

# Learning lessons bulletin

## PPO investigations | issue 3

### Transgender prisoners

This learning lessons bulletin explores the care and management of transgender individuals while in prison. It draws on recommendations from our investigations into deaths in custody, as well as our complaint investigations, and outlines six lessons we can learn from past cases.

My office has historically received few complaints from prisoners identifying themselves as transgender, and, fortunately, has investigated relatively few deaths of transgender individuals in custody. However, more recently, these numbers have been climbing. Last year, in quick succession, two transgender women tragically took their own lives while in custody. These events made the need to address this issue all the more pressing.

Prisons are always difficult environments, never more so than in recent months, but they have a fundamental responsibility to keep prisoners safe and to protect and support those with particular vulnerabilities. Transgender prisoners are among the most vulnerable, with evident risks of suicide and self harm, as well as facing bullying and harassment. Undoubtedly, managing transgender prisoners safely and fairly poses challenges for prison

staff in the “hyper-gendered” world of prisons, but law and policy are unequivocal that this is what is required.

This bulletin is timely, not only because of the two high profile deaths of transgender prisoners, but also because of much wider public debate about transgender issues. It also coincides with a long-awaited review of the Prison Service Instruction (PSI) that governs the care and management of transgender prisoners. This PSI reflects the appropriately heightened awareness of transgender issues in prison - and in society as a whole.

I hope that the learning in this bulletin, together with the PSI, contribute to a more flexible and proactive approach to managing transgender prisoners, based on their individual needs and circumstances. This is an issue which has come of age and I hope the bulletin will contribute to helping transgender prisoners live safely in their gender identity.

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### Background

Our prison system is currently built to house genders separately, and will usually distinguish gender based on that which is recognised by law. According to the Gender Recognition Act 2004 (the Act), proof of gender is determined either by the person’s birth certificate, or a gender recognition certificate (GRC). The process for obtaining a GRC is set out in the Act, and is rather complex. It involves satisfying

a panel that the individual has or had gender dysphoria, has ‘lived in their acquired gender’ for a period of at least two years and plans to do so until their death, and has submitted the required documentation and evidence. Because of the process and the cost involved, because of the symbolism, or because it can have implications for existing marriages, many transgender people choose not to obtain a certificate. Since the law

came into effect in April 2005, the GRC panel has received just over of 4,900 applications.<sup>1</sup>

Most transgender prisoners are, at least upon first arrival in prison, housed according to the gender they were assigned at birth.

This bulletin discusses past recommendations the Prisons and Probation Ombudsman (PPO) has made on issues about transgender prisoners, including location, mental health support, bullying and harassment, interpretation of the transgender compact, and balancing security concerns with reasonable adjustments. We draw on the work of both our complaint and fatal incident investigations to present case studies and identify learning.

The PPO conducts investigations into all deaths that occur in prisons, the aim of which is to examine the circumstances surrounding the death and make recommendations to help prevent avoidable deaths in the future. Similarly, we investigate complaints made by prisoners to understand what happened and correct injustices where we find them. Both types of investigation may highlight learning points; this bulletin collectively analyses cases from both parts of the office and identifies lessons that aim to better protect transgender prisoners from bullying and harassment, and better support transgender prisoners to live in their gender identity while in prison.

## Policy

The regulations that guide the care and management of transgender prisoners in England and Wales are now found in Prison Service Instruction (PSI) 17/2016.<sup>2</sup> This PSI was released November 2016, along with a broader review of the care and management of transgender offenders conducted by the Ministry of Justice. As this PSI was published very recently, all of the cases discussed in this bulletin fell under the old PSI.<sup>3</sup> We note that many of the lessons outlined in this bulletin, along with many of the recommendations we have made in the course of our investigations, are reflected in the new PSI.

PSI 17/2016 should be read in conjunction with PSI 32/2011 *Ensuring Equality*,<sup>4</sup> which imposes responsibility on prison staff to work to eliminate discrimination and promote equality in line with the Equality Act 2010. As such, and as is illustrated in the cases in this bulletin, it is important to have a proactive, individual, and multidisciplinary approach to supervising transgender prisoners and ensuring their safety and well-being.

## Data collection

It is difficult to estimate precisely how many serving prisoners in England and Wales are transgender, partly because the Prison Service did not, until the release of the new PSI, collect data on the gender identity of prisoners (only legally-recognised sex category) but also because, even if this data was collected, those who are gender non-conforming are less likely to disclose their status, often due to safety concerns.<sup>5</sup> The new PSI provides for data collection and publication of official statistics on transgender offenders. Until this data is collected, we must make do with rough approximations. Oral evidence given in the House of Commons estimates that, while the number of transgender individuals in prison is growing, it is still relatively small – approximately 80.<sup>6</sup> Despite this, research suggests transgender people are overrepresented in the criminal justice system and in prisons, relative to the broader population.<sup>7</sup>

## PPO Cases

When a prisoner makes a complaint to the PPO, National Offender Management Service (NOMS) data is used to collect socio-demographic characteristics. However, because data on transgender prisoners has not been collected by NOMS until recently, we are usually only aware of a complainant's transgender status when it is related to the substance of a complaint. Because of this, it is possible – even likely – that we have received more complaints from transgender prisoners than are represented here.

From April 2012 to end of August 2016, we received 33 complaints related to transgender equalities issues.

Since 2008, the PPO has completed investigations into the deaths in custody of five transgender prisoners.

In this bulletin, we draw on these 38 cases to outline recommendations and lessons for the care and management of transgender prisoners.

It is important to note that all of the complaints we have received, as well as all of the deaths in custody we have investigated, are related to transgender female prisoners, nearly all of whom were housed in a male estate. This does not mean we have not received complaints from transgender male prisoners, simply that their transgender status was not related to the subject of their complaint.

## Supporting prisoners: location and mental health

Previous research has shown there is greater prevalence of mental health concerns and risk of suicide in the transgender population.<sup>8</sup> When a person enters prison, they often leave behind what support they had in the community, which can aggravate existing mental health concerns or result in increased psychological distress.

Prisons are gender-segregated, as per Prison Rule 12(1)<sup>9</sup>, and treat gender as binary. While the new PSI provides for offenders who identify as gender non-binary or gender fluid, these prisoners will nonetheless be housed in an estate associated with a particular gender. Traditionally prisons frequently rely on unambiguous gender boundaries to enact and enforce rules and maintain security.

This environment, frequently referred to as 'hyper-gendered' in the literature, can be particularly difficult for transgender prisoners, exacerbating existing vulnerabilities.<sup>10</sup> As such, the issues of where a transgender prisoner is housed, and their mental health and well-being, can be closely tied together.

PSI 7/2011, which was in force during Ms A's time in prison, stated prisoners would ordinarily be housed according to their legally-recognised gender. However, the PSI did allow a prisoner to request placement in a different estate if they were 'sufficiently advanced in the gender reassignment process'. In such situations, a case conference, including a multi-disciplinary risk assessment, should have been completed to consider the issue of location. According to this guidance, the prison should have considered moving the prisoner to the estate of the gender with which the prisoner identifies, if that was the prisoner's preference. Our investigations have found that this did not always happen in a proactive, timely, or consistent way. Too often, when concerns are raised about a transgender prisoner's location, the prison either segregates them or moves them to another area of the prison, rather than organising a case conference to give full consideration to the matter, in line with the former PSI. The case of Ms A, below, was one such instance.

### Case study A

Ms A was transgender and had been living as female since she was very young, though did not have a GRC. When in police custody, Ms A had threatened to self-harm. She was remanded to a male estate, and prison staff immediately began suicide and self-harm monitoring procedures, known as ACCT.<sup>11</sup> At reception, Ms A said that she did not want to be in a male prison. She was assessed by a mental health nurse, but not offered any further mental health support, and was prescribed anti-depressants by a doctor who did not evaluate her in person. Her community health records were not obtained. Ms A self-harmed throughout her first month at the prison.

Located on a standard wing, Ms A frequently complained about other prisoners behaving inappropriately toward her. Because of this, she was eventually moved to a unit for vulnerable prisoners. When interviewed during the PPO

investigation, staff said Ms A was happier in this unit, and said she did not want to move to a women's prison at that time.

The equalities team at the prison had two case conferences about how to manage Ms A, but did not directly involve her in either of them. Neither of these sessions considered a move to a women's prison. Despite her needs as a transgender prisoner, no one from the equalities team attended her ACCT case reviews. Ten days prior to her death, staff ended ACCT monitoring.

With sentencing imminent, Ms A reported being worried about receiving a custodial sentence, and said she had thoughts of suicide. Prison staff began ACCT procedures again, but assessed her as a low risk. Two days later, an officer found Ms A unresponsive with a ligature around her neck. Resuscitation was unsuccessful.

Ms A had been living as female for half her life. On arrival, she told a member of reception staff that she did not want to be at a male prison, but there was no evidence that anyone told her she could apply to be moved to a women's prison, or that anyone considered her request in the absence of a formal request. While we acknowledge there is evidence Ms A was equivocal about her location, our investigation found that, given her circumstances, someone should have formally consulted Ms A about her preferences on arrival at the prison. Regardless of whether Ms A was moved to another location, a conversation should have taken place and did not.

Given the circumstances of Ms A and others like her, we are heartened that the newly released PSI advocates a more practical and flexible approach to housing transgender prisoners at the point they are first remanded or sentenced – one that proactively consults with transgender prisoners and takes a balanced decision based on the circumstances to hand.

The case of Ms A also demonstrates important points about mental healthcare and ACCT procedures. The Department of Health advocates individually tailoring suicide prevention approaches and targeting at-risk groups. Transgender individuals, who they note have a higher incidence of mental health concerns and rates of self-harm, are targeted specifically by this guidance.<sup>12</sup> While Ms A had contact with the equalities team at the prison, who were able to provide her with support, they were not involved in her ACCT reviews. Given the guidance in both the former PSI 7/2011 and PSI 64/2011, which sets out requirements for the ACCT process, we would have expected case reviews to be multidisciplinary, in order to better target support for Ms A, particularly considering her known risks.

## Lessons to be learned

### Lesson 1:

As is reflected in the new PSI, the location of a transgender prisoner should be proactively evaluated based on an individual assessment of their needs, and the possibility of residing in the estate of their acquired gender should be given appropriate consideration. The location agreed must allow them to live safely in their gender.

## Lessons to be learned

### Lesson 2:

ACCT case reviews for transgender prisoners should be multidisciplinary, and should be attended by all relevant people involved in a prisoner's care.

## Bullying and Harassment

Bullying and harassment are all too common themes in the complaints we receive from, and deaths in custody of, transgender prisoners. Under PSI 32/2011 prison staff are required to work actively and meaningfully to eliminate discrimination and bullying based on protected characteristics. PSI 7/2011 required that the establishment put in place measures to address transphobic harassment and hate crimes.

In a number of cases concerning allegations of discrimination, bullying and harassment we found that, while steps were taken to protect the prisoner, such as moving them to a different wing or differently gendered estate, the establishment did not properly investigate the allegations raised. While it is commendable that prisons take necessary steps to protect individuals, not investigating these allegations fails to prevent bullying and harassment in the future, and could undermine confidence in the investigation process.

### Case study B

Ms B was housed in a male prison. She submitted two Discrimination Incident Reporting Forms (DIRFs) to the prison, saying that she experienced two incidents of aggressive transphobic bullying in the prison library. A week later, she received an interim response to both DIRFs, saying they were being dealt with by a manager, but that the investigation could take up to 28 days. A month later, she received notice that a manager was drafting the investigation report. Nearly four and a half months after submitting the DIRFs, she received a reply from the prison saying that, due to them not meeting timeframes, it was not possible to investigate the complaint in a satisfactory manner. Ms B was not happy with this response and asked us to investigate her complaint. After complaining to us, Ms B obtained her GRC and was moved to a female estate. The prison requested that we consider their support of Ms B in obtaining her GRC and her subsequent transfer, as part of our investigation into her complaint.

We upheld Ms B's complaint. While we acknowledged the support the prison offered in helping Ms B move to the female estate, this did not mitigate their poor handling of her DIRF complaints. We found, given the risks facing transgender prisoners, as well as the necessity for prisoners to have confidence in the DIRF process, the lack of investigation and response by the establishment constituted a failure to meet expectations and the requirements of the complaint handling guidelines.

## Lessons to be learned

### Lesson 3:

Allegations of transphobic bullying and harassment should be meaningfully investigated so prisoners have confidence in the process, and so steps can be taken to challenge and prevent this behaviour in future.

## Prisoner contact

Research has shown that transgender prisoners can be at a higher risk for sexual assault and verbal abuse in prison.<sup>13</sup> The Commission on Sex in Prison found prison staff can have a pragmatic 'don't ask don't tell' attitude towards sex in prisons, either ignoring sexual activity to 'keep the peace' or exercising discretion not to intervene.<sup>14</sup> However, this attitude can mean ignoring coercive or transactional sexual encounters, which could aggravate existing vulnerabilities.

One of the ways prisons can be more attuned to these risks is through meaningful contact between prisoners and their personal officers, which includes knowledge and understanding of offences and personal circumstances. This is particularly the case for prisoners undertaking gender reassignment, as PSI 7/2011 required monthly meetings with personal officers. In the case of Ms C, below, this did not appear to happen. We found that, if a consistent and supportive relationship had been in place, the officer might have been able to better identify the distress she was suffering and act accordingly.

## Case study C

Ms C had been in prison for over twenty years, and lived as a woman for the nine months prior to her death. She was a category A (high security) prisoner and was frustrated by her category and sentence progression. Previous applications to reduce her category had been refused. Her category was due for review again at the time of her death.

Throughout her time in prison, other prisoners had accused Ms C of sexually assaulting or grooming other prisoners, and saying that she often spoke in an inappropriately sexualised way. Ms C had also made similar allegations against other prisoners and complained she was being victimised by officers. At the time of her death, there were rumours that Ms C was in a sexual relationship with two prisoners on the same wing, and that she was purchasing canteen items for them in return. It is not clear whether these rumours were known to staff.

On the afternoon of the day of her death, a prisoner made an accusation of sexual assault against her. Ms C was found unresponsive in her cell later that night. Resuscitation was attempted, but was unsuccessful. In a letter found in her cell, she described alleged blackmail related to the sexual assault and how these accusations would have affected her category review.

Our investigation raised concerns that officers apparently had little awareness of the relationships and sexual activity between prisoners on Ms C's wing. It was likely that sexual activity and in particular the allegations of sexual assault triggered Ms C's actions, but given the lack of staff knowledge of Ms C's circumstances and activities on the wing, staff would have been unlikely to foresee and prevent her actions.

We recommended the governor ensure personal officers have regular, quality contact with the prisoners, that staff are up-to-date and briefed regularly on security information, that they effectively patrol, monitor and interact with prisoners on wing, and that they challenge inappropriate sexual behaviour.

## Lessons to be learned

### Lesson 4:

Personal officers should have regular, meaningful contact with transgender prisoners; staff should be aware of their vulnerabilities, and challenge inappropriate behaviour.

## Compacts

PSI 7/2011 stated that permitting prisoners to “live permanently in their acquired gender” involves allowing transgender prisoners to dress in appropriate clothing and adopt a preferred name. In order to be meaningful, the establishment must allow transgender prisoners access to items they may use to maintain their gender appearance at all times, regardless of their level on the Incentives and Earned Privileges (IEP) scheme, and without disciplinary action being taken. This point is further reinforced in the new PSI 17/2016.

In order to facilitate this, the prison and the prisoner would normally agree a compact upon arrival at the establishment, which outlines both the requirements and entitlements of a prisoner undertaking gender reassignment. Compacts would normally have been drafted in accordance with the rights and responsibilities outlined in the PSI. However, in some cases, we found that these compacts are either more restrictive or unhelpfully vague than the guidelines in the PSI.

### Case study D

Ms D complained that she was given an IEP warning for wearing lipstick and was subsequently downgraded to a basic IEP for the same offence. She said that, while her compact stated makeup should be minimal, there was no guidance as to what this meant, and pointed out that she was allowed to purchase lipstick from canteen. Guidance from NOMS suggests that there is no restriction (other than volumetric) on the type of make up that a prisoner may wear; however, it must be appropriate and is therefore regulated by ‘decency values’.

We upheld Ms D’s complaint, finding that the prison interpreted the PSI more restrictively than the guidance would suggest. Both the prison’s diversity policy (which had not been updated in light of PSI 7/2011) and Ms D’s compact appeared to impose more restrictive conditions than the PSI. While it was possible that Ms D applied makeup ‘to excess’, the warning given would only be appropriate if an agreement was reached clarifying what was considered acceptable. This was not the case. We recommended an apology, reimbursement for any loss of earnings that might have resulted from the IEP downgrade, reassessment and redrafting of the transgender compacts at the prison, and updating of the prison’s diversity policy in line with PSI 7/2011.

## Lessons to be learned

### Lesson 5:

Ensure local policies concerning the support and management of transgender prisoners are in line with national guidance, do not impose unfair additional restrictions, and are not interpreted more strictly than the PSI allows.

## Balancing concerns

Prisons can struggle with balancing security concerns and meeting the requirements of the *Equality Act* and PSI 32/2011 when navigating the support and management of transgender prisoners. To keep prisons secure, rules are set to maintain discipline. When establishments are confronted with situations requiring reasonable adjustments to these rules, we understand it can be difficult to amend practices without compromising the security of the prison or safety of the prisoner.

We have received several complaints from transgender female prisoners about restrictions to gender expression that were based on security considerations – most concerning clothing or makeup important to the prisoner for their gender expression. We consider many of these could have been resolved more effectively by learning from the female estate and considering what a female prison would do in the circumstances. Indeed, Annex B of PSI 7/2011 suggested that prisons should obtain guidelines from an equivalent ‘opposite gender’ prison to help determine what is acceptable.

### Case study E

Ms E complained to us that she had not been permitted to wear makeup for her security photo, saying that this was a breach of PSI 7/2011. She said that in previous prisons, they took two pictures of her: one with makeup and one without. The prison said that only one picture could be stored on the system, and that image needed to be a true likeness of the person. They said that the picture they took was, indeed, a true likeness of Ms E and that she was treated no differently than the male prisoners at the prison.

We accepted the explanation that only one photo could be stored on the system and it was reasonable to require the photo be a true reflection of how the prisoner presents. We consulted a female prison to ask whether women were asked to remove makeup for their security photos. They confirmed that women would be photographed as they presented, and would not be asked to remove any makeup.

Ms E’s compact allowed her to wear minimal makeup. There was no indication that Ms E was asked to remove her makeup because it was excessive and, arguably, a transgender prisoner who regularly wears makeup would be more likely identified with her makeup on than without. We recommended that Ms E receive an apology, that the prison arrange another photograph where she is allowed minimal makeup, and that staff are reminded of local and national policy regarding transgender prisoners.

## Lessons to be learned

### Lesson 6:

Reasonable adjustments should be made for transgender prisoners to help them to live in their gender role, when such adjustments can be made safely without compromising security. Consideration should be given to the practices of establishments that house the gender with which they identify.

## Conclusion

While some prisons do take steps to make reasonable adjustments to support transgender prisoners, it is clear from the cases in this bulletin that there are still lessons to be learned. The revised PSI will hopefully improve existing practices and, ultimately, help prisons work towards the safe, fair and equal treatment of transgender prisoners.

## Endnotes

1. Ministry of Justice (2016) *Tribunals and Gender Recognition Statistics Quarterly, Main Tables (January to March 2016)*. London: Ministry of Justice [online at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2016>]
2. Prison Service Instruction (PSI) 17/2016: The care and management of transsexual offenders. This bulletin focuses solely on transgender prisoners however the PSI also applies to individuals in community supervision settings and approved premises under Probation Instruction 16/2016.
3. Prison Service Instruction (PSI) 7/2011: The care and management of transgender prisoners.
4. Prison Service Instruction (PSI) 32/2011: Ensuring equality.
5. Lambie, S. (2012) 'Rethinking gendered prison policies: Impacts on transgender prisoners.' *ECAN Bulletin*, 16, 7-12.
6. Women and Equalities Committee, [Oral Evidence: Transgender Equality Inquiry](#), HC 390, 28 October 2015: Q284.
7. Poole, L., Whittle, S. & Stephens, P. (2002) 'Working with transgendered and transsexual people as offenders in the probation service.' *Probation Journal*, 49, 227-232.
8. Department of Health (2008) *Trans. 'A practical guide for the NHS.'* London: Department of Health. See also King, M., Semlyen, J., See Tai, S., Killaspy, H., Osbourne, D., Popelyuk, D., and Nazareth, I. (2008) 'A systematic review of mental disorder, suicide and deliberate self-harm in lesbian, gay, and bisexual people.' *BMC Psychiatry*, 8: 70.
9. Prison Rules 1999.
10. Tarzwell, S. (2006) 'The Gender Lines are marked with razor wire: addressing state prisons and practices for management of transgender prisoners.' *Columbia Human Rights Law Review*. 38, 167-219.
11. ACCT is the Prison Service process for monitoring and supporting prisoners at risk of self-harm or suicide. It stands for: Assessment Care in Custody and Teamwork.
12. HM Government (2012) '*Preventing suicide in England: A cross-government strategy to save lives.*' London: Department of Health.
13. Edney, R. (2004) 'To keep me safe from harm? Transgender Prisoners and the experience of imprisonment.' *Deakin Law Review*, 9, 327-338.
14. Stevens, A. (2015) '*Sex in Prison: Experiences of former prisoners.*' London: The Howard League for Penal Reform.

## Lessons to be learned

### Lesson 1

As is reflected in the new PSI, the location of a transgender prisoner should be proactively evaluated based on an individual assessment of their needs, and the possibility of residing in the estate of their acquired gender should be given appropriate consideration. The location agreed must allow them to live safely in their gender.

### Lesson 2

ACCT case reviews for transgender prisoners should be multi-disciplinary, and should be attended by all relevant people involved in a prisoner's care.

### Lesson 3

Allegations of transphobic bullying and harassment should be meaningfully investigated so prisoners have confidence in the process, and so steps can be taken to challenge and prevent this behaviour in future.

### Lesson 4

Personal officers should have regular, meaningful contact with transgender prisoners; staff should be aware of their vulnerabilities, and challenge inappropriate behaviour.

### Lesson 5

Ensure local policies concerning the support and management of transgender prisoners are in line with national guidance, do not impose unfair additional restrictions, and are not interpreted more strictly than the PSI allows.

### Lesson 6

Reasonable adjustments should be made for transgender prisoners to help them to live in their gender role, when such adjustments can be made safely without compromising security. Consideration should be given to the practices of establishments that house the gender with which they identify.

The Prisons and Probation Ombudsman investigates complaints from prisoners, young people in secure training centres, those on probation and those held in immigration removal centres. The Ombudsman also investigates deaths that occur in prison, secure training centres, immigration detention or among the residents of probation approved premises. These bulletins aim to encourage a greater focus on learning lessons from collective analysis of our investigations, in order to contribute to improvements in the services we investigate, potentially helping to prevent avoidable deaths and encouraging the resolution of issues that might otherwise lead to future complaints.

### PPO's vision:

To carry out independent investigations to make custody and community supervision safer and fairer.

### Contact us

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