evaluate this plan. This study examines relevant international instruments and domestic laws related to CSC's failure to create clear policies to govern their treatment of trans prisoners. The absence of such policies has resulted in a breach of trans*

prisoners' human and constitutional rights. Abolition, and/or decarceration, is presented as the ideal proposal for dealing with discrimination against trans prisoners and should be seriously considered by legislators and policy-makers. Until abolition becomes a realistic option, recommendations are provided on how CSC can better protect trans prisoners within current domestic and international frameworks.

## *Introduction*

On 6 December 2012, police in Toronto arrested Boyd Kodak, a fifty-eight-year-old trans man, on harassment charges.<sup>1</sup> At the time of his arrest, Boyd had presented as male for twenty years. He had facial hair, wore men's clothing, and possessed a deep voice. At the police station, he confirmed his age and sex and presented his identification. However, after he was strip searched, officers moved him to the female holding cells. A day later, police transferred Kodak to the Vanier Centre for Women where he was strip searched again, and his penile prosthesis removed by the prison officers, despite his protests that they were stripping away his identity.<sup>2</sup> Officers forced him out of his men's clothes and into women's underwear and clothing. Kodak had to appear in court the next day in the green prison garb worn by female prisoners. He recounted horrifying tales of insults and other forms of abuse while in holding because of his masculine appearance. Though the Crown dropped the harassment charges, Kodak suffered from depression and anxiety and is being treated for post-traumatic stress disorder and is now prone to panic attacks.<sup>3</sup>

Kodak's experience is a small part of a broader narrative of abuse and violence endured by trans people in the Canadian criminal justice system and criminal justice systems across the world. Statistics indicate that complaints from trans persons at the Canadian Human Rights Commission (CHRC) have almost doubled over a fifteen-year period.<sup>4</sup> A study in California found that 59 percent of trans women housed in men's prisons have been sexually abused while imprisoned, compared to only 4 percent of the cisgender prisoners in men's prisons.<sup>5</sup>

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1. Laura Fraser, "Transgender Man Forced into Clothes and Jail for Women Settles with Toronto Police", *CBC News* (8 June 2016) <[www.cbc.ca/news/canada/toronto/police-trans-jail-1.3621420](http://www.cbc.ca/news/canada/toronto/police-trans-jail-1.3621420)>.
  2. *Ibid.*
  3. *Ibid.*
  4. Canadian Human Rights Commission (CHRC), *Number of Trans-Related Complaints Received by the CHRC: Prepared for the Department of Justice* (Ottawa: CHRC, Statistical Analysis Unit, Promotions Branch, 2016) [unpublished; archived at CHRC].
  5. Valerie Jenness et al, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Irvine, CA: Center for Evidence-Based Corrections, University of California, 2007); QMUNITY, "Queer Terminology from A to Q" (January 2018) at 4 <[https://qmunity.ca/wp-content/uploads/2019/06/Queer-Glossary\\_2019\\_02.pdf](https://qmunity.ca/wp-content/uploads/2019/06/Queer-Glossary_2019_02.pdf)> (cisgender denotes a person who identifies with the same gender they were assigned at birth).

The Canadian prison system does not comply with best or humane practices for trans prisoners as required by international and Canadian human rights law. Abuses continue despite attempts at protecting trans rights in domestic and international law. Both federal and provincial/territorial human rights legislation protect trans rights through direct provisions protecting “gender identity” or “gender expression.”<sup>6</sup> Section 3 of the *Corrections and Conditional Release Act (CCRA)* states that “the purpose of the federal prison system is to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of [prisoners].”<sup>7</sup> This provision affirms the need for the safe and humane treatment of all prisoners including, and especially, vulnerable populations such as people who are trans. At the international level, the *Universal Declaration of Human Rights (UDHR)* provides that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”<sup>8</sup> The *UDHR* aims to protect the human dignity to which everyone is entitled, regardless of their sexuality or gender.<sup>9</sup> Minority groups, such as imprisoned trans people, are particularly susceptible to having their rights infringed upon.<sup>10</sup> Therefore, it is imperative that the government take special care in ensuring their rights are protected. It is clear that the current system increases discrimination against the population who fit outside of the “norm.” The concepts of abolition and/or decarceration are offered as a proposal for dealing with discrimination against trans prisoners and should be seriously considered by legislators and policy-makers.

Indigenous trans prisoners, who sometimes identify as Two-Spirited, face an additional set of challenges in the prison system.<sup>11</sup> Existing data on the experiences of lesbian, gay, transsexual, queer, Two-Spirited, and intersex (LGBTQ2SI) Indigenous

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6. Trans Equality Society of Alberta, “Fact Page: Human Rights across Canada” (July 2016), *TESA Online* <[www.tesaonline.org/human-rights-across-canada.html](http://www.tesaonline.org/human-rights-across-canada.html)>. However, in 2016, New Brunswick, Nunavut, and Quebec interpreted trans rights through the interpretation of other rights—namely, “sex” or, in the Yukon, “gender.” Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, and Prince Edward Island protect “gender expression” and “gender identity” in their human rights codes. Manitoba, the Northwest Territories, and Saskatchewan list “gender identity” in their human rights codes. *Ibid.*

7. *Corrections and Conditional Release Act*, SC 1992, c 20, s 3(a) [CCRA].

8. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at 73 [UDHR].

9. *Ibid.*

10. National Centre for Transgender Equality, “Issues: Police Jails and Prisons” <<https://transequality.org/issues/police-jails-prisons>>.

11. Marie Laing, “Two-Spirit and LGBTQ Indigenous Health” (July 2016) at 3, *Rainbow Health Ontario* <[www.rainbowhealthontario.ca/wp-content/uploads/2016/07/2SLGBTQINDIGENOUSHEALTHFactHeet.pdf](http://www.rainbowhealthontario.ca/wp-content/uploads/2016/07/2SLGBTQINDIGENOUSHEALTHFactHeet.pdf)>.

people suggests that they experience unique barriers to culturally safe health care and are at a greater risk for negative mental and physical health outcomes than their non-Indigenous LGBTQI peers and their non-LGBTQ2SI Indigenous peers.<sup>12</sup> Among the respondents that identified as Aboriginal in the Trans PULSE Project, involving a survey of 433 trans-identified Ontarians, 43 percent reported being subjected to physical or sexual violence motivated by transphobia.<sup>13</sup>

Correctional Service Canada (CSC) governs the federal penitentiary system. CSC is the government agency responsible for administering sentences of a term of two years or more.<sup>14</sup> It is responsible for running penitentiaries of various security levels and supervising prisoners under conditional release in the community.<sup>15</sup> CSC is governed by the *CCRA*, which outlines CSC's purpose as carrying out court-mandated sentences through safe and humane custody and supervision.<sup>16</sup> The *CCRA* stresses that prisoners "retain the rights of all members of society except those that, as a consequence of their sentence, are lawfully and necessarily removed or restricted."<sup>17</sup> It states that prison "policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups."<sup>18</sup>

As recently as January 2017, the CSC policy dictated that trans prisoners be assigned to either men's or women's penitentiaries based on their pre-operative sex.<sup>19</sup> Consequently, trans women who had not undergone gender affirmation surgery were forced to live in men's prisons instead of with the gender they identify with.<sup>20</sup> This CSC policy has led to extreme difficulties for these women, who are often subjected to sexual harassment and assault.<sup>21</sup> Frequently, they are sent to solitary confinement or are otherwise isolated for their protection. Trans women are often classified under

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12. *Ibid.*

13. Ayden I Scheim et al, "Barriers to Well-Being for Aboriginal Gender-Diverse People: Results from the Trans PULSE Project in Ontario, Canada" (2013) 6:4 *Ethnicity and Inequalities in Health and Social Care* 108 at 108, 111.

14. *CCRA*, *supra* note 7, s 5(a).

15. *Ibid.*, ss 5(a)–(b).

16. *Ibid.*, s 3(a).

17. *Ibid.*, s 4(d).

18. *Ibid.*, s 4(g).

19. Correctional Service Canada (CSC), *Guidelines on Gender Dysphoria*, Commissioner's Directive No 800-5 (Ottawa: Correctional Service Canada, 9 January 2017) <[www.csc-scc.gc.ca/005/006/800-5-gl-eng.shtml](http://www.csc-scc.gc.ca/005/006/800-5-gl-eng.shtml)> [CSC, *Guidelines on Gender Dysphoria*]

20. Jennifer Metcalfe, "CSC Fails to Bring Transgender Policy in Line with International Standards" (21 May 2015), *West Coast Prison Justice Society* <<https://prisonjustice.org/csc-fails-to-bring-transgender-policy-in-line-with-international-standards/>>.

21. Jennifer Metcalfe, "Trans\* Prison Policy in Canada" (December 2015) at 1, *West Coast Prison Justice Society* <<https://prisonjustice.org/wp-content/uploads/2018/11/wcp-js-trans-prisoner-policy-reform-sogic.pdf>>.

“protective custody” because of their vulnerability to victimization from other prisoners. Trans men may choose not to self-disclose out of fear of being placed in a men’s facility and the abuse or harassment that might follow. Individuals who have been charged with a sex offence are also put in “protective custody,” which means that trans women are often put in the same vicinity as sex offenders, thereby increasing their vulnerability to sexual assault.<sup>22</sup> These CSC policies are exceptionally harmful to the physical, spiritual, emotional, and mental health of trans prisoners.

In 2015, Ontario and British Columbia implemented policies that determine where to place prisoners based on their gender identity.<sup>23</sup> The federal government followed suit in January 2017.<sup>24</sup> Some case law suggests that courts are beginning to recognize that protecting trans prisoners is important. In *R v Forster*, Justice Terence Schultes stated in his reasons for sentencing: “I accept as a matter of common sense that a transgendered person will inevitably be vulnerable to predatory behaviour by male inmates and that her time in custody will be more difficult as a result.”<sup>25</sup> Clear-cut policies are required to protect trans prisoners from being put at risk of sexual assault and harassment and that afford trans people the dignity and equality to which all people are entitled. Canada’s penitentiaries are not complying with best practices for trans prisoners as required by international and Canadian human rights law.

In January 2017, CSC reversed its trans prisoner placement policy, the day after Prime Minister Justin Trudeau promised to promote equality for trans Canadians both in and out of prison. This reversal came days after CSC released a revised policy directive that confirmed its previous rule that placed trans prisoners based on birth sex rather than gender identity.<sup>26</sup> The spokesman for CSC stated in an email to CBC News that CSC is currently assessing prisoner’s placement on a case-by-case basis.<sup>27</sup> While a step in the right direction, it is by no means a complete solution as there is still uncertainty about how this case-by-case assessment would be implemented. The lack of records and statistics on trans prisoners makes it difficult to

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22. *Ibid.*

23. Ontario, Ministry of Community Safety and Correctional Services (MCSCS), *Institutional Services Policy and Procedures Manual: Admission, Classification and Placement of Trans Inmates*, January 2015 update (Toronto: Ministry of Community Safety and Correctional Services, 2015); British Columbia Corrections Branch (BCCB), *Adult Custody Policy*, November 2015 update (Victoria: BC Corrections Branch, 2015) at para 9.17.1.

24. CSC, *Guidelines on Gender Dysphoria*, *supra* note 19.

25. 2012 BCSC 1682 at para 56.

26. Kathleen Harris, “Correctional Service Flip-Flops on Transgender Inmate Placement Policy”, *CBC News* (13 January 2017) <[www.cbc.ca/news/politics/transgender-inmates-placement-policy-1.3934796](http://www.cbc.ca/news/politics/transgender-inmates-placement-policy-1.3934796)>.

27. *Ibid.*

monitor the efficacy of the new case-by-case method. The dearth of structure and explicit procedure can create uncertainty and lead to difficulty in uniformly protecting the rights of trans prisoners across the country.

CSC is legally responsible for meeting all of the needs of the prisoners, including their health care needs.<sup>28</sup> It is responsible for the mental, physical, and emotional well-being of trans prisoners. Trans people often experience difficulties accessing appropriate health care. Health providers are often not educated on many of the treatments that trans people seek, such as hormone therapy. Some health professionals resist treating trans patients, and some make prejudiced or abusive statements.<sup>29</sup> Many doctors are not aware that they are able to prescribe hormonal therapy for their trans patients.<sup>30</sup> This lack of knowledge, skill, and expertise also occurs within the prison health care context, making accessing health care for trans prisoners that much more difficult.

Criticisms of the pre-2017 CSC policies, including the procedure for determining the eligibility of trans prisoners for gender affirmation surgery, have resulted in some changes.<sup>31</sup> Under the new policy, a prisoner is eligible for the surgery if they have lived in an identity-congruent gender role for twelve continuous months and the surgery is recommended by a specialist physician.<sup>32</sup> CSC will now pay for gender affirmation surgery and will proceed “without delay” to determine the timing of the surgery. These changes to the policies are the direct consequence of the *Kavanagh* decision.<sup>33</sup> CSC will retain the same specialist who provided care to the prisoner throughout their transition prior to their imprisonment unless the prisoner and CSC agree on a different choice.<sup>34</sup> Trans prisoners will be permitted to wear clothing appropriate to their self-identified gender.<sup>35</sup> The commissioner of corrections will ensure that staff who have regular contact with trans prisoners have the necessary knowledge to effectively respond to their needs.<sup>36</sup> Though these changes are a start, the policy guiding the treatment of trans prisoners by

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28. *CCRA*, *supra* note 7, s 5(a).

29. Sam Winter et al, “Transgender People: Health at the Margins of Society” (2016) 233:10042 *The Lancet* 390.

30. “Local Access to Healthcare for Transgender Patients Lacking, One Advocate Says”, *CBC News* (27 January 2016) <[www.cbc.ca/news/canada/kitchener-waterloo/local-access-healthcare-transgender-patients-1.3421756](http://www.cbc.ca/news/canada/kitchener-waterloo/local-access-healthcare-transgender-patients-1.3421756)>.

31. CSC, “Policy Bulletin 551” <[www.csc-scc.gc.ca/005/006/551-pb-eng.shtml](http://www.csc-scc.gc.ca/005/006/551-pb-eng.shtml)> (old policy required trans people to have lived in their preferred gender role in the community for twelve months prior to incarceration to be eligible for gender affirmation surgery).

32. CSC, *Guidelines on Gender Dysphoria*, *supra* note 19 at para 5.

33. *Kavanagh v Canada (Attorney General)* (2001), 41 CHRR 119 [*Kavanagh*].

34. CSC, *Guidelines on Gender Dysphoria*, *supra* note 19 at para 8.

35. *Ibid* at para 10.

36. *Ibid* at para 9.

CSC is still fraught with problems and far from meeting domestic and international standards.

### *Research Objectives*

The overarching goal of this study is to identify solutions to protect trans prisoners from the risk of sexual assault and harassment. This article is presented in five sections. The first section provides an overview of federal and provincial prison policies and regulations and provides a brief overview of areas of concern. The second section reviews the current federal and provincial policies for housing incarcerated trans people. The third section examines the framework of rights for trans prisoners within domestic law and under international instruments. The fourth section compares and analyzes the current policies within the framework of rights to determine any gaps or breaches under Canadian or international law. The final section provides recommendations on how any gaps or breaches in the rights of trans prisoners may be remedied.

### *Terminology*

This article uses the term “Aboriginal” when referring to the three groups of Aboriginal people identified as rights holders in the *Constitution Act, 1982*.<sup>37</sup> The terms “First Nation,” “Indian,” “Métis,” and “Inuit” are used where appropriate; otherwise, Indigenous or Aboriginal are used throughout this article. The term “prisoner,” is used unless different language is presented in the document referred to. According to the Canadian Association of Elizabeth Fry Societies, “prisoner” is the only correct term used to refer to incarcerated individuals.<sup>38</sup> “Prisoner” describes someone who is involuntarily in a facility who depends on the “keeper(s)” for the quality of care they receive.<sup>39</sup> The Ontario Human Rights Commission defines gender identity as “each person’s internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person’s gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person’s sexual

37. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

38. Gayle K Horii, “Guidelines for Advocacy: Introduction” (October 2000) at 7, *Canadian Association of Elizabeth Fry Societies* <[www.caefs.ca/wp-content/uploads/2013/05/Guidelines-for-Advocacy-Updated-December-2011.pdf](http://www.caefs.ca/wp-content/uploads/2013/05/Guidelines-for-Advocacy-Updated-December-2011.pdf)>.

39. *Ibid.*

orientation.”<sup>40</sup> In addition, the commission defines gender expression as “how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language, and voice. A person’s chosen name and pronoun are also common ways of expressing gender.”<sup>41</sup> An individual expresses their gender identity in all or some aspects of their life, depending on their choice and comfort, including at work, while shopping or accessing other services, in their home environment, or in the broader community. The Ontario Human Rights Commission describes trans or transgender as

an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, or gender non-conforming, gender variant, [non-binary, gender fluid] or gender queer.<sup>42</sup>

This article uses both trans and transgender interchangeably, noting that it is always best to use terms by which individuals self-identify.<sup>43</sup>

Most of the policies regarding trans prisoners discuss gender in dichotomous terms. For example, the policies use the term “opposite gender,” which excludes gender queer, non-binary, and intersex individuals. The researchers acknowledge that there are more than simply two genders and that prison systems still have a long way to go to address this reality. Policies that attempt to improve the quality of life for non-binary individuals will be ineffective within the current gender binary framework for prisons in Canada.

Two-Spirit is a term used by some Métis, First Nations, and Inuit people to describe individuals, from a holistic perspective, who identify as LGBTQ2SI.<sup>44</sup> The term is used to capture a concept that exists in many different Indigenous cultures and languages. For some, the term Two-Spirit describes a societal and spiritual role that people play within Indigenous societies, such as mediators and keepers of certain ceremonies, transcending accepted roles for men and women.<sup>45</sup> Not all Two-Spirited people will identify as LGBTQ2SI, and not all Indigenous LGBTQ2SI people will identify as Two-Spirited.<sup>46</sup>

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40. Ontario Human Rights Commission (OHRC), *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* (Ottawa: OHRC, 14 April 2014) at 3 <[www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf](http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf)> [OHRC, *Policy on Preventing Discrimination*].

41. *Ibid.*

42. OHRC, *Policy on Preventing Discrimination*, *supra* note 40 at 7.

43. QMUNITY, *supra* note 5.

44. *Ibid* at 15.

45. *Ibid.*

46. Laing, *supra* note 11 at 1.

## *Trans Policies in the Prison System*

### *Federal*

CSC recognizes that some prisoners experience gender dysphoria as outlined in its *Guidelines on Gender Dysphoria*.<sup>47</sup> They define gender dysphoria as “distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth.”<sup>48</sup> Where there is a likelihood that a prisoner is experiencing gender dysphoria, they will be referred to a psychiatrist for an assessment and possible diagnosis. The stated purpose of these guidelines is to provide those diagnosed with gender dysphoria with a continuity of care with respect to the provision of health services. This means that, for a trans person to receive any of the benefits under these policy guidelines, they must be diagnosed with gender dysphoria.

The *Guidelines on Gender Dysphoria* permits prisoners to initiate or continue hormone therapy as prescribed by a medical professional.<sup>49</sup> Those who were receiving gender transition guidance from a health care professional before incarceration will have access to that same professional unless the prisoner and CSC decide otherwise.<sup>50</sup> The directive states that gender affirmation surgery may be available to those with gender dysphoria while they are in prison in two situations: when a health professional who specializes in gender dysphoria recommends the surgery or “when a health professional qualified in the area of gender dysphoria confirms that the prisoner has satisfied the criteria for surgery as contained in the most recent provisions of the World Professional Association for Transgendered Health’s Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People.”<sup>51</sup> These standards state that some surgeries require documented proof that the individual has lived at least twelve continuous months in an identity-congruent gender role before surgery can occur.<sup>52</sup> CSC will pay for gender affirmation surgery if a medical professional, who consults with CSC, deems it an essential medical service under CSC policy.<sup>53</sup> Subject to “operational considerations,” prisoners with gender dysphoria will be permitted to wear clothing of their self-identified gender.<sup>54</sup>

Specific policies on searching and urinalysis state, respectively, that searching, especially strip searching, will consider the “mixed gender physiology” of

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47. CSC, *Guidelines on Gender Dysphoria*, *supra* note 19 at para 1.

48. *Ibid* at Annex A.

49. *Ibid* at para 2.

50. *Ibid* at para 8.

51. *Ibid* at para 5.

52. *Ibid*.

53. *Ibid* at para 6.

54. *Ibid* at para 10.

individuals diagnosed with gender dysphoria.<sup>55</sup> According to this policy, these individuals are entitled to an individualized protocol that is put in place through consultation with the prisoner.<sup>56</sup> The CSC policy on urinalysis states that the collector will be of the same sex as the prisoner.<sup>57</sup> In addition, the *Canadian Human Rights Act* was amended in 2017 to include a new ground of prohibited discrimination, gender identity, or expression.<sup>58</sup>

### Provincial

Most provinces do not have specific policies on trans prisoners and house them according to their sex assigned to them at birth and not the gender with which they identify. In January 2015, Ontario became the first province to change its official policy to place trans prisoners who have not undergone gender affirmation surgery in facilities based on their gender identities.<sup>59</sup> British Columbia and Yukon followed in November 2015 and March 2016, respectively.<sup>60</sup>

### British Columbia

The British Columbia Corrections Branch's Adult Custody Policy contains a section devoted to the health care services for transgender inmates.<sup>61</sup> The policy covers various aspects of the interactions between trans prisoners and the Corrections Branch.

### Definition and identification

The Corrections Branch defines a trans prisoner as an individual whose gender identity or gender expression is different from the gender associated with their

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55. CSC, *Searching of Offenders*, Commissioner's Directive No 566-7 (Ottawa: CSC, 2 July 2015) at Annex F <[www.csc-scc.gc.ca/politiques-et-lois/566-7-cd-eng.shtml](http://www.csc-scc.gc.ca/politiques-et-lois/566-7-cd-eng.shtml)> [CSC, *Searching*].

56. *Ibid.*

57. CSC, *Urinalysis Testing*, Commissioner's Directive No 566-10 (Ottawa: CSC, 18 June 2015) at para 32 <[www.csc-scc.gc.ca/lois-et-reglements/566-10-cd-eng.shtml](http://www.csc-scc.gc.ca/lois-et-reglements/566-10-cd-eng.shtml)> [CSC, *Urinalysis*].

58. CSC, "Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)" (13 December 2017) <[www.csc-scc.gc.ca/policy-and-legislation/584-pb-en.shtml](http://www.csc-scc.gc.ca/policy-and-legislation/584-pb-en.shtml)>.

59. MCSCS, *supra* note 23.

60. Yukon Corrections, *Adult Custody Policy Manual*, March 2016 update (Whitehorse: Yukon Corrections, 2016); BCCB, *supra* note 23 at para 9.17.1.

61. BCCB, *supra* note 23 at 9.17.

birth-assigned sex.<sup>62</sup> A trans prisoner may be identified through behaviour, outward appearance, or information from an external source. However, self-identification is the primary consideration in identifying a trans individual in British Columbia. The policy allows trans individuals to identify differently from how they identified during previous admissions. The policy also recognizes that some trans prisoners choose not to self-identify because of fear of physical harm or ridicule or because of previous negative experiences resulting from identifying as trans.

## Admission

When a British Columbia prison admits a trans prisoner, the prison must notify the provincial director, medical director, and the director of mental health services.<sup>63</sup> The prison must record the prisoner's preferred name and gender pronoun in their prison information system.<sup>64</sup> Prisoners are addressed by their preferred names and gender pronouns, both verbally and on written documents, except in cases where the prisoner's legal name is required for identification purposes.<sup>65</sup> Decisions on the classification of trans prisoners are made on a case-by-case basis. Before reaching decisions, the prison authorities are to gather information from many sources, which includes consultation with the affected prisoner. If the prison's decision is contrary to the prisoner's preference, the prisoner is provided with reasons.<sup>66</sup>

## Placement

In British Columbia, trans prisoners are placed in jails according to their identified gender or housing preference unless there are "overriding health and/or safety concerns that cannot be resolved."<sup>67</sup> These concerns must be clearly explained to the prisoner, and the prisoner should be involved in the decision-making process. Consultations should also occur with the medical director and/or the director of mental health services. The policy recognizes that not all trans prisoners want to be housed according to their self-identified gender.<sup>68</sup> If it is found that a prison cannot accommodate a prisoner's self-identified gender or housing preference, the prison staff should ensure that the individual is transferred as soon as possible.<sup>69</sup> Whenever

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62. *Ibid* at 9.17.1.

63. *Ibid* at para 9.17.2.

64. *Ibid*.

65. *Ibid* at para 9.17.10.

66. *Ibid* at para 9.17.1.

67. *Ibid* at para 9.17.4.

68. *Ibid*.

69. *Ibid* at para 9.17.12.

possible and subject to the prisoner's preference, trans prisoners are integrated into the general population unless there are overriding health and safety concerns present that cannot be resolved. If the prisoner is separately confined, it is for the shortest time possible. The prisoner is given as many social and programming opportunities as possible when separately confined.<sup>70</sup> Trans prisoners who are housed according to birth-assigned sex are not required to share cells with other prisoners and have private access to the shower and toilet to ensure their safety and privacy.<sup>71</sup>

Trans prisoners can retain personal items to express their gender, both in the prisons and during transport between centres, unless there are safety reasons preventing it. The warden makes the determinations regarding the safety of the personal effects. Where they identify health concerns, they should consult with the medical director and/or the director of mental health services. Trans prisoners are provided with their preferred prison clothing and underclothing while in custody and for court appearances and release. They are also allowed to order canteen items according to their gender.<sup>72</sup>

### Strip searching

According to the Adult Custody Policy, if the prisoner chooses a split search, they may choose which parts of their body are searched by whom. The choice of the strip and frisk search option made by the trans prisoner are to be documented in detail.<sup>73</sup> Prison staff are to explain the strip and frisk search processes, including any search of prosthetics, and the options available. These explanations are to be given privately, and further steps are to be taken to maximize the privacy and confidentiality of any information related to the individual's gender identity or history.<sup>74</sup>

## Ontario

Ontario Correctional Services has a policy outlining the admission, classification, and placement of trans prisoners and associated staff training.<sup>75</sup> This document covers much of the same areas as the BC policy but with more depth. The policy was created and last updated in January 2015. The purpose of the Ontario policy is to establish the requirements for the admission, classification, and placement of trans prisoners whose gender identity or gender expression is different from the gender

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70. *Ibid* at para 9.17.7.

71. *Ibid* at paras 9.17.8–9.17.9.

72. *Ibid* at para 9.17.6.

73. *Ibid* at para 9.17.3.

74. *Ibid* at para 9.17.2.

75. MCSCS, *supra* note 23.

associated with their birth-assigned sex.<sup>76</sup> The policy applies to all prison employees involved in the various processes of the Ontario prison system, including the admissions, classification, placement, and supervision of trans prisoners.<sup>77</sup> The policy stresses the importance of maximizing privacy and confidentiality of information pertaining to the trans prisoner's gender identity and history, subject to the prisoner's consent. Consultations between staff must occur privately.<sup>78</sup>

## Placement

Ontario's Ministry of Community Safety and Correctional Services has a legal obligation under the *Ontario Human Rights Code (OHRC)* to accommodate prisoners short of undue hardship.<sup>79</sup> Trans prisoners are placed in prisons appropriate to their self-identified gender or housing preference unless there are unresolvable health and/or safety risks for them or other prisoners that would amount to undue hardship, as defined in the *OHRC*. The policy recognizes that not all trans prisoners will want to be housed according to their self-identified gender.<sup>80</sup>

Wherever possible, the trans prisoner is to be integrated into the general population and not isolated, unless voluntarily requested by the prisoner. However, they may need to be separated from the general population in situations where it is necessary to ensure their health and safety and that of other prisoners. Single cell housing may not be necessary if the prisoners and staff do not identify privacy or health and safety concerns.<sup>81</sup> The prisoner will be permitted to retain personal items, like prosthetics, to express their identified gender, both in the prison and on transfer, unless there are legitimate health and safety reasons that amount to undue hardship under the *OHRC*.<sup>82</sup>

## Strip searching

Trans prisoners are offered a private space in which to be searched, including when staff search any prosthetics. At no time are the prisoners to be left standing uncovered prior to, or following, the searching procedure.<sup>83</sup> The operating manager must privately explain the strip or frisk search process and the various options available to the prisoner.<sup>84</sup> The trans prisoner must be given the opportunity to choose whether to be

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76. *Ibid* at para 1.0.

77. *Ibid* at para 2.0.

78. *Ibid* at para 3.2.4.

79. *Ibid* at paras 3.0, 4.1.

80. *Ibid* at para 3.2.5.

81. *Ibid* at para 6.1.12.

82. *Ibid* at para 6.2.1.

83. *Ibid* at para 6.5.1.

84. *Ibid* at para 6.5.3.

searched by a man or woman or by a split search, where the prisoner will designate which parts of their body, including prosthetics, are searched by which gender of staff member.<sup>85</sup> The choice made by the prisoner should be documented in detail.<sup>86</sup>

## Yukon

Although brief, the Yukon policy on trans prisoners lists several important items.<sup>87</sup> Trans prisoners are placed according to their self-identified gender or housing preference unless there are overriding and/or safety concerns that cannot be resolved.<sup>88</sup> The policy recognizes that not all trans prisoners want to be housed according to their self-identified gender.<sup>89</sup> According to this policy, trans prisoners may choose to be strip searched by either a male or female staff member or choose a “split search.”<sup>90</sup> In general, trans prisoners are housed in single-celled units.<sup>91</sup>

## Other Provinces and Territories

Currently, no other province or territory has specific policies for trans prisoners. Some provinces have made informal statements about trans prisoners. For instance, Saskatchewan’s *Correctional Services Act, 2012* states guiding principles with which the legislative scheme are to be interpreted and administered.<sup>92</sup> One of these principles states “[t]hat correctional policies, practices, programs and services be respectful of gender, ethnic, cultural and linguistic differences and be responsive to the particular needs of women, as well as to the needs of other groups of offenders with special requirements.”<sup>93</sup> The spokesperson for Manitoba Justice said that Manitoba jails have “effectively managed trans prisoners in the past and is not aware of any significant incidents.”<sup>94</sup> According to the spokesperson, prisons consider factors like self-identification, gender on official identity documents, and any file history about past placements before placing a trans prisoner. They also consider health and safety and any security concerns and house trans prisoners with a smaller population.<sup>95</sup>

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85. *Ibid* at para 6.5.4.

86. *Ibid* at para 6.5.5.

87. Yukon Corrections, *supra* note 60.

88. *Ibid* at 3.

89. *Ibid*.

90. *Ibid*.

91. *Ibid* at 4.

92. SS 2012, c C-39.2, s 3.

93. *Ibid*, s 3(f).

94. Larkin Schmiedl, “Transgender and Incarcerated” (2014) 2014:210 *Outwords* 8 at 9.

95. *Ibid*.

“As I understand it,” the spokesperson said, “a transgender inmate in a correctional facility would likely be placed in an area with either a smaller population of inmates (i.e. not a dorm-style arrangement), or in other areas better suited to protect [their] safety.”<sup>96</sup>

### *A Framework of Rights for Trans People in Prison*

Protecting the rights of trans prisoners is important because of their susceptibility to maltreatment and abuse. Identifying various laws and instruments that may offer protection is an important aspect of determining appropriate solutions. This section will provide an overview of applicable laws and instruments, both domestic and international, that are relevant to the rights of trans prisoners.

#### *International Legal Instruments*

International treaties and customary law form the framework of international human rights law, while declarations, guidelines, and principles contribute to their understanding, implementation, and development.<sup>97</sup> Canada is a party to several international instruments that protect the rights of trans prisoners.<sup>98</sup> Simply being

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96. *Ibid.*

97. United Nations Human Rights Office of the High Commissioner (UNHRO), “International Human Rights Law” <[www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx)>.

98. Department of Foreign Affairs and International Trade, “The Human Rights of LGBTI Persons” (25 May 2018), *Government of Canada* <[https://international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/human\\_rights-droits\\_homme/rights\\_lgbti-droits\\_lgbti.aspx?lang=eng&\\_ga=2.50514794.234392629.1554590731-2030765415.1554590731](https://international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/rights_lgbti-droits_lgbti.aspx?lang=eng&_ga=2.50514794.234392629.1554590731-2030765415.1554590731)>. Canada has ratified the following treaties: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Convention for the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

a party to these instruments can have a persuasive impact on governments and influence a court's interpretation of laws. However, the instruments are not truly binding until they are ratified by Parliament.<sup>99</sup> When states become parties to international treaties, they have an obligation and a duty under international law to respect, protect, and fulfill human rights. Protecting individuals and groups against human rights abuses is inherent in this obligation and must be fulfilled through positive action by the state. This positive action is often in the form of domestic measures and legislation compatible with their treaty obligations and duties.<sup>100</sup>

Treaty bodies are committees of independent experts who monitor state compliance. Parties to treaties are required to submit periodic reports to the treaty body to ensure compliance, usually every three to five years.<sup>101</sup> There are nine core international human rights treaties. The founding treaty is the *UDHR*, which was adopted by the United Nations General Assembly in 1948.<sup>102</sup> This declaration, although not legally binding, establishes several civil, political, economic, social, and cultural rights. Two other documents, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*, along with the *UDHR*, form the *International Bill of Rights*.<sup>103</sup> Since 1948, all "UN member states have ratified at least one core international human rights treaty, and eighty percent have ratified four or more."<sup>104</sup> Canada has ratified seven United Nations (UN) human rights treaties, including the *UDHR*, the *ICCPR*, and the *ICESCR*, and must submit reports on how it implements each of these treaties.<sup>105</sup>

The *UDHR* provides that "[a]ll human beings are born free and equal in dignity and rights."<sup>106</sup> In the preamble, the *UDHR* proclaims that one of the greatest aspirations of the people is the "advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear," so as to help heal the conscience of mankind from the barbarous acts that resulted from the disregard and

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99. UNHRO, *supra* note 97.

100. *Ibid.*

101. Department of Foreign Affairs and International Trade, "The Universal Periodic Review Process" (2 June 2017) *Government of Canada* <[https://international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/upr-epu/process-processus.aspx?lang=eng](https://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/upr-epu/process-processus.aspx?lang=eng)>.

102. *UDHR*, *supra* note 8.

103. *ICCPR*, *supra* note 98; *ICESCR*, *supra* note 98.

104. Office of the High Commissioner for Human Rights (UN Human Rights), "Treaty-Based Bodies" <[www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx)>.

105. "Canada and the United Nations Human Rights System: Human Rights Treaties", Government of Canada <<https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>>.

106. *UDHR*, *supra* note 8 at 72.

contempt for human rights.<sup>107</sup> Article 5 provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>108</sup> Article 10(1) of the *ICCPR* provides that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>109</sup> Article 10(3) reiterates that the function of the prison system is to rehabilitate and reform the prisoners and not to torture them.<sup>110</sup> Article 9 of the *ICESCR* provides that “the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”<sup>111</sup> International instruments that recognize the importance of protecting potentially vulnerable people who have been imprisoned include Article 5 of the *UDHR* and Article 7 of the *ICCPR*.<sup>112</sup>

The UN recognizes that the risk of torture or cruel, inhuman, or degrading treatment of LGBTQ2SI people is of concern in prison.<sup>113</sup> The *United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)* stipulates that all prisoners are to be treated with respect because of “their inherent dignity and value as human beings.”<sup>114</sup> Prisoners are not to be subjected to any form of torture or other cruel, inhuman, or degrading treatment or punishment for any reason.<sup>115</sup> The *Mandela Rules* stress that prison rules are to be applied impartially, and there should be no discrimination on the grounds of sex or any other status.<sup>116</sup> Prison administrations must take account of the individual needs of prisoners, particularly those who are most vulnerable.<sup>117</sup> Protecting trans prisoners from rights abuses is in keeping with preserving their inalienable rights and dignity that accrue to them by virtue of their human existence. Creating an avenue where they are abused is an unconscionable attack on their rights as human beings.

### *The UNDRIP*

Gender variance is not a new concept in many cultures. For example, many Indigenous cultures have special roles for trans people. An example of a special

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107. *Ibid* at 71.

108. *Ibid* at 73.

109. *ICCPR*, *supra* note 98, art 10(1).

110. *Ibid*, art 10(3).

111. *ICESCR*, *supra* note 98, art 9.

112. *UDHR*, *supra* note 8 at 73; *ICCPR*, *supra* note 98, art 7.

113. Juan E Mendez, UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 31st Sess, UN Doc A/HRC/31/57 (2016) at 5.

114. *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/RES/70/175 (2016) at 8, Rule 1 [*Mandela Rules*].

115. *Ibid*.

116. *Ibid* at 8, Rule 2.

117. *Ibid*.

role is Two-Spirited people.<sup>118</sup> The word “Two-Spirit” comes from the Northern Algonquin word “*niizh manitoag*,” meaning possessing two spirits.<sup>119</sup> It represents the embodiment of both the feminine and masculine spirits within one person.<sup>120</sup> Pre-contact, many First Nation communities accorded respect for sexual and gender diversity, and many Two-Spirit people had both sacred and ceremonial roles within the communities.<sup>121</sup> It was not until colonization and the imposition of compulsory Christianity that the suppression of the Two-Spirit roles was enforced.<sup>122</sup> Even within the larger LGBTQ2SI community, Two-Spirited people face a unique set of challenges, including racism that may force a choice between following their identities or a culture that presents additional unique stressors and health risk factors.<sup>123</sup>

The *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) aims to protect the rights and interests of Indigenous peoples around the world through a holistic approach to effecting change to systems, governance, language, and rights and freedoms for Indigenous peoples worldwide.<sup>124</sup> The declaration’s preamble provides that Indigenous peoples, in the exercise of their rights, should be free from discrimination.<sup>125</sup> It addresses the “urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, and philosophies.”<sup>126</sup> The goal of the *UNDRIP* is to protect and preserve the culture and practices of Indigenous peoples, including Two-Spirited people.

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118. Beatrice Medicine, “Directions in Gender Research in American Indian Societies: Two Spirits and Other Categories” (2002) 3:1 *Online Readings in Psychology and Culture* 2 at 8.
119. Kimberly F Balsam et al, “Culture, Trauma, and Wellness: A Comparison of Heterosexual and Lesbian, Gay, Bisexual, and Two-Spirit Native Americans” (2004) 10:3 *Cultural Diversity and Ethnic Minority Psychology* 287 at 288.
120. Richard Anguksuar LaFortune, “A Postcolonial Perspective on Western [Mis] Conceptions of the Cosmos and the Restoration of Indigenous Taxonomies” in Sue-Ellen Jacobs et al, eds, *Two-Spirit People: Native American Gender Identity, Sexuality, and Spirituality* (Chicago: University of Illinois Press, 1997) 217 at 221.
121. Balsam et al, *supra* note 119 at 288.
122. LaFortune, *supra* note 120 at 222.
123. Karina L Walters, “Urban Lesbian and Gay American Identity: Implications for Mental Health Service Delivery” (1997) 6:2 *Journal of Gay and Lesbian Social Services* 43.
124. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (2007) [*UNDRIP*]; Walters, *supra* note 123.
125. *UNDRIP*, *supra* note 124 at 2.
126. *Ibid.*

The *UNDRIP* contains several articles that relate to Two-Spirited persons and their rights. Article 2 provides that Indigenous peoples are “free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, [that are based] on their Indigenous origin or identity.”<sup>127</sup> This provision expressly prohibits discrimination against Indigenous peoples because of how they choose to express their identity. According to Article 8(2)(a), states must provide effective mechanisms for prevention of, and redress for, “any action which has the aim or effect of depriving [Indigenous persons] of their integrity as distinct peoples, or of their cultural values or ethnic identities.”<sup>128</sup> This provision indicates that governments take particular care to protect Indigenous prisoners who identify as trans or Two-Spirited and whose identity is linked to their Indigenous cultural practices.

States must ensure that “Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health . . . [by] taking the necessary steps to . . . achieving progressively the full realization of this right.”<sup>129</sup> Overall, these provisions of the *UNDRIP* mandate that Indigenous prisoners who identify as trans or Two-Spirited require states to take steps to protect their physical, emotional, and mental health. It is imperative that these rights are protected to preserve the cultural practices that stem from this aspect of Indigenous identities.

### *Canadian Human Rights Law*

Until very recently, federal rights or protections for trans people did not exist. However, explicit recognition of such rights is imperative in creating a legal framework that protects the rights of all trans people, including those serving sentences in prison. Bill C-16 in 2016 marked the ninth time that legislation rectifying this omission had been introduced to the House of Commons.<sup>130</sup> Bill C-16, *An Act to Amend the Canadian Human Rights Act and the Criminal Code*, amends the *Canadian Human Rights Act* to include gender expression and gender identity as protected grounds of discrimination.<sup>131</sup> In June 2017, Parliament passed the bill, and it received royal assent a week later.<sup>132</sup>

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127. *Ibid.*, art 2.

128. *Ibid.*, art 8(2)(a).

129. *Ibid.*, art 24(2).

130. Bill C-392, *An Act to Amend the Canadian Human Rights Act (Gender Identity)*, 1st Sess, 38th Parl, 2005 (first reading 17 May 2005) was the eighth attempt to create a legal framework for trans rights.

131. Bill C-16, *An Act to Amend the Canadian Human Rights Act and the Criminal Code*, 1st Sess, 42nd Parl, 2017, clause 2 (assented to on 19 June 2017), SC 2017, c 13 (clauses 3 and 4 also amend the *Criminal Code* provisions on hate speech and aggravating factors in sentencing); *Criminal Code*, RSC 1985, c C-46.

132. Bill C-16, *supra* note 131.

Although explicit rights recognition at the federal, provincial, and territorial levels is very recent, human rights tribunals have a history of recognizing discrimination against trans people under the grounds of “sex” and/or “disability.”<sup>133</sup> Every province and territory in Canada has a human rights code that enumerates protections for its citizens. As of 2017, all Canadian jurisdictions include “gender identity” and, in all but three jurisdictions, “gender expression” as protected groups under their human rights legislation.<sup>134</sup> The Supreme Court of Canada has stated that human rights legislation is quasi-constitutional law that “attracts a generous interpretation to permit the achievement of its broad public purposes.”<sup>135</sup> Human rights legislation will override other provincial laws as well as regulations, contracts, and collective agreements unless specifically exempt.<sup>136</sup>

Although the Northwest Territories was the first to explicitly prohibit discrimination against trans people in 2002, by including gender identity in its *Human Rights Code*,<sup>137</sup> it was not until 2012 that Ontario became the first province to include gender identity and gender expression as grounds for discrimination in its *Human Rights Code*.<sup>138</sup> Bill 33, known as *Toby’s Act*, amended the *Human Rights Code* to specify that every person, regardless of gender identity or gender expression, has a right to equal treatment without discrimination. Accordingly, the *Human Rights Code* now provides protection from discrimination in services, accommodation, contracting, employment, and vocational association on the basis of “gender expression” and “gender identity.”<sup>139</sup> However, the terms “gender identity” and “gender expression” are not defined within the legislation, meaning the understanding of these terms will evolve from tribunal and court decisions. The Ontario Human Rights Commission issued a non-legally binding interpretation bulletin that defines the differences between gender identity and gender expression.<sup>140</sup>

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133. See e.g. Jena McGill & Kyle Kirkup, “Locating the Trans Legal Subject in Canadian Law: *XY v Ontario*” (2013) 33:1 Windsor Review of Legal and Social Issues 96.

134. Amnesty International, “Canada: Human Rights Protections Extended to Trans People”, press release (15 June 2017) <[www.amnesty.ca/news/canada-human-rights-protections-extended-trans-people](http://www.amnesty.ca/news/canada-human-rights-protections-extended-trans-people)>.

135. *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 17.

136. Ontario Human Rights Commission (OHRC), *Human Rights at Work*, 3rd ed (Toronto: OHRC, 2008) <[www.ohrc.on.ca/en/human-rights-work-2008-third-edition](http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition)>.

137. *Human Rights Act*, SNWT 2002, c 18, s 5(1).

138. Bill 33, *An Act to Amend the Human Rights Code with Respect to Gender Identity and Gender Expression*, 1st Sess, 40th Leg, Ontario, 2012 (assented to 19 June 2012), SO 2012, c 7. See also McGill & Kirkup, *supra* note 133.

139. *Human Rights Code*, RSO 1990, c H 19, ss 1–7.

140. OHRC, *Gender Identity and Gender Expression*, brochure (Toronto: Queen’s Printer for Ontario, 2014).

In *Browne v Sudbury Integrated Nickel Operations*, the Ontario Human Rights Tribunal took a purposive approach to applying gender identity protection.<sup>141</sup> The complaint came from a cisgender male challenging his employer's clean-shaven policy on the basis of sex and gender expression.<sup>142</sup> As an equipment operator, the complainant was required to wear a mask to ensure the fit of a respirator mask.<sup>143</sup> The tribunal held that the purpose of the legislation was to protect the rights of trans and gender non-conforming persons, who experience "severe social, economic and historical disadvantage" and that there was no evidence that bearded men suffered a similar disadvantage.<sup>144</sup> The tribunal rightly rejected a broad interpretation of the legislation given that the purpose of the *Human Rights Code* is to ensure the protection of disadvantaged groups such as imprisoned trans people from various forms of discrimination.<sup>145</sup>

### *The Disconnect*

The *Kavanagh* case was one of the early cases that highlighted the difficult issues associated with the imprisonment of trans people.<sup>146</sup> Synthia Kavanagh had lived as a woman since she was thirteen.<sup>147</sup> In 1993, she filed three complaints with the CHRC because CSC refused to give her an adequate hormone dosage to prevent the reversal of the physical changes she had undergone prior to imprisonment.<sup>148</sup> CSC also denied her repeated requests for gender affirmation surgery.<sup>149</sup> Synthia described the many difficulties she encountered as a trans woman in a male prison. She recounted humiliating experiences of showering with male prisoners and being strip searched by male guards.<sup>150</sup> She spent considerable time in segregation, often for her own protection after being sexually assaulted, harassed, and taunted while in the general population.<sup>151</sup> Though she eventually won her case and was finally transferred to a female prison, her story is a graphic example of how severe the effects of the CSC policies are on trans prisoners.

In 2001, the Canadian Human Rights Tribunal found that "transsexuals" and their housing needs should be assessed individually in consultation with an expert in the

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141. 2016 HRTO 62 [*Browne*].

142. *Ibid* at paras 36–37.

143. *Ibid* at para 4–5.

144. *Ibid* at para 35.

145. *Ibid* at para 39.

146. *Kavanagh*, *supra* note 33.

147. *Ibid* at para 4.

148. *Ibid* at para 6.

149. *Ibid*.

150. *Ibid* at para 124.

151. *Ibid* at paras 121, 131.

treatment of gender dysphoria.<sup>152</sup> The tribunal further noted that trans women must undergo surgery to be placed in a women's facility and held that gender affirmation surgery can be considered an essential medical service and that CSC is expected to cover the costs of surgery of trans prisoners who have completed the qualifying period for gender affirmation surgery before going to jail and whose physician recommends surgery.<sup>153</sup>

Although the tribunal's decision presented a first step in alleviating the sufferings of trans prisoners, it failed to eradicate the problems. In December 2015, the West Coast Prison Justice Society (WCPJS) filed a human rights complaint against CSC at the CHRC.<sup>154</sup> Their complaint discussed some of the problems facing trans prisoners under the CSC policies. The WCPJS argued that CSC discriminated against trans prisoners when providing "goods, services, facilities or accommodation" on the grounds of sex and disability because gender identity and gender expression had not yet been added as protected categories of discrimination.<sup>155</sup> The complaint identified areas in which CSC was failing to accommodate trans prisoners. One such area was the accommodation of trans prisoners regarding their placement. The WCPJS argued that when trans women are put in male prisons they are more likely to be considered "protective custody" prisoners, resulting in a greater deprivation of liberty.<sup>156</sup> The WCPJS argued that, with the development of expert opinion, international standards, and human rights law since 2001, the Canadian Human Rights Tribunal would have decided the *Kavanagh* case differently today.<sup>157</sup>

The WCPJS identified cell sharing as another area of discrimination impacting trans prisoners. In their claim, they argued that the CSC's allowance of double bunking or cell sharing between trans women and male prisoners has resulted in the women being put "at constant risk of and, in constant fear of, sexual assault."<sup>158</sup> The WCPJS further suggested that the current CSC policies concerning searches and urinalysis testing, which allow prison officers to decide whether a male or female officer will frisk search, strip search, and conduct urinalysis tests on trans prisoners, was discriminatory.<sup>159</sup>

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152. *Ibid* at para 192 (transsexual is the term used by the Canadian Human Rights Tribunal in this case).

153. *Ibid* at para 191.

154. Jennifer Metcalfe, "WCPJS Files Human Rights Complaint on Behalf of Transgender Prisoners" (14 December 2015), *West Coast Prison Justice Society* <<https://prisonjustice.org/wcpjs-files-human-rights-complaint-on-behalf-of-transgender-prisoners/>>.

155. Jennifer Metcalfe, "West Coast Prison Justice Society v Correctional Service of Canada" (2015), *West Coast Prison Justice Society* <<https://prisonjusticedotorg.files.wordpress.com/2015/12/trans-prisoner-rep-complaint-form-version.pdf>> [Metcalfe, "West Coast Prison Justice Society"].

156. *Ibid* at 1.

157. *Ibid*.

158. *Ibid* at 1–2.

159. *Ibid* at 2.

Legal scholar Kyle Kirkup maintains that strip searches are actually a part of the power imbalance where sexuality outside the “norm” is attacked.<sup>160</sup> The fact that trans prisoners can be strip searched and tested by guards of genders they do not feel comfortable being searched by can be extremely humiliating to the affected prisoner.<sup>161</sup> The decision of the Ontario Human Rights Tribunal in *Forrester v Peel (Regional Municipality) Police Services Board*<sup>162</sup> supports this position. Although, in a police services context, the tribunal held that it was discriminatory to deny a trans woman her request to be searched by a female officer and that it was a humiliating experience to be searched by a male police officer.<sup>163</sup>

The WCPJS complaint also brought up the issue of sharing bathrooms with non-trans prisoners, arguing that this situation leads to increased risks to the trans prisoner’s safety and impacts their mental health as it can aggravate anxieties about body image.<sup>164</sup> The WCPJS also argued that CSC policy does not adequately protect the rights of trans prisoners to access personal items that traditionally align with their gender, such as make-up, underwear, or shaving items, with the same ease as other prisoners, which can lead to negative outcomes for trans individuals.<sup>165</sup> Finally, the WCPJS complaint highlighted that the CSC policies do not protect trans prisoners’ right to be referred to by their preferred names or gender pronouns both verbally and in written documents.<sup>166</sup> They expressed that “it is hurtful and discriminatory to refer to transgender people by gender pronouns or names that do not correspond to their gender identities.”<sup>167</sup> Their complaint ultimately sought a declaration that these CSC policies are discriminatory and should be amended in accordance with human rights law.

The issues raised by the WCPJS are pertinent to protecting trans prisoners’ physical, spiritual, emotional, and mental health. Although, the *CCRA* is the federal legislation governing CSC, and it clearly states that one of the federal correctional system’s purposes is “to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of [prisoners];” there seems to be a disconnect between the purpose and the realities in prison.<sup>168</sup> The purpose of the prison system is not to torture or harm prisoners; rather, the *CCRA* stipulates that prisoners are to be treated safely and with dignity. Section 4(d) stresses that prisoners have the same rights as other Canadians, except those that are “lawfully and necessarily removed

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160. Kyle Kirkup, “Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law” (2009) 24:1 *Canadian Journal of Law and Society* 107 at 114.

161. *Ibid.*

162. 2006 HRTO 13.

163. *Ibid* at paras 18, 25, 395.

164. Metcalfe, “West Coast Prison Justice Society”, *supra* note 155 at 2–3.

165. *Ibid* at 3.

166. *Ibid.*

167. *Ibid.*

168. *CCRA*, *supra* note 7, ss 3–3(a).

or restricted” because of the sentence.<sup>169</sup> In addition, section 4(g) requires that all “correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, [Indigenous] peoples, persons requiring mental health care and other groups.”<sup>170</sup>

Since the WCPJS complaint, CSC has changed its placement and accommodation policy to assess requests on a case-by-case basis.<sup>171</sup> However, the lack of certainty that exists without a clear-cut policy leaves prisoners open to further discretionary harm and abuse. Leaving the placement and treatment of trans prisoners open to the discretion of decision-makers allows for the influence of personal biases and prejudices. It can also create an atmosphere of confusion and lead to a lack of uniformity in decision-making. Additionally, poor record keeping on issues concerning trans prisoners makes it difficult to assess the efficacy of policies governing trans prisoners. Some health professionals resist treating trans patients, and some make prejudiced or abusive statements that are hurtful to the patients.<sup>172</sup>

CSC’s *Guidelines on Gender Dysphoria* are also problematic as they only apply to prisoners diagnosed with gender dysphoria by a psychiatrist.<sup>173</sup> This policy makes it impossible for prisoners who identify as trans but who do not experience gender dysphoria to have access to proper health care. The policy will be particularly troublesome for Indigenous trans and Two-Spirited people whose gender roles may be larger than discrepancies between their gender identity and the sex assigned to them at birth. It is also possible that prisoners not yet diagnosed will be left with inadequate health care pending their diagnosis.

The policy provision regarding gender affirmation surgery also creates challenges. CSC will pay for gender affirmation surgery if a medical professional, having consulted with CSC, deems it an essential medical service.<sup>174</sup> The criteria that determines whether the surgery will be deemed an essential medical service under CSC policy is left largely to the discretion of the medical professional. Failing to clearly spell out the criteria for making these determinations leaves the decision open to prejudice and abuse of authority.

CSC policies regarding trans prisoners are plagued with uncertainty in other areas like searching and urinalysis testing. The search policy states that decisions regarding searching, especially strip searching, will consider the “mixed gender physiology” of individuals diagnosed with gender dysphoria.<sup>175</sup> According to this policy, trans individuals are entitled to an individualized protocol developed through consultation with the prisoner.<sup>176</sup> However, there are gaps in the details of the procedure

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169. *Ibid*, s 4(d).

170. *Ibid*, s 4(g).

171. CSC, *Gender Dysphoria*, *supra* note 19 at para 4.

172. Winter et al, *supra* note 29.

173. CSC, *Gender Dysphoria*, *supra* note 19 at para 1.

174. *Ibid* at para 6.

175. CSC, *Searching*, *supra* note 55 at Annex F.

176. *Ibid*.

and criteria for enforcing this individualized protocol. The limits of the protocol are not always clearly prescribed. For example, the sample protocol outlined in Annex F indicates that a trans woman who has not had gender affirmation surgery is to be searched by a female officer on her top half and a male officer on her bottom half.<sup>177</sup> The policy does not clearly state, however, if the trans woman can choose the genders of those searching her top or bottom halves. In addition, the policy regarding urinalysis testing provides that the collector will be of the same sex as the prisoner but does not state whether the collector is to consider the self-identified gender of the prisoner when determining gender.<sup>178</sup>

### *Recommendations*

These recommendations focus on the laws and the policies that produce the systemic norms that affect trans prisoners' experiences in the prison system.

### *Abolition/Decarceration*

Abolition/decarceration could be the ideal solution for dealing with discrimination against trans prisoners, and it should be seriously considered by legislators and policy-makers. Improving the discriminatory system that is currently in place creates a myriad of unforeseen problems.<sup>179</sup> Continuing to focus on a system that is punishment-based neglects alternative solutions to address real and damaging issues within our society like transphobia, racism, homophobia, male dominance, and class bias.<sup>180</sup> Overcrowding in Canadian prisons is currently being remedied by building more prisons, and it is becoming easier to send an individual to prison rather than using alternative and less expensive means.<sup>181</sup>

Developing creative measures to address issues around incarceration, combined with a durable system of education to assist in prisoners' societal integration, are not only two fundamental steps towards abolition, but they will also significantly improve society. Education programs teach functional and academic skills that will assist prisoners in returning to work while providing benefits to the community, and the encouragement of harm reparation through victim/offender reconciliation provides benefits to the community that are cost saving and effective. Focusing on

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177. *Ibid.*

178. CSC, *Urinalysis Testing*, *supra* note 57 at para 32.

179. Angela Y Davis, *Are Prisons Obsolete?* (Toronto: Publishers Group Canada, 2003) at 106.

180. *Ibid* at 107.

181. John Howard Society of Canada, "Financial Fact on Canadian Prisons" (23 August 2018) (blog), <<http://johnhoward.ca/blog/financial-facts-canadian-prisons/>>.

decreasing time spent in segregation, for example, is not addressing the crucial needs of specific populations such as trans prisoners. Although it is addressing human rights standards, a standard is a fine line between a tolerable act and a human rights violation. Alternatively, the following recommendations are presented as ways of improving the existing prison system.

### *Implementation of the CCRA*

The *CCRA*, if properly applied, could achieve improvements in prison health care more quickly and easily than any major changes to legislation. CSC's current discretionary approach to the *CCRA* is problematic. As such, the current health crisis in Canadian prisons may be the product of wilful actions rather than statutory interpretation. Senator Kim Pate has emphasized that current policies already provide the tools to improve the health status of prisoners.<sup>182</sup> Solutions can come from appropriately applying existing legislation and infrastructure. A strong proponent of decarceration, Senator Pate has stated that the health of prisoners can be improved by properly applying the *CCRA* and by shifting prisoners out of the system and into the community.<sup>183</sup>

### *Conclusion*

Trans prisoners are some of the most vulnerable targets in the prison system, as they are susceptible to violence, abuse, and discrimination. This situation is worsened when trans prisoners are also members of other minority groups that are equally susceptible to discrimination. Therefore, steps need to be taken by the prison authorities to protect them. Although CSC has revised some policies, more must be done to fully ensure prisoner safety. The current situation leaves room for uncertainty and grants discretionary powers to prison officials in their dealings with trans prisoners. This can result in situations that amount to abuse of their rights in breach of domestic and international law. Though jurisdictions like Ontario, British Columbia, and the Yukon have made significant strides in protecting trans prisoners, CSC and the rest of Canada are lagging behind. While abolition and/or decarceration may offer the best means of addressing discrimination against trans prisoners and should seriously be considered by legislators as an alternative to the status quo, this article also

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182. Senator Kim Pate, "Increasing Over-representation of Indigenous Women in Canadian Prisons" (29 May 2018), *Senate of Canada* <<https://sencanada.ca/en/speeches/speech-by-senator-pate-increasing-over-representation-indigenous-women-canadian-prisons-inquiry-debate-concluded/>>.

183. *Ibid.*

presents recommendations on how CSC can better protect trans prisoners within current domestic and international frameworks. It is critically important for CSC to revise its policies, educate prison officials and staff on trans issues, and properly implement existing legislation.

### *About the Contributors / Quelques mots sur nos collaborateurs*

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**Ayoola Odeyemi** is the senior policy advisor at the Indigenous Advanced Education Skills Council. His work at the council focuses on the advancement of Indigenous education in Canada. He is a lawyer in good standing with the law societies of Ontario and Nigeria. He has previously practised criminal law, immigration law, and refugee law. He has a Master of Arts degree in environmental policy from Memorial University in Newfoundland.

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**Jade Fletcher** is a member of the Métis Nation of Ontario (ancestral roots in Red River, Manitoba). She received her Bachelor of Arts in Criminology from Dominican College in New York and her Juris Doctor degree from the University of Ottawa in 2018 and is completing her articles in family law, with a focus on representing women who are fleeing violence. Her passions lie with Aboriginal law, prison law, and family law. Jade's keen interest in prison law grew significantly after taking (now Senator) Kim Pate's prison law class. Through this experience, she had the opportunity to delve into the injustices surrounding Canadian prisons and get hands-on experience learning how to put action behind tackling these inequalities.