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CLINKS
BRIEFING

Briefing on the Ministry of Justice's review of the care and management of transgender offenders

Background

In December 2015, following two high profile deaths of transgender women held in male prisons, the then Parliamentary Under Secretary of State for Women, Equalities and Family Justice, Caroline Dineage, [launched a review of the treatment of transgender people in prison, probation services and the youth justice system](#). The review provided recommendations for a revised approach by prison and probation services towards transgender people. It also informed the development of a new Prison Service Instruction (PSI) to replace the expired PSI 7/2011, which guides the National Offender Management Service's (NOMS) treatment of transgender people in contact with prison and probation services. Peter Dawson, the then Deputy Director of the Prison Reform Trust, and Jay Stewart, Director of Gendered Intelligence, acted as independent advisers to the review.

Clinks attended the Ministry of Justice (MoJ) consultation events and submitted [a written response to the review](#), which highlighted the need for a more inclusive definition of transgender, improved training for criminal justice staff on the needs of transgender people and increased partnership work with voluntary organisations with knowledge and expertise on supporting transgender people. The response also emphasised the need for meaningful consultation with transgender people at each stage of decision making on issues that affect them.

Introduction

This briefing outlines the core principles of the review, the key changes to policy and guidance and the new process for making decisions on the care and management of transgender offenders put forward in PSI 17/2016.

The briefing therefore examines the following three documents:

- [Review on the Care and Management of Transgender Offenders \(final report\)](#)¹
- [PSI 17/2016: The Care and Management of Transgender Offenders](#)²
- [Prisoner transgender statistics: March to April 2016](#)³

The review report, published in November 2016, outlines a number of underpinning principles and actions to inform a new approach to transgender people in prison and under probation supervision. Its recommendations are directed at NOMS and focus on enabling transgender people to live openly in their gender identity and providing a transparent process for decisions around allocation to binary services. Informed by the review report, NOMS published PSI 17/2016 to replace PSI 7/2011 and provide updated instruction on how transgender people in prison or probation services should be treated.

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The review's report and the corresponding PSI represent significant progress in recognising and addressing the needs of transgender people in contact with the criminal justice system (CJS). In particular, they introduce a broader and more flexible definition of transgender which allows more transgender individuals to access support when at court, in prison or under probation supervision and begins to shift the understanding of transgender identities within the CJS towards a social model from a purely medical/legal one. The review and PSI also establish clearer and more transparent processes around decisions relating to gender expression, leaving less room for discrimination against transgender people in the CJS based on stereotyping and lack of awareness.

Core principles

The review report is based on the following underpinning principle:

"People who are living in a gender different to that of their assigned sex at birth should, as a general presumption, be treated by offender management services according to the gender in which they identify."

This represents a significant move away from the previous approach, which used the more biologically-oriented word 'transsexual' to refer to transgender people and focused on transgender people who had obtained a Gender Recognition Certificate (GRC) or had a diagnosis of gender dysphoria. The review report moves towards a more socially-informed, flexible definition of transgender, based on self-identification. The PSI clarifies that this definition of transgender includes:

- Gender-fluid people – people who feel their identity cannot be expressed in conventional gender roles or whose gender identity changes on a regular basis
- Non-binary people – people whose identity sits outside of the binary of male/female or man/woman
- Intersex people – people whose anatomy or genetics does not fit conventional understandings of male or female
- Transvestites – people who wear clothes conventionally seen as appropriate for the opposite sex.

However, not all of the PSI's provisions apply to these groups, with some focused only on people who intend to live permanently in a different gender to the one assigned to them at birth.

While this is not put forward as the basis upon which allocation and transfer decisions are made, the report recommends that individuals should be respected in their gender and provided with items that enable their gender expression, wherever they are held. It suggests that the prison service should standardise rules on prison clothing and items available to be purchased across the male and female estates. The PSI further confirms that people in court custody, prison and under probation supervision should be enabled to express their gender and provides guidance on what resources should be made available to them to do this.

Another key principle of the report is that decision-making about transgender people in the criminal justice system should as far as possible be anticipative and aim for early intervention. Indeed, it states that "the requirement to keep vulnerable people safe outweighs the desirability of swift proceedings." To support this core principle, the report recommends that questions around allocation to binary services should be addressed as soon as a transgender person is on or awaiting trial, where there is a possibility of going into custody. In some cases, the report suggests, court processes may need to be adjourned in order to allow for accurate reports or safeguarding decisions.

Transgender Advisory Board

In order to provide national oversight and implementation of activity to improve the treatment of transgender people in prisons and probation services, the report recommends the establishment of an advisory group on transgender people in custody or subject to community supervision. This group has now been set up and is called the Transgender Advisory Board. It includes representatives from voluntary sector organisations with expertise in supporting transgender people, NHS and clinical experts, youth justice, inspecting and scrutiny bodies, and offender management practice experts. The group reports regularly to the Minister for Victims, Youth and Family Justice in the MoJ on the implementation of policy around transgender people and explores specific areas where more expertise is required, such as the needs of intersex and non-binary people.

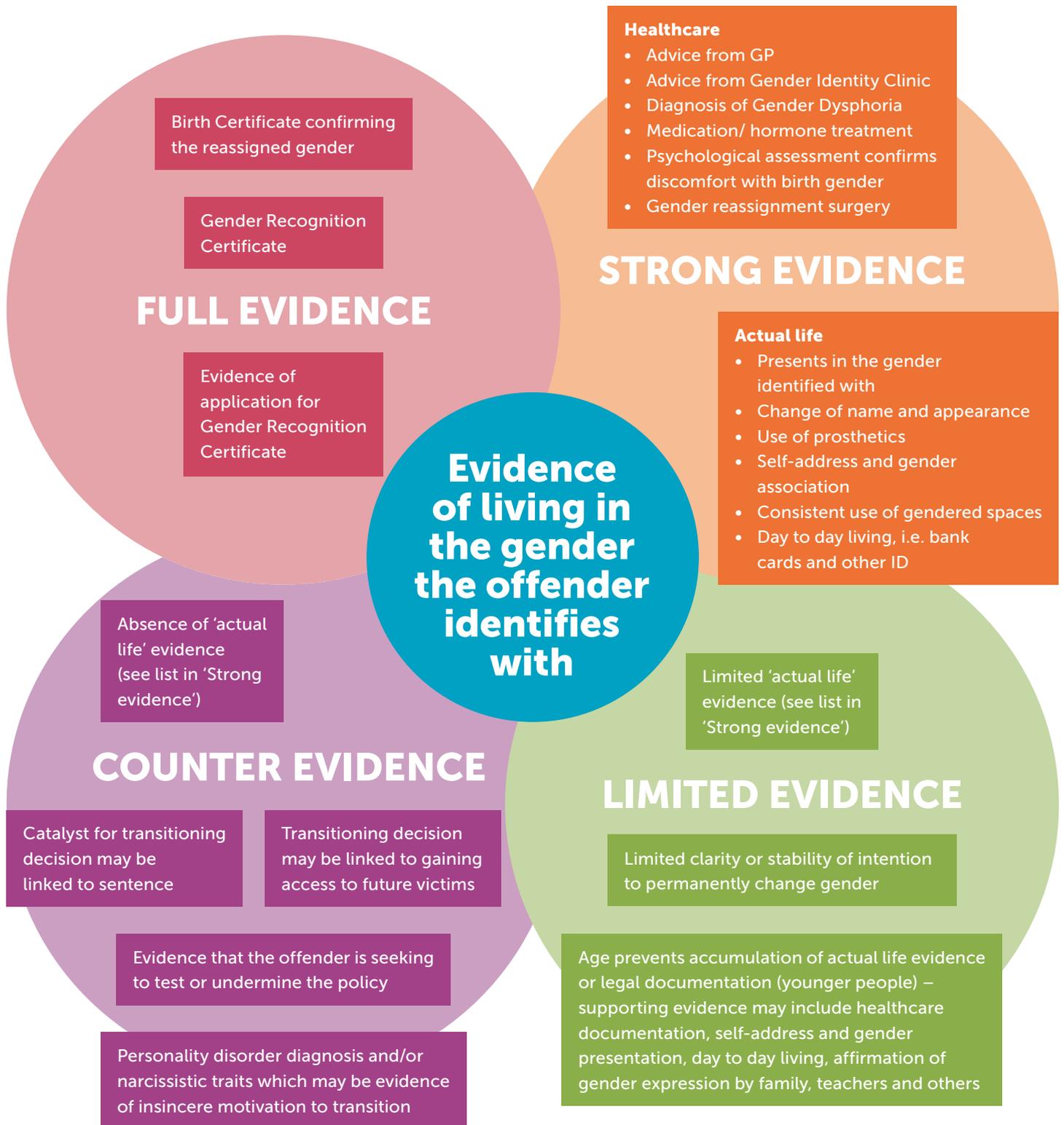
Allocation decisions

The report recommends that decisions about allocation to prisons and probation services should be based on clear criteria and that the decision-making process and the reasons behind decisions made should be communicated to the individual they concern. It notes the need to consider any potential risks both to the individual concerned and to those in the prison they may be placed in, emphasising in particular the safeguarding of victims of domestic violence or sexual abuse. It also suggests that decisions will be informed by evidence presented by the individual that they live or intend to live in their stated gender.

The PSI puts more emphasis on this evidence, stating that flexibility regarding the location of an individual in a prison or in approved premises will only be exercised for those who demonstrate consistent evidence of living in the gender they identify with. It provides a corresponding diagram (see page 4), indicating what should be taken as strong and weak evidence of gender identity. While the Equality Act 2010 makes clear that an individual does not need to be under medical supervision to be understood as going through a process of gender reassignment, the PSI focuses heavily on medical and aesthetic evidence, presenting barriers to those who have not accessed medical treatment or who are less conventional in their visible presentation of their gender.

Clinks is concerned that, by requiring individuals to provide evidence of their gender identity, the processes outlined in the PSI have the potential to exclude a range of people who identify as transgender. The more flexible approach implied in the report's underlying principles, which emphasise individual self-identification, may provide a more inclusive and person-centred basis for decision-making processes.

Adapted evidence diagram from PS1 17/2016⁴



The decision-making process

The report makes clear that allocation decision-making processes should include provision for "review and rapid remedy" if the allocation could have a detrimental impact on the person's mental health or wellbeing, social integration, access to services, or safety.

The PSI gives clear guidelines for the allocation of certain transgender prisoners, stating that those whose preference matches their legal gender (for example, people with a GRC, or transgender people who wish to be held in a prison matching their legal rather than actual gender identity) must be held according to their preference. For example, transgender men without a GRC who wish to be located in the female estate and transgender women without a GRC who wish to be located in the male estate should be held according to their preference.

The formal processes outlined in the PSI for allocating transgender people to prisons and probation services do not apply to gender-fluid, intersex or non-binary people, or transvestites. The PSI states that people with these identities should be managed through voluntary agreements to allow them to express their gender identity while being allocated to locations and services according to their legal gender.

The voluntary agreement is an agreement between the individual and the court custody staff, prison staff or probation staff "to support consideration of privacy, dignity, well-being and arrangements for searching and personal care whilst living in a communal environment." This gives individuals the opportunity to communicate their needs around expressing their gender identity and gain clarification from staff about how these needs will be met. This also allows staff to communicate the reasons behind certain decisions which may be seen to restrict the expression of gender identity, such as restricting access to certain items of clothing due to security reasons.

The PSI then outlines a more detailed process for making decisions about allocation and other issues arising for transgender people who have expressed an intention to permanently change their gender to the opposite of the biological sex assigned to them at birth. For these decisions, individuals should be referred to one of three case boards. These are as follows:

- **Local case board:** This is the main mechanism for decision-making around the allocation of transgender people to prisons and probation services, as well as for designing care and management plans. The PSI states that a local case board should be set up as soon as possible once a transgender person enters the system with a likelihood of going into custody. The board should be attended by all key stakeholders relevant to the individual case; for example, the Deputy Director of Custody, offender manager and Regional Lead Psychologist. If a case board has not been convened before a person enters custody, it must be convened within three working days of the person's reception to custody (whether they have been sentenced or are being held on remand), or within three working days of a person disclosing their transgender identity while in custody. For probation services, a local case board must be set up within three working days of an individual arriving at Approved Premises or following disclosure of their transgender identity.

The role of the local case board is to consider evidence provided by the individual of living in the gender they identify with, to consider any risk factors for the individual and to use this information to make a decision about which prison estate or service they should be allocated to. The board also puts together an initial care and management plan for the individual and can draw up a voluntary agreement with the individual to support them in expressing their gender identity.

- **Local review board:** This revisits earlier decisions made by local case boards where there are concerns raised by stakeholders or the individual concerned. It reviews complaints about the decisions of local case boards, makes arrangements

for transfers between the male and female estates and allows individuals to present further evidence of living in the gender they identify with.

- **Complex case board:** This is a centrally managed board to look at the cases of individuals who present significant complexity and/or risk of harm to themselves or others. Individuals can be referred to this board at any time and for a range of reasons, but a referral must be made when a transgender person is located in a Care and Separation Unit (sometimes known as a segregation unit). Any under 21 year old disclosing that they intend to permanently live in a gender opposite to the sex they were assigned at birth must also be referred to this board, reflecting the increased vulnerability of young transgender people in the CJS.

The PSI requires that the individual concerned must have the opportunity to express their views to any case board they are referred to, either in person or in writing.

Service user and voluntary sector involvement

While Clinks welcomes the commitment to involving a range of stakeholders in case boards, we recommend that more should be done to ensure that transgender people and organisations with expertise in supporting transgender people are able to engage in decision-making processes. Where possible, transgender people should have the option to nominate an advocate from an independent organisation to provide representation for them on the case board as well as being able to personally express their views to the board. Clinks understands, however, that prisons and probation services may struggle to develop voluntary sector engagement in areas where there is a lack of organisations with expertise in supporting transgender people in the CJS. We will seek to raise awareness within the voluntary sector working in the CJS about the needs of transgender people and to provide support to small organisations to strategically engage with prisons and probation services.

Clinks is pleased that the Transgender Advisory Group includes members representing voluntary organisations with expertise on supporting transgender people. We suggest that this kind of involvement should be further embedded into the day to day running of prisons and probation services. This could be done through utilising voluntary sector support to set up transgender prisoner groups and appoint transgender prisoner representatives in prisons and probation, or by including transgender prisoners in strategic groups within the prison or probation service. Clinks' response to the review's consultation highlights examples of how representational groups for lesbian, gay, bisexual and transgender people and older people have been set up and used effectively in some prisons.

Recording and monitoring

The report emphasises that NOMS should aim for better recording of transgender identities and that this information should be gathered at the earliest stage possible. This change specifically addresses concerns raised by the Women and Equalities Committee in 2015 that there was "no reliable data about the numbers of trans people in the criminal justice system."⁵ Noting that some individuals choose not to disclose their transgender status or to consent to this information being shared, the report recommends active encouragement of disclosure and consent for sharing, for example by demonstrating that the institution or service is inclusive of transgender people. Following on from this, the PSI mandates data capture on individuals who disclose that they are proposing to undergo, are undergoing or have undergone a process of gender reassignment. This does not apply to gender-fluid, intersex or non-binary people, nor to transvestites.

The report notes two developments to provide a clearer picture of transgender people across prison and probation services. One is a [data collection exercise](#)⁶ across the prison estate, which was published alongside the report and provides statistics on the number of transgender people held in the prison estate. The exercise only collected data about people who intend to live permanently in a different gender to the one they were assigned at birth, excluding those who had obtained a Gender Identity Certificate. It found that there were 70 transgender people in prison in England and Wales, the majority of whom were transgender men, but acknowledged that under-counting may have resulted from people not known to staff not being counted. While this is a significant step forward in data collection around transgender people, it is clear that broader and more accurate data will be necessary to gain a thorough understanding of the numbers and needs of transgender people held in the prison estate. The PSI mandates the continuation of this data collection, instructing NOMS staff to capture data on all individuals who declare the protected characteristic (under the Equality Act 2010) of gender reassignment. The second development is the introduction of an equality information form including a question on gender identity, which National Probation Service (NPS) staff producing pre-sentencing reports are required to complete.

Staff training and awareness

Echoing Clinks' previous recommendation to the review, the report says that all NOMS staff should undergo training to understand the rights of transgender people. It suggests that this training should include guidance on recording and sharing information and appropriately respecting the preferences of individuals in expressing their gender identity. It also advises that staff should have access to further information and support via their line managers, equality managers or specialist colleagues.

The PSI states that training, guidance and awareness materials will be made available to all staff in NOMS and that access to specialist advice will be available through a range of listed contacts.

Care and integration

The Review's Terms of Reference include a recognition of the need to safeguard the wellbeing of transgender people in the CJS. The report and the PSI make clear that transgender people should have the same access to healthcare in prison that they would in the community, including access to gender identity services. The PSI also specifies that probation requirements should not prevent an individual from attending a Gender Identity Clinic or another appointment relating to gender dysphoria. This may require alternative medical venues to be identified by the Offender Manager, or variation of a licence or sentence.

The report comments on the importance of integration in the prison regime, saying that a person should not be isolated due to being transgender. Similarly, the PSI advises that Care and Separation should not be used to manage risks to transgender prisoners from other prisoners and that these risks should be addressed through holding the transgender person in an appropriate supportive environment away from the main regime of the prison. When a transgender person is placed in Care and Separation, a referral to the complex case board must be made within seven days of the decision. Both the report and PSI recognise that transgender people in the CJS are at increased risk of mental health problems, self-harm and suicide, and state that appropriate action must be taken to address this, such as utilising Assessment Care in Custody Team procedures in prison.



Clinks supports, represents and campaigns for the voluntary sector working with offenders. Clinks aims to ensure the sector and all those with whom they work, are informed and engaged in order to transform the lives of offenders.

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Conclusion and next steps

As discussed in the introduction to this briefing, this review represents a clear step forward in the recognition of a broader range of transgender identities and acknowledgement of the need to respect each individual within the gender identity they wish to express. Having recommended this in our response to the review, Clinks welcomes the increased clarity and transparency around decision-making processes, allowing transgender people to have more input into the decisions made about them and to receive clear information about the reasons behind these decisions. We also welcome the move towards involving individuals in decision-making about them through giving them the opportunity to share their views with case boards; this will support CJS agencies in developing well-informed and effective approaches to addressing the needs of transgender people.

However, there remains a lack of clarity on exactly how perceived risks and wellbeing needs are to be weighed against each other in decision-making processes and, in particular, how far decisions will rest on the ability of individuals to provide the evidence of living in a gender specified by the PSI.

Clinks will continue to update our members about any developments regarding the review. If you have any questions or comments about this briefing, please contact Oonagh Ryder at Clinks.

Notes

1. Ministry of Justice (2016) *Review on the care and management of transgender offenders*. Online: www.gov.uk/government/publications/care-and-management-of-transgender-offenders (last accessed 06/04/2017)
2. HM Prison and Probation Service (2016) *PSI 17/2016: The care and management of transgender offenders*. Online: www.justice.gov.uk/offenders/psis/prison-service-instructions-2016 (last accessed 06/04/2017)
3. Ministry of Justice (2016) *Prisoner transgender statistics: March to April 2016*. Online: www.gov.uk/government/statistics/prisoner-transgender-statistics-march-to-april-2016 (last accessed 06.04.2017)
4. NOMS (2016). *The Care and Management of Transgender Offenders*. Pg. 28. Online: www.justice.gov.uk/downloads/offenders/psipso/psi-2016/PSI-17-2016-PI-16-2016-AI-13-2016-The-Care-and-Management-of-Transgender-Offenders.docx
5. House of Commons Women and Equalities Committee (2015). *Transgender Equality*. Online: www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf
6. Ministry of Justice (2016) *Prisoner transgender statistics: March to April 2016*. Online: www.gov.uk/government/statistics/prisoner-transgender-statistics-march-to-april-2016