

# TRANSGENDER PRISONERS IN AUSTRALIA: AN EXAMINATION OF THE ISSUES, LAW AND POLICY

SAM LYNCH AND LORANA BARTELS<sup>†</sup>

This article presents an overview of the treatment of transgender people in Australian prisons. It commences by considering the key issues faced by transgender prisoners, including the risk of harm by others and self-harm, the need for and challenges in accessing medical intervention, and the choice of where to house prisoners. Next, the article presents an overview of some recent Australian cases involving transgender people, especially in the context of harm, allegations of discrimination and the relevance of transgender status to bail and sentencing decisions. The specific experience of Indigenous transgender people is also considered. The following section describes the extent to which transgender issues are explicitly acknowledged in sentencing and corrections legislation, followed by a detailed analysis of each jurisdiction's policies on managing transgender prisoners. The article concludes by calling for policy and legislative reform to appropriately manage the special needs and vulnerabilities of transgender prisoners.

## I INTRODUCTION

It might seem fairly straightforward that when a person has been found guilty of a criminal offence and sentenced to a term of imprisonment, or remanded in custody because bail has been refused, the next step is that the person is then transferred to prison. It is generally axiomatic that men go to men's prisons, while women go to women's prisons. However, specific issues arise in respect of the

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<sup>†</sup> Sam Lynch, LLB (UC); GDLP (College of Law); Solicitor of the Australian Capital Territory (ACT); Associate to Magistrate Theakston, Magistrates Court of the ACT. Lorana Bartels, BA, LLB, LLM (UNSW); PhD (UTas); GDLP (College of Law); GCTE (UC); Professor and Head of School, School of Law and Justice, University of Canberra; Honorary Professor, University of Tasmania.

placement and treatment of transgender prisoners. As Blight noted, '[p]eople who transgress the traditional boundaries of sex pose a challenge for the correctional system'.<sup>1</sup>

The challenges experienced by transgender<sup>2</sup> people in a correctional context have received greater prominence in recent years, especially as a result of the role of Sophia Bursett — played by trans-woman Laverne Cox — in the high-profile Netflix program *Orange Is the New Black*.<sup>3</sup> The issues viewers see Sophia experience include transphobic abuse from other prisoners and correctional staff, withdrawal of her hormone medication and being placed in solitary confinement, ostensibly for her own protection.

In a recent report by the Australian Human Rights Commission (AHRC) on sexual orientation, gender identity and intersex rights, the AHRC noted that '[t]he capacity for correctional services to meet the needs of L[esbian] G[ay] B[isexual] T[ransgender and] I[ntersex] people is an evolving area of public policy, particularly related to providing safe environments for transgender people'.<sup>4</sup> It is therefore timely to provide an overview of the publicly available information on the laws and policies governing the management of transgender people in Australia's prisons.

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<sup>1</sup> Jake Blight, 'Transgender Inmates' (Trends and Issues in Crime and Criminal Justice No 168, Australian Institute of Criminology, September 2000) 1.

<sup>2</sup> For the purposes of this article, a transgender (or trans) person is someone whose sex and/or gender does not correspond with the sex they were designated at birth and the gender that is expected to follow from that designation. For a comprehensive recent discussion of definitional issues in this context, see Jess Rodgers, Nicole Asquith and Angela Dwyer, 'Cisnormativity, Criminalisation, Vulnerability: Transgender People in Prisons' *TILES Briefing Paper* (2017). See also Transgender Victoria, *Definitions* (2013) <<http://www.transgendervictoria.com/about/definitions>>.

<sup>3</sup> See Katy Steinmetz, 'The Transgender Tipping Point', *TIME Magazine*, 9 June 2014.

<sup>4</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights: National Consultation Report* (2015) 69.

It is unclear how many transgender people there are in Australian prisons — or, for that matter, in the broader Australian community<sup>5</sup> — as data on this issue are not routinely collected. However, earlier surveys suggest that less than one per cent of Australian prisoners are transgender.<sup>6</sup> In the Australian Institute of Health and Welfare's *The Health of Australia's Prisoners 2015* report,<sup>7</sup> six of the 1011 people entering prison across Australia indicated that they were transgender, but it is not clear if this is representative of the population more generally, as participation in the study is voluntary. A 2008 study of New South Wales (NSW) prisons revealed three transgender prisoners in male prisons and two in female prisons.<sup>8</sup> In addition, data relating to prisoner receptions in NSW revealed 16 transgender prisoners being received into court cells or correctional facilities between July 2009 and December 2010.<sup>9</sup> In 2010, there were at least two transgender women in male prisons in Queensland.<sup>10</sup> In early 2016, by contrast, a media report indicated that there were seven transgender prisoners in Queensland prisons.<sup>11</sup> At the time, this represented about 0.1 per cent of prisoners in Queensland,<sup>12</sup> whereas the figures from the Australian Institute of Health and Welfare would place the rate closer to 0.6 per cent. Extrapolated across the whole prison population, which was just over 41,000 in March 2017,<sup>13</sup> this

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<sup>5</sup> Casey Briggs, 'Census 2016: LGBTI People at Risk of Being Undercounted in ABS Survey, Advocates Say', *ABC News* (online), 4 August 2016 <<http://www.abc.net.au/news/2016-08-04/census-2016-lgbti-people-at-risk-being-uncounted-in-abs-survey/7687050>>.

<sup>6</sup> See Rodgers, Asquith and Dwyer, above n 2.

<sup>7</sup> Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (AIHW, 2015).

<sup>8</sup> Juliet Richters et al, *Sexual Health and Behaviour of New South Wales Prisoners* (University of NSW, 2008), cited in Rodgers, Asquith and Dwyer, above n 2.

<sup>9</sup> Tony Butler et al, *Sexual Health and Behaviour of Queensland Prisoners: Queensland and New South Wales Comparisons* (Curtin University and University of NSW, 2010), cited in Rodgers, Asquith and Dwyer, above n 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> Cameron Atfield, 'Call for Queensland Prisoners to Have Access to Sex-change Therapy', *Brisbane Times*, 23 January 2016 <<http://www.brisbanetimes.com.au/queensland/call-for-queensland-prisoners-to-have-access-to-sexchange-therapy-20160123-gmncnw.html>>.

<sup>12</sup> Australian Bureau of Statistics, *Corrective Services Australia, March 2017 Quarter* (ABS, 2017).

<sup>13</sup> *Ibid.*

suggests that there are between 40 and 246 transgender people in Australian prisons. Although these numbers are small, this is not surprising, given the procedures to record prisoners as transgender are almost non-existent. The true number of transgender people incarcerated ultimately could be much higher. Furthermore, it is arguable that any underestimation of the number of transgender prisoners may be a result of inadequate prison policies — as well as police and court policies — which fail to adequately regulate how details of such inmates are recorded.

This article will begin by outlining the main issues faced by transgender people who come into contact with Australia's prison system. This will be discussed in the context of a number of issues identified by Blight in a paper published by the Australian Institute of Criminology in 2000.<sup>14</sup> These issues will be illustrated through a number of recent cases across Australia.

Next, the article will consider the extent to which the Australian sentencing and corrections legislation address this issue. The article will then assess how effective prison systems across Australia appear to be in relation to the management of transgender inmates, by comparing the current policies and procedures (if any) in place. We note that we have in some instances been required to rely on media sources, as access to more authoritative sources was not publicly available. In doing so, we do not necessarily endorse the tone of the publications, which may at times be unnecessarily salacious.

This article aims to highlight ongoing issues in the management of transgender inmates in Australia and determine the extent to which progress has been made since Blight's paper 17 years ago. However, more in-depth research is required, ideally with transgender prisoners and the correctional staff who are tasked with their care. Training is also required to ensure that correctional staff understand and respond appropriately and sensitively to the specific needs of trans prisoners.

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<sup>14</sup> Blight, above n 1.

## II DISCRIMINATION LAWS

Across Australia, anti-discrimination legislation makes it unlawful to discriminate against a person because of their transgender status. The legislation defines the concept of gender identity and the scope in which a person is considered to be transgender.<sup>15</sup> But these definitions are not uniform across Australia and do not necessarily align with the common law position. NSW and Tasmania are the only jurisdictions that specifically define ‘transgender’.<sup>16</sup> The Australian Capital Territory (ACT), Queensland and Victoria use the term ‘gender identity’,<sup>17</sup> while South Australia defines ‘chosen gender’,<sup>18</sup> Northern Territory adopts the term ‘sexuality’<sup>19</sup> and Western Australia uses a dual definition of ‘gender reassigned person’ and ‘gender history’.<sup>20</sup>

Not only does the terminology differ across jurisdictions, but so do the definitions themselves. Despite this, there are some consistencies. All states and territories except the Northern Territory provide that a person needs to ‘identify’ as a member of the opposite sex.<sup>21</sup> All jurisdictions except the Northern Territory and Tasmania

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<sup>15</sup> *Anti-Discrimination Act 1977* (NSW) s 38A; *Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996* (NSW); *Discrimination Act 1991* (ACT) Dictionary; *Anti-Discrimination Act 1991* (Qld) Dictionary; *Equal Opportunity Act 1984* (SA) s 5(5); *Anti-Discrimination Act 1998* (Tas) s 3; *Equal Opportunity Act 2010* (Vic) s 4; *Anti-Discrimination Act 1992* (NT) s 4; *Equal Opportunity Act 1984* (WA) s 4.

<sup>16</sup> *Anti-Discrimination Act 1977* (NSW) s 38A; *Anti-Discrimination Act 1998* (Tas) s 3.

<sup>17</sup> *Discrimination Act 1991* (ACT) Dictionary; *Anti-Discrimination Act 1991* (Qld) Dictionary; *Equal Opportunity Act 2010* (Vic) s 4. See also *Legislation Act 2001* (ACT) ss 169A–169B.

<sup>18</sup> *Equal Opportunity Act 1984* (SA) s 5(5).

<sup>19</sup> *Anti-Discrimination Act 1992* (NT) s 4.

<sup>20</sup> *Equal Opportunity Act 1984* (WA) s 4.

<sup>21</sup> *Anti-Discrimination Act 1977* (NSW) s 38A; *Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996* (NSW); *Discrimination Act 1991* (ACT) Dictionary; *Anti-Discrimination Act 1991* (Qld) Dictionary; *Equal Opportunity Act 1984* (SA) s 5(5); *Anti-Discrimination Act 1998* (Tas) s 3; *Equal Opportunity Act 2010* (Vic) s 4; *Equal Opportunity Act 1984* (WA) s 4.

refer to the requirement of ‘living, or seeking to live as a member of the opposite sex’,<sup>22</sup> and all jurisdictions except NSW, Queensland and Western Australia specifically refer to the person ‘assuming characteristics of the other sex, whether by way of medical intervention or not, style of dressing or otherwise.’<sup>23</sup> In other words, a person is generally to be considered transgender if they either identify, live, or assume characteristics of the opposite sex. It is important to remember, however, that not all these qualifications for transgender status apply in every state and territory. Furthermore, not all transgender people identify with or assume cisnormative characteristics of what the opposite sex should be.

Overall, there is general uniformity across the legislation regulating the parameters that determine a person’s status as transgender. Despite this, the Northern Territory is lacking in any apparent detail compared to the rest of Australia and would benefit from reform.<sup>24</sup> General uniformity cannot be deemed to be satisfactory considering the injustices and consequences that may occur as a result of inconsistent definitions relating to gender identity.<sup>25</sup> Inconsistencies may lead to a person being considered transgender in one state or territory, but not another. Consequently, this means the way in which that person is dealt with when coming into contact with the criminal justice system may not necessarily be appropriate or legal.

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<sup>22</sup> *Anti-Discrimination Act 1977* (NSW) s 38A; *Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996* (NSW); *Discrimination Act 1991* (ACT) Dictionary; *Anti-Discrimination Act 1991* (Qld) Dictionary; *Equal Opportunity Act 1984* (SA) s 5(5); *Equal Opportunity Act 1984* (WA) s 4.

<sup>23</sup> *Discrimination Act 1991* (ACT) Dictionary; *Equal Opportunity Act 1984* (SA) s 5(5); *Anti-Discrimination Act 1998* (Tas) s 3; *Equal Opportunity Act 2010* (Vic) s 4; *Anti-Discrimination Act 1992* (NT) s 4.

<sup>24</sup> See *Anti-Discrimination Act 1982* (NT) s 4. Sexuality means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality.

<sup>25</sup> It is acknowledged that some critical trans theorists do not endorse the concept of ‘identity’ in this context. The term is used in the present paper as a reflection of the terminology used in the policies which are the focus of the paper. For a recent Australian perspective on relevant issues, see Katherine Fallah, ‘*Re Georgio: An Intimate Account of Transgender Interactions with Law and Society*’ (2017) *Griffith Journal of Law and Human Dignity* 6.

The way in which the law defines a person to be transgender is fundamental to how they will be treated and managed in the criminal justice system. Accordingly, a failure to appropriately identify an individual's status as transgender under state and territory anti-discrimination legislation will give rise to discriminatory practices by authorities if transgender people are incarcerated incorrectly. Correctional staff should also be required to ask about a prisoner's transgender status, rather than making assumptions which may be erroneous.<sup>26</sup> All jurisdictions should therefore adopt a uniform approach to defining and recording a person's status as transgender, as well as utilising a common term that can be relied on across Australia. It is recommended that the term 'transgender' be utilised uniformly across Australia, given the broad nature of the term and types of gender identity issues encompassed by this term.

### III KEY ISSUES FACED BY TRANSGENDER INMATES

Over a decade ago, Edney observed that:

The absence of scholarship of [transgender prisoners'] experience [in Australia] is part of the problem. Instead of that scholarship, and a reflexive understanding of how the prison order may be modulated to properly protect the interests of transgender prisoners, we have the pre-eminence of correctional administrators to determine how best to accommodate transgender prisoners. The empirical evidence suggests that the level of protection is not of such quality as to guarantee the basic human rights of transgender persons while in custody.<sup>27</sup>

Arguably, little has changed in the intervening years. In contrast with

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<sup>26</sup> A similar and compounding issue may arise in policing when such information is regarded as optional and may be omitted or only included in case notes.

<sup>27</sup> Richard Edney, 'To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment' (2004) 9(2) *Deakin Law Review* 327, 336.

the emerging literature in the United States,<sup>28</sup> there is still very limited knowledge about the treatment of transgender prisoners in Australia, as there has been no detailed research conducted with trans prisoners. Nevertheless, the international experience suggests that such prisoners have specific needs and are at a particularly high risk of assault and self-harm.<sup>29</sup> The Association for the Prevention of Torture noted that ‘LGBTI persons in detention ... are in a situation of particular vulnerability, at risk of human rights violations and abuses, including by fellow detainees throughout the entire criminal justice system’.<sup>30</sup> The AHRC also stated that it ‘has been widely recognised that transgender people are more likely than the general population to experience assault and self-harm, and that these vulnerabilities are magnified when transgender persons are incarcerated’.<sup>31</sup>

Specifically, transgender prisoners can be exposed to harm in a number of ways, including inadequate and inconsistent medical treatment, as well as higher risks of self-harm and sexual assault whilst in prison.<sup>32</sup> Transgender prisoners in the past have reported ‘daily experiences of sexual coercion and psychological distress’.<sup>33</sup> Some of the key considerations include how to determine where transgender inmates will be housed, how to reduce the risk of self-harm and assaults on transgender inmates, and on what basis medical intervention should be available.<sup>34</sup> The issues of harm, housing and medical intervention will be considered in more detail below. In the context of the risk of sexual assault, however, Edney has suggested that if prisons cannot protect transgender prisoners from the predatory behaviour of other inmates, ‘there necessarily arises a

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<sup>28</sup> See, eg, Lori Sexton and Valerie Jenness, “‘We’re Like Community’”: Collective Identity and Collective Efficacy Among Transgender Women in Prisons for Men’ (2016) 18 *Punishment and Society* 544.

<sup>29</sup> Rodgers, Asquith and Dwyer, above n 2.

<sup>30</sup> Association for the Prevention of Torture, *LGBTI Persons Deprived of Their Liberty: A Framework For Preventive Monitoring* (Penal Reform International, 2013), cited in AHRC, above n 4, 69.

<sup>31</sup> AHRC, above n 4.

<sup>32</sup> Edney, above n 27, 328-29.

<sup>33</sup> Roger, Asquith and Dwyer, above n 2, 9-10.

<sup>34</sup> Blight, above n 1, 2-3.

problem of legitimacy in the punishment of transgender prisoners'.<sup>35</sup> We agree with Edney's assertion that such failures by correctional agencies amount to both a breach of their duty of care and a failure to guarantee prisoners' human rights. It is therefore vital that all correctional facilities across Australia have appropriate policies and practices in place for the management of transgender inmates.

### A *Self-Harm and Harm by Others*

As Goulding has noted, prisons 'are dangerous places where the threat of violence is ever present'.<sup>36</sup> There are several factors that can increase a prisoner's vulnerability to harm from other prisoners, including both old age and youth, physicality, intellectual disability, perceived passivity, or being in prison for the first time.<sup>37</sup>

In addition to the threat of harm from other inmates, prisoners also face issues relating to self-harm and suicide. Across Australia, 16 per cent of people entering prison report having intentionally harmed themselves, while 11 per cent had thoughts of harming themselves. Actual self-harm and thoughts of self-harm were more common among female and non-Indigenous entrants.<sup>38</sup> Although there are no specific data on transgender prisoners, the comparatively higher rates of self-harm among LGBTIQ Australians, even without the added burden of imprisonment, are well recognised. For example, the Australian Human Rights Commission<sup>39</sup> referred to research indicating that the rate of suicide for LGBT people is 3.5 to 14 times higher than the general population. A recent study with 859 transgender and gender diverse young people across Australia found

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<sup>35</sup> Edney, above n 27, 329.

<sup>36</sup> Dot Goulding, 'Violence and Brutality in Prisons: A West Australian Context' (2007) 18(3) *Current Issues in Criminal Justice* 399, 400.

<sup>37</sup> Dot Goulding and Brian Steels, 'Predator or Prey? An Exploration of the Impact and Incidence of Sexual Assault in West Australian Prisons' (Centre for Social & Community Research, Murdoch University, November 2009) 12.

<sup>38</sup> Matthew Willis et al, 'Self-Inflicted Deaths in Australian Prisons' (Trends & Issues in Crime and Criminal Justice No 513, Australian Institute of Criminology, 2016) 2.

<sup>39</sup> Australian Human Rights Commission, above n 4.

that 79 per cent of respondents had self-harmed, while nearly half (48 per cent) had attempted suicide.<sup>40</sup>

According to Blight, '[i]t is clear that a transgender inmate ... who is placed with male prisoners is likely to be at much greater risk of harm, particularly sexual assault, than those placed within a female institution'.<sup>41</sup> Blight acknowledged that segregation from the rest of the prisoner population for extended periods of time may not necessarily be sufficient as a means of protecting inmates, and that in itself, segregation can become a form of punishment instead of protection.<sup>42</sup> Furthermore, Edney pointed out that this has the result that transgender prisoners, through no fault on their part, are 'subject to less than equal treatment within the prison system and exposure to a far more punitive daily regime'.<sup>43</sup> By virtue of being segregated from the general prison population, trans prisoners are deprived of the opportunity to socialise and participate in day-to-day prison activities, which can be a positive, as well as negative, experience. Instances of self-harm, such as those described below, have included situations where transgender inmates have died whilst segregated. To reduce the risk of self-harm, Blight identified basic processes that could be adopted to maintain self-identity and self-esteem. These included: allowing transgender inmates to have separate toilet facilities and the ability to shower separately; allowing access to gender appropriate clothes; and ensuring that staff refer to the person by their chosen name and gender.<sup>44</sup>

## B *Medical Intervention*

In relation to the medical requirements of transgender inmates, it is clear that serious consequences can occur from suddenly preventing a transgender person's access to medical interventions such as hormone therapy. Blight commented that medical intervention is not

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<sup>40</sup> Penelope Strauss et al, *Trans Pathways: The Mental Health Experiences and Care Pathways of Trans Young People* (Telethon Kids Institute, 2017).

<sup>41</sup> Blight, above n 1, 3.

<sup>42</sup> *Ibid* 5.

<sup>43</sup> Edney, above n 27, 334.

<sup>44</sup> Blight, above n 1, 5.

consistent across Australia and identified issues regarding commencing hormone therapy or surgical intervention whilst in prison. It must be noted that the health of prisoners in Australia generally is already a concern. For example, the Australian Institute of Health and Welfare has noted that they

have higher levels of mental health problems, risky alcohol consumption, tobacco smoking, illicit drug use, chronic disease and communicable diseases than the general population... [they] have significant and complex health needs, which are often long-term or chronic in nature.<sup>45</sup>

The current policies on transgender prisoners' access to medical intervention are discussed in more detail below. However, our analysis demonstrates that, generally, medical intervention commenced prior to incarceration can be continued. However, commencement whilst incarcerated is not necessarily permitted. In early 2016, Dr Wendell Rosevear, a medical practitioner and LGBTI advocate in Queensland called for hormone treatment to be more readily available in prison. In particular, he suggested that gender dysphoria was often a root cause of substance abuse and addiction, which is in turn associated with violence and other crime. Accordingly, he argued that '[i]f we don't treat people with gender dysphoria, it's actually dangerous for society because they can turn to violence and abuse'.<sup>46</sup>

In spite of this, access to medical intervention remains a discretionary decision dependent on an evaluation by prison authorities.<sup>47</sup> Inmates therefore find themselves relying heavily on medical evidence or testimony from their treating physician. Unfortunately, practical limitations arise, such as being physically confined or inadequate medical support because socioeconomic status did not allow for access to a private physician prior to

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<sup>45</sup> AIHW, above n 7, 2. See also Victorian Ombudsman, *Investigation into Prisoner Access to Health Care* (2011).

<sup>46</sup> Atfield, above n 11.

<sup>47</sup> Roger, Asquith and Dwyer, above n 2, 13.

incarceration.<sup>48</sup> This consequently runs the risk that even if an inmate is provided with hormones, ‘there is no guarantee that they will be provided at the appropriate levels and with necessary physical and psychological support services’.<sup>49</sup>

### C *Choice of Institution*

It is clear that the issue of choosing the appropriate institution for a transgender prisoner is of critical importance in managing their safety and those of the prisoners around them. However, this is very difficult in circumstances where a person is transgender and their physical characteristics do not align with their gender identity. Blight identified two basic approaches used by prison authorities in classifying a transgender person. The first is based on anti-discrimination legislation, while the second is based on birth certificate legislation and whether any surgery has been undertaken.<sup>50</sup> Blight noted that neither approach gives a satisfactory result in a correctional context.<sup>51</sup> Undoubtedly, this is not an easy decision to make and therefore requires careful consideration and regulation. Unfortunately, where the law fails to adequately dictate how such instances should be handled, the consequences of incorrectly housing a transgender person can be grave.

## III AUSTRALIAN CASES INVOLVING TRANSGENDER PEOPLE AND THE CRIMINAL JUSTICE SYSTEM

This section examines key Australian cases in the context of the harm experienced by transgender prisoners, the issue of discrimination, the extent to which transgender status is taken into

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<sup>48</sup> Edney, above n 27, 334-335.

<sup>49</sup> Ibid 334.

<sup>50</sup> Blight, above n 1, 3-4. See also *AB v Western Australia* [2011] HCA 42, discussed below.

<sup>51</sup> Blight, above n 1, 3-4.

account in sentencing, and finally the specific circumstances of Indigenous ‘brotherboys’ and ‘sistergirls’.

Across Australia, there have been a number of instances in recent years where male prisoners have transitioned whilst in prison.<sup>52</sup> From a legal perspective, however, the concept of gender identity is still a relatively new topic. The first judicial decision regarding the sexual identity of ‘transsexuals’ in Australia was the 1989 case of *R v Harris and McGuinness*.<sup>53</sup> The decision concerned Harris, a post-operative male-to-female person, and McGuinness, a pre-operative male-to-female person, being charged with an offence relating to acts of indecency with another male person. The issue arose with the phrasing of the offence referring to ‘whosoever being a male person’.<sup>54</sup> The NSW Court of Criminal Appeal rejected the biological formula for gender, that is, sex is determined at birth, and favoured the approach used in the American decisions of *Re Anonymous*<sup>55</sup> and *MT v JT*,<sup>56</sup> which found that sex is ultimately determined by psychological and anatomical harmony. Ultimately, the Court found that ‘a male to female transsexual who has undergone full sex reassignment to align her genital features with her psychological sex is to be regarded as female for the purposes of the criminal law’.<sup>57</sup> As a result, Harris fell outside the ambit of the legislation, but McGuinness was convicted. It should be noted that, more recently, the High Court accepted that ‘the physical characteristics by which a person is identified as male or female are confined to external physical characteristics’.<sup>58</sup> In other words, a

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<sup>52</sup> Candice Sutton, ‘Male Criminals Who Become Women Behind Bars’, *Perth Now* (online), 11 April 2013 <<http://www.perthnow.com.au/news/weird/call-me-michelle-the-killers-who-become-women-behind-bars/story-fngo0pay-1226615750377>>; ABC, ‘Transgender and Prison’, *Law Report* (online), 29 March 2016 <<http://www.abc.net.au/radionational/programs/lawreport/transgender-and-the-prison-system/7263996>>.

<sup>53</sup> *R v Harris and McGuinness* [1989] 17 NSWLR 158.

<sup>54</sup> *Crimes Act 1900* (NSW) s 81A, as repealed by *Crimes (Amendment) Act 1984* (NSW).

<sup>55</sup> *Re Anonymous* 293 NYS 2d 834 (1968).

<sup>56</sup> *MT v JT* 355 A 2d 204 (1976).

<sup>57</sup> See Andrew Sharpe, ‘The Precarious Position of the Transsexual Rape Victim’ (1994) 6(2) *Current Issues in Criminal Justice* 303, 304.

<sup>58</sup> *AB and AH v Western Australia* [2011] HCA 42 [21].

transgender person can now legally be recognised as a male, despite having female sex organs. Against the foregoing legal background, the following section provides more detail about the issues that pertain to transgender people more specifically in the prison context.

### A *Harm*

In 2009, a review of Queensland's correctional policy outlined a case relating to a transgender prisoner and the ensuing interrelated issues of sexual assault and self-harm:

a transgender male prisoner held in a Queensland men's prison (the prisoner had undergone some sexual reassignment surgery but still had a vagina) pleaded with authorities, unsuccessfully, to transfer him to a female prison for his own safety. The prisoner reported being threatened with sexual assault by other prisoners, and ended up attempting suicide as a result of his predicament.<sup>59</sup>

The case of Veronica Baxter provides another stark illustration of the issues faced by transgender inmates. Veronica was arrested in 2009 for selling drugs and sent to Silverwater Correctional Centre in Sydney, NSW. Despite identifying as female, Veronica was housed with the male population and was not given the hormone medication which she had been prescribed. Not even a week later, Veronica was found dead in her cell, having committed suicide.<sup>60</sup>

Pursuant to s 75 of the *Coroners Act 2009* (NSW), the Deputy Coroner in Veronica's inquest, Paul MacMahon, initiated a gag order which prevented the inquest from being made public.<sup>61</sup> Articles that

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<sup>59</sup> Jenny Samiec, 'Transgender Prisoners: A Critical Analysis of Queensland Corrective Services' New Procedure' (2009) 2 *Queensland Law Student Review* 33, 39.

<sup>60</sup> Alicia Wood, 'Why Did Our Sister Die in a Men's Jail?', *The Sydney Morning Herald* (online), 10 April 2011 < <http://www.smh.com.au/nsw/why-did-our-sister-die-in-a-mens-jail-20110409-1d8fe.html>>.

<sup>61</sup> See Rachel Evans, 'Activists Call For New Veronica Baxter Inquiry', *Green Left Weekly* (online), 8 April 2011 < <https://www.greenleft.org.au/content/activists-call-new-veronica-baxter-inquiry>>.

had already been published were removed from all media outlets. Despite this, and based on what had already been viewed by the public, the inquiry did not examine if Veronica had been given access to her hormone treatment whilst in custody. Activist and androgynous person Norrie commented that the Deputy Coroner had ‘declared that corrective services followed the NSW transgender imprisonment policy to the letter. But we had no evidence to confirm she had been given her hormones. If trans people are not given their hormones, they can become suicidal’.<sup>62</sup>

Another tragic case was that of Catherine Moore, who was on remand in a NSW prison in 1997.<sup>63</sup> She had been placed in the protection unit but was nevertheless raped by a male prisoner. Soon afterwards, she also committed suicide. In the coronial inquiry that followed, the Coroner determined that her suicide was as a result of both the sexual assault and her being provided with drugs by another prisoner.<sup>64</sup> The Coroner recommended the introduction of policies to ensure transgender prisoners were ‘house[d]... in institutions appropriate to their gender identification’.<sup>65</sup>

Another incident in Queensland involved a transgender woman known only by her pseudonym, Mary. Mary was convicted for the theft of a motor vehicle and spent four years in the now decommissioned Boggo Road Prison in Brisbane.<sup>66</sup> Whilst incarcerated, Mary reported having been raped approximately 2000 times by male inmates. In 2016, Mary revealed her tragic story,

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<sup>62</sup> Ibid. As noted above, the reported rates of suicide attempts among transgender youth are very high: see Straus et al, above n 40.

<sup>63</sup> See Catherine Renshaw, ‘The Death of Catherine Moore: The Predicament of Transgender Prisoners’ (1999) 3 *Australian Lawyers for Human Rights* 1. See also Edney, above n 27.

<sup>64</sup> Renshaw, above n 63, 2.

<sup>65</sup> Inquiry into the Death of Catherine Moore (Coroner J Abernethy, 21 July 1999, NSW State Coroner’s Court W308 201/99 JI-D1).

<sup>66</sup> Olivia Lambert, ‘A Transgender Woman Talks About Life In A Male Prison’, *News.com.au* (online), 18 April 2016 <<http://www.news.com.au/national/queensland/a-transgender-woman-talks-about-life-in-a-male-prison/news-story/ae7ecb63dbc4da82cc56b4f1a97267f3>>.

describing it as ‘hell on earth’.<sup>67</sup> Mary was also denied any hormone treatment and began to exhibit physical signs that her body was beginning to revert back to her biological gender; that is, for the first time she had begun to display physical characteristics experienced by males, such as the growth of facial hair.<sup>68</sup>

The case of convicted murderer Maddison Hall illustrates the difficulties that can arise for authorities when transgender prisoners identify as one gender but possess the genitalia of the other. In particular, in some instances where transgender women are held in female institutions, there may be significant safety concerns for the general population with whom they are housed. Upon incarceration in a male prison in NSW, Maddison began dressing as a woman and claimed to be a woman trapped in a male body.<sup>69</sup> She was eventually moved to Mulawa women’s prison. During this time, Maddison also lodged a complaint, alleging that the NSW Department of Corrective Services had discriminated against her on the grounds of her transgender status after a correctional officer referred to Maddison as ‘he’ and ‘him’, stated that Maddison was not female, and made derogatory comments about her.<sup>70</sup> The presiding member determined that certain allegations made by Maddison against NSW Corrective Services were capable of being converted into evidence which, if accepted, could support a finding of ‘less favourable treatment’.

Leave was granted so that Maddison could proceed with her complaint of unlawful discrimination.<sup>71</sup> Shortly after being placed in Mulawa, Maddison was charged with raping her cellmate,<sup>72</sup> but the

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Sutton, above n 52.

<sup>70</sup> *Hall v State of NSW (Department of Corrective Services)* [2006] NSWADT 243 [16], [19].

<sup>71</sup> Ibid.

<sup>72</sup> Jeremy Story Carter and Damien Carrick, “‘Absolutely Terrifying’: Transgender People and the Prison System”, *ABC Online*, 4 April 2016 <<http://www.abc.net.au/radionational/programs/lawreport/transgender-people-and-the-prison-system/7284154>>.

matter did not ultimately proceed.<sup>73</sup> There were also a number of other reports from inmates claiming that Hall had sexually assaulted them, including an incident where a prisoner allegedly fell pregnant to Hall.<sup>74</sup> After approximately three months after being housed with female inmates, Hall was returned to the male prison population and subsequently released in 2010.<sup>75</sup> It should be noted that the decision to release Hall on parole was challenged by the NSW Attorney-General. In rejecting this application, McClellan CJ at CL observed that Hall had ‘told the court of her progress towards gender reassignment, including her understanding that she may have a full reassignment, including surgery, within nine months’.<sup>76</sup> His Honour referred to a report from the Department of Corrective Services which considered Hall’s gender issues and observed that ‘[a]s far as I know the management of her gender disorder has been satisfactory and professional support is available for future treatment’.<sup>77</sup>

It is somewhat reassuring that McClellan CJ at CL regarded the treatment of Hall’s gender issues within NSW prisons as satisfactory, but the challenges for correctional agencies remain generally intractable. These were recently highlighted by a senior case manager and NSW prison outreach worker for the Gender Centre, Liz Ceissman, who commented that when authorities place a transgender inmate in a facility, it is very much a balancing act of who is exposed to the greater risk of harm. As she observed, ‘[i]f I put them in a female jail or a male jail, what risk is it to them? What risk are they to other inmates?’. However, Ms Ceissman noted that the incident involving Hall appears to have resulted in an increased and more serious consideration of the risks potentially posed to the

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<sup>73</sup> *Regina v Hall* [2001] NSWSC 1125 [12] (McClellan J).

<sup>74</sup> AAP, ‘Did Hall Get Fellow Prisoner Pregnant?’, *Sydney Morning Herald* (online), 21 September 2006 <<http://www.smh.com.au/news/national/did-hall-get-fellow-prisoner-pregnant/2006/09/21/1158431837244.html>>.

<sup>75</sup> Janet Fife-Yeomans, ‘Sex Change Killer Maddison Hall To Be Free As A Bird’, *The Daily Telegraph* (online), 3 April 2010 <<http://www.dailytelegraph.com.au/news/nsw/sex-change-killer-to-be-free-as-a-bird/story-e6freuzi-1225849057946>>.

<sup>76</sup> *Attorney General for New South Wales v New South Wales State Parole Authority and Anor* [2006] NSWSC 865 [4].

<sup>77</sup> *Ibid.*

general prison population.<sup>78</sup>

## B *Discrimination*

The protections for transgender people under Australian anti-discrimination law are set out above. It should be noted, however, that there may be a number of challenges for prisoners seeking access to remedies through these processes. The following are recent cases where issues of discrimination have arisen in circumstances where correctional policies relating to the management of transgender prisoners were alleged to have resulted in the unfavourable treatment of the prisoner.

This was the case in *Lawarik v Chief Executive Officer, Corrections Health Service*.<sup>79</sup> In that case, Lawarik, who had recently transitioned from male to female, appealed against the decision not to allow her access to female hormone therapy while in prison. At the time, the relevant policy provided that such therapy ‘will only be provided to those transsexuals who have been receiving such before admission to prison, ie hormone therapy will *not* be commenced whilst an inmate.’<sup>80</sup> The key issue was whether Ms Lawarik was, at the relevant time, a transsexual (the term then used) within the meaning of the relevant legislation.<sup>81</sup> The Administrative Decisions Tribunal determined that she had not fallen within the relevant classification at the relevant time, and she had therefore not substantiated her complaint of discrimination. Edney criticised this decision, arguing that the Tribunal had trivialised the significance of obtaining appropriate medical treatment. Furthermore, he suggested that ‘there appears a tacit assumption that the choice to undertake such a regime of choice is simply a cosmetic decision, rather than treatment fundamental to psychological well-being and the ability to flourish’.<sup>82</sup> This approach also leaves transgender people subject to

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<sup>78</sup> Story Carter and Carrick, above n 72.

<sup>79</sup> [2003] NSWADT 16.

<sup>80</sup> Ibid [30] (emphasis in the original).

<sup>81</sup> See *Anti-Discrimination Act 1977* (NSW) s 38A, as it then applied.

<sup>82</sup> Edney, above n 27, 335.

the assessment of medical practitioners about who and when they can access hormone treatment.

In 2011, an inmate at the Adelaide Remand Centre, Krista Richards, complained to the Commissioner for Equal Opportunity and the Ombudsman, alleging discrimination as a result of being placed in a male prison.<sup>83</sup> She complained that prison staff refused to let her wear women's clothing, as well as denying her permission to wear make-up for court appearances.<sup>84</sup> Unfortunately for Richards, she was advised that it was unlikely her complaint would be acted upon as she was unable to establish that she had been treated differently to how a comparator, or hypothetical person who was not transgender, would have been treated.<sup>85</sup>

In 2012, transgender prisoner Thalia Sinden also complained she had been discriminated against after Queensland Corrective Services (QCS) refused to allow her to commence female hormone therapy whilst in prison.<sup>86</sup> QCS alleged that its refusal was consistent with its transgender policies and procedures, which did not permit a person to commence hormone therapy for the first time in prison.<sup>87</sup> Between 2001 and 2008, QCS had implemented three policies, all of which were consistent in not authorising the commencement of hormone therapy after incarceration.<sup>88</sup> One of the underlying principles for this policy was the safety concerns that would be created for

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<sup>83</sup> Nigel Hunt, 'Sex-Change Inmate Leslie "Krista" Richard Pleads "Let Me Wear Women's Clothes"', *The Australian* (online), 16 October 2011 < <http://www.theaustralian.com.au/archive/news/sex-change-inmate-leslie-krista-richard-pleads-let-me-wear-womens-clothes/story-e6frg6p6-1226167676553>>.

<sup>84</sup> Sean Fewster, 'Transgender Inmate Krista Richards Wants to Wear Dress In Custody', *The Advertiser* (online), 19 August 2015 < <http://www.adelaidenow.com.au/news/south-australia/transgender-inmate-krista-richards-wants-to-wear-dress-in-custody/news-story/439591ec2c45b3efc7fd5468e1e825ca>>.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Sinden v State of Queensland* [2012] QCAT 284 [4]. For discussion of this decision, see Jeremy Kane, 'Sistergirl Inside: Doubly Colonised, Doubly Trapped' (2013) 1 *Griffith Journal of Law and Human Dignity* 63.

<sup>87</sup> *Sinden v State of Queensland* [2012] QCAT 284 [5].

<sup>88</sup> *Ibid* [23]-[27].

offenders who adopted a female identity in a male prison.<sup>89</sup> At the time, the Deputy Commissioner of Custodial Operations, Marlene Morrison, stated that, ‘the correctional environment is not an appropriate environment for an individual to embark on a life changing decision such as commence transgender hormone treatment’.<sup>90</sup> Ultimately, this case was dismissed, with the Queensland Civil and Administrative Tribunal finding that Sinden had not been discriminated against.<sup>91</sup> This case illustrates the challenges faced by authorities in balancing the interests of a transgender prisoner in achieving psychological and anatomical harmony with the safety concerns created through medical intervention, namely an increased risk of physical and/or psychological harm to that person.

For completeness, it should be noted that Thalia was convicted of further offences in 2014.<sup>92</sup> In August 2016, it was reported in the media that correctional staff were deciding whether to move Thalia from a male facility to a women’s facility, in what was described as a ‘historic move being debated by Queensland Corrective Services management’.<sup>93</sup> The outcome of this decision has not been reported.

### C *Bail and Sentencing*

There appear to be very few cases where courts have taken a person’s transgender status into account in the context of bail determinations (that is, whether to remand someone in custody) and sentencing. In one recent case, however, Judge Sleight of the Western Australian District Court granted bail to Sienna Fox,

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<sup>89</sup> Ibid [30].

<sup>90</sup> Ibid [33].

<sup>91</sup> Ibid [79]-[81].

<sup>92</sup> *R v Sinden* [2015] QCA 280 [1] (Holmes CJ, McMurdo JA and Lyons J agreeing).

<sup>93</sup> Kieran Rooney, ‘Debate Raging Among Queensland Corrective Services Over Transfer of Transgender Worker’, *Townsville Bulletin*, 27 August 2016 <<http://www.townsvillebulletin.com.au/news/debate-raging-among-queensland-corrective-services-over-transfer-of-transgender-worker/news-story/864659f301fa19dd1f759b8e9f0c097e>>.

formerly known as Clayton Palmer. His Honour noted that ‘Ms Palmer’s transgender presentation is genuine’.<sup>94</sup> Sienna, who was being held in a male prison, had previously made two unsuccessful attempts to obtain bail, even though her lawyer had provided the court with ‘a report from an expert on transgender issues, which he said had found the male prison was “potentially a very harmful place” for his “vulnerable” client’.<sup>95</sup>

In the appeal decision of *Clark v R*,<sup>96</sup> one of the grounds on which the applicant sought leave to appeal against her sentence was that, as a result of her transgender status, she was put on a non-association order for her protection whilst incarcerated. She argued that this caused an increase in her isolation and reduced her access to prison support facilities.<sup>97</sup> She used her transgender status to argue that her sentence should be reduced, based on these exceptional circumstances.<sup>98</sup> She supported this view by adducing evidence in the form an affidavit on the issues faced by transgender people in the correctional system,<sup>99</sup> as well as other documentary evidence which concerned the management of transgender prisoners in a custodial setting.<sup>100</sup> Justice Johnson (with whom Garling JA and Basten J agreed) noted that the issue of the applicant’s transgender status only arose after she was sentenced. Although a court can consider post-sentence events in exceptional circumstances, the Court did not accept that the applicant’s transgender status classification was a relevant exceptional circumstance<sup>101</sup> and accordingly refused leave to appeal against her conviction and sentence.

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<sup>94</sup> ‘Transgender Prostitute to Leave Male Jail on Bail’, *WA Today*, 5 December 2016 <<http://www.watoday.com.au/wa-news/transgender-prostitute-to-leave-male-jail-on-bail-20161205-gt4kfu.html>>.

<sup>95</sup> Joanna Menagh, ‘Sex Worker Charged With Infecting Client With HIV Refused Bail’, *ABC News*, 21 April 2016 <<http://www.abc.net.au/news/2016-04-21/transgender-hiv-court-case/7346196>>.

<sup>96</sup> [2012] NSWCCA 158.

<sup>97</sup> *Ibid* [11].

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* [15].

<sup>100</sup> *Ibid* [48].

<sup>101</sup> *Ibid* [49].

The recent case of *DPP v Lester*,<sup>102</sup> by contrast, provides an example of a court taking transgender status into account in sentencing. That case involved Lee Lester being sentenced for bushfire offences. In her judgment, Judge Gaynor of the Victorian County Court observed:

A great difficulty for you has been that ...it has been your belief that from a very early age that although you were born a girl, you are in fact a boy. In other words, you have had transgender difficulties since a very early age and that, *in and of itself, would be enough to wreak havoc in someone's life*. ... in addition to having to deal with transgender issues at a time when the community is only just becoming truly accepting and understanding of the problems that attend on people who feel that they have been born into the wrong body, you have, as I have said, had a very difficult childhood.<sup>103</sup>

Her Honour also acknowledged that ‘as a transgender person, it is very difficult for you, I accept, to be housed in an all-female facility’.<sup>104</sup> It is noteworthy that her Honour addressed the offender as ‘Mr Lester’ and ‘sir’ throughout her judgment. Her Honour ultimately ordered the offender to the time in custody already served and imposed a community corrections order. It is of course impossible to know if a different outcome would have ensued but for Lester’s transgender status.

#### D ‘Brotherboys’ and ‘Sistergirls’

It was recently confirmed that, to the extent that it can be determined, based on available data, Indigenous Australians are the most incarcerated people on Earth.<sup>105</sup> According to data released by the Australian Bureau of Statistics,<sup>106</sup> the imprisonment rates for

<sup>102</sup> *DPP v Lester* [2016] VCC 1445.

<sup>103</sup> *Ibid* [36] (emphasis added).

<sup>104</sup> *Ibid* [50].

<sup>105</sup> Thalia Anthony, ‘FactCheck Q&A: Are Indigenous Australians the Most Incarcerated People on Earth?’, *The Conversation*, 6 June 2017 <<https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>>.

<sup>106</sup> ABS, above n 12. For discussion of Indigenous deaths in custody, see Mathew Lynham and Andy Chan, ‘Deaths in Custody in Australia to 30 June 2011:

Aboriginal and Torres Strait Islander people in March 2017 were 2,469 per 100,000, compared with an overall imprisonment rate of 218 per 100,000. The figures for Aboriginal and Torres Strait Islander men and women were 4,477 and 502 respectively, compared with overall rates for men and women of 406 and 36 respectively. Sinden, Baxter and Moore, were, in addition to being transgender, also Indigenous. Kane observed that, ‘both trans people and Australia’s First Peoples are incarcerated at rates higher than the general population [and] requires that the unique needs of those inmates positioned at the intersection of these oppressions...receive greater attention’.<sup>107</sup>

The phrases ‘sistergirl’ and ‘brotherboy’ have been adopted to express the cultural identity of Aboriginal and Torres Strait Islander people who are gendered in non-normative ways, as the western definitions of transgender and sexuality are not reflected in Indigenous culture.<sup>108</sup> This identity is vital for trans Indigenous people, as they can often be excluded from traditional customs which can contribute to a loss of identity and culture.<sup>109</sup> Coupled with instances of stigma, violence and discrimination, sistergirls and brotherboys often face additional hardships not experienced by non-Indigenous trans prisoners.

Aboriginal transgender inmate Lisa O’Brien has expressed her belief that sistergirls are at the highest risk of abuse, alienation and death because they do not satisfy the relevant requirements under prison policies.<sup>110</sup> O’Brien commented that:

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Twenty Years of Monitoring by the National Deaths in Custody Program Since the Royal Commission into Aboriginal Deaths in Custody’ (Monitoring Report No 20, Australian Institute of Criminology, 2013). The data suggest that the rate of Indigenous deaths in custody is no higher than the non-Indigenous population, but is instead reflective of the higher rates of incarceration.

<sup>107</sup> Kane, above n 86, 63.

<sup>108</sup> Ibid 69.

<sup>109</sup> Ibid.

<sup>110</sup> Allan Clarke, ‘Fears for Transgender “Sistergirls” Locked Up In NT Prisons’, *Buzz Feed News*, 8 October 2015 <[https://www.buzzfeed.com/allanclarke/fears-for-transgender-sistergirls-locked-up-in-ntprisons?utm\\_term=.by718QZRn#.qxgbvKp0e](https://www.buzzfeed.com/allanclarke/fears-for-transgender-sistergirls-locked-up-in-ntprisons?utm_term=.by718QZRn#.qxgbvKp0e)>.

Even with a prison policy I don't think there is a lot of protection for transgender people ... In most cases, they wouldn't even come under that prison policy anyway. Prison policy around transgender people has conditions, like you must be on hormone replacement therapy, and it relies on your surgical status. It's up to the discretion of whoever processes you to decide if you meet the conditions. Most sisters/girls don't meet these conditions because they have limited access to health services and options.<sup>111</sup>

Kane supported this argument in his critique of the outcome of Thalia Sinden's discrimination complaint. In particular, he noted that the transgender policy under which Thalia had been refused access to hormone treatment was in itself a form of direct discrimination on the grounds of her gender identity.<sup>112</sup> Clearly, Indigenous trans prisoners are doubly disadvantaged within our criminal justice system, given their gross overrepresentation in Australian prisons. It is vital to ensure that policies and procedures are respectful of both gender and cultural identity. Furthermore, policies need to be developed in collaboration with organisations such as Sisters & Brothers NT, an advocacy group for gender diverse people, including Indigenous people, in the Northern Territory (NT).<sup>113</sup>

#### IV SENTENCING AND CORRECTIONS LEGISLATION

Every person who is sentenced ultimately has their fate decided pursuant to one of the nine sentencing regimes around Australia.<sup>114</sup> If they are incarcerated, whether on remand or sentence, their future is

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<sup>111</sup> Ibid.

<sup>112</sup> Kane, above n 86, 73-74.

<sup>113</sup> See Sisters & Brothers NT, *Mission Statement* <<http://sistersandbrothersnt.com/mission-statement/>>.

<sup>114</sup> *Crimes (Sentence Administration) Act 2005* (ACT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Penalties and Sentences Act 1992* (Qld); *Crimes (Sentencing) Act 1988* (SA); *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT); *Sentencing Act 1991* (Vic); *Sentencing Act 1997* (Tas); *Crimes Act 1914* (Cth) Part 1B.

then governed by one of the eight correctional services regimes.<sup>115</sup> It is therefore necessary to assess the extent in which these regimes acknowledge transgender offenders.

The simple answer to this is that they do not do so to any significant extent. It appears that only one of the 17 relevant legislative frameworks which operate around Australia specifically acknowledges or makes reference to transgender offenders, gender identity, or the like. The *Corrections Management Act 2007* (ACT) regulates the process whereby a person's sexual identity will be determined upon admission to a correctional centre in the Australian Capital Territory (ACT).<sup>116</sup> Specifically, s 79 provides in relevant part:

**Transgender and intersex detainees — sexual identity**

- (1) This section applies to a transgender or intersex detainee.
- (2) For this Act, the sex of the detainee is taken to be —
  - (a) the sex chosen under subsection (3); or
  - (b) if subsection (4) applies—the sex chosen with approval under subsection (4).
- (3) On admission to a correctional centre—
  - (a) the detainee may tell the director-general the sex the detainee chooses to be identified with; or
  - (b) if the detainee fails to make a choice under paragraph (a) — the director-general may choose the sex the detainee is to be identified with having regard to the report obtained under subsection (5).
- (4) The director-general may, on application by the detainee, approve a change in the sex the detainee chooses to be identified with, having regard to the report obtained under subsection (5).
- (5) Before making a decision under subsection (3) or (4), the director-

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<sup>115</sup> *Corrections Management Act 2007* (ACT); *Crimes (Administration of Sentences) Act 1999 No 93* (NSW); *Corrective Services Act 2006* (Qld); *Correctional Services Act 1982* (SA); *Prisons Act 1981* (WA); *Correctional Services Act 2014* (NT); *Corrections Act 1986* (Vic); *Corrections Act 1997* (Tas).

<sup>116</sup> *Corrections Management Act 2007* (ACT) s 79.

general must obtain a report by a doctor appointed under section 22 (Health practitioners — non-therapeutic functions) about the detainee's sexual identity.

- (6) The director-general must —
- (a) give the detainee written notice of a decision by the director-general under subsection (3) or (4); and
  - (b) must ensure that the detainee's sex chosen under this section is entered in the register of detainees.

**Examples of effect of this section**

The conduct of searches of the detainee, and the allocation of accommodation and sanitary facilities for the detainee,<sup>117</sup> would be on the basis that the detainee was a person of the chosen sex.

As mentioned above, the assessment of sexual identity under s 79 is then used to regulate how searches of transgender and intersex detainees are carried out, especially the gender of the corrections officer that will conduct the search of the prisoner.<sup>118</sup> The importance of this determination is that it goes beyond the traditional rules of gender and same-sex prisoner searches, and ultimately acknowledges that a same sex-search may in fact involve a female officer searching an inmate who was born male.<sup>119</sup> In such circumstances, it is the fact that the inmate identified as female upon admission that regulates the same-sex search. For clarity, ss 109 and 114 of the *Corrections Management Act* provide that the sex of a transgender (or intersex) detainee is that entered in the register of detainees (in accordance with s 79(6)(b)) and strip searches must be performed by a person of the same sex. It should be noted that the ACT is one of only two jurisdictions in Australia that is governed by a human rights framework, namely, the *Human Rights Act 2004* (ACT).<sup>120</sup>

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<sup>117</sup> Interestingly, this approach does not accommodate trans men who still menstruate.

<sup>118</sup> *Ibid* s 109.

<sup>119</sup> Note that in the recent case of *NSW Births, Deaths and Marriages v Norrie* [2014] HCA 11, the High Court recognised in this case that a person's sex may be ambiguous or indeterminate, or in other words, that not everyone can be classified as either male or female.

<sup>120</sup> The other jurisdiction is Victoria, which is governed by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

With the exception of the ACT, the legislation across Australia that governs how people are sentenced and where and how a transgender person is incarcerated fails to acknowledge their very existence. As a result, great reliance is ultimately placed on the correctional facilities themselves to implement effective policies to appropriately manage transgender inmates. The following section will discuss each jurisdiction's specific policies on this issue.

## V POLICIES ON TRANSGENDER INMATES IN AUSTRALIAN PRISONS

The discussion on correctional policies that follows should be placed in its national and international context. The treatment of prisoners in Australia is governed by the Standard Guidelines for Corrections in Australia (the Guidelines), although they do not have the force of law.<sup>121</sup> The Guidelines were first published in 1978 and the current edition was revised in 2012.<sup>122</sup> The Guidelines do not make explicit reference to transgender issues, although they do state, *inter alia*, that:

- males and females shall in principle be segregated;<sup>123</sup>
- programme design needs to consider gender, cultural

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<sup>121</sup> For a recent discussion, see Lorana Bartels and Jeremy Boland, 'Human Rights and Prison: A Case Study from the Australian Capital Territory', in Elaine Fishwick, Marinella Marmo and Leanne Weber (eds), *Routledge International Handbook of Criminology and Human Rights* (Routledge, 2016) 556. See generally Bronwyn Naylor, 'Protecting the Human Rights of Prisoners in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 395; Bronwyn Naylor, 'Human Rights and their Application in Prison' (2016) 227 *Prison Service Journal* 17; Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218, 225-232.

<sup>122</sup> Australian Corrective Services Ministers' Conference, *Standard Guidelines for Corrections in Australia* (2012).

<sup>123</sup> *Ibid* 19.

background, physical or mental impairment, health status, age or other special considerations in consultation with relevant community groups and experts;<sup>124</sup> and

- searches, including strip searches, should be conducted by staff members of the same gender, wherever practicable.<sup>125</sup>

The Guidelines were influenced by the *Standard Minimum Rules for the Treatment of Prisoners* (the SMR),<sup>126</sup> which were approved by the United Nations in 1977.<sup>127</sup> The Rules, as they initially existed, stated that there ‘shall be no discrimination on grounds of ...sex’<sup>128</sup> and made reference to the need to segregate prisoners by sex, and therefore ‘[m]en and women shall so far as possible be detained in separate institutions.’<sup>129</sup> The SMR were substantially revised in 2015 and are now known as the *Nelson Mandela Rules*.<sup>130</sup> Significantly, for the purposes of this article, what is now Rule 7(a) provides that ‘[p]recise information enabling determination of his or her unique identity, *respecting his or her self-perceived gender* ... shall be entered in the prisoner file management system upon admission of every prisoner’.<sup>131</sup>

It should also be noted that Article 10(1) of the *International*

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<sup>124</sup> Ibid 12.

<sup>125</sup> Ibid 20. For discussion of the issues associated with strip searches, especially for victims of sexual violence, see eg Jude McCulloch and Amanda George, ‘Naked Power, Strip Searching in Women’s Prisons’ in Phil Scraton and Jude McCulloch (eds), *The Violence of Incarceration* (Routledge, 2009); Lorana Bartels and Patricia Easteal, ‘Women Prisoners’ Sexual Victimization: Ongoing Vulnerabilities and Possible Responses’ (2016) 2 *Journal of Criminological Research, Policy and Practice* 206. Rule 20 of the United Nations *Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules) is also relevant in this context.

<sup>126</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.

<sup>127</sup> See Bartels and Boland, above n 121, for a recent overview.

<sup>128</sup> United Nations, above n 126, Rule 6.

<sup>129</sup> Ibid Rule 8(a).

<sup>130</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (17 December 2015).

<sup>131</sup> Ibid Rule 7(a).

*Covenant on Civil and Political Rights* (ICCPR) provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.<sup>132</sup> The UN Human Rights Committee (UNHRC), which oversees the ICCPR, has stated that Article 10(1):

applies to everyone deprived of their liberty under the laws and authority of the State who is held in *prisons* ... or *correctional institutions*. ... States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.<sup>133</sup>

The UNHRC went on to say that Article 10 imposes a 'positive obligation' on states' parties because people who are deprived of their liberty are particularly vulnerable. However, the ICCPR is only enforceable in the ACT, while violations in Victoria can only be remedied in court where they can be linked to a separate right.<sup>134</sup> In all other circumstances, individuals in Australia have no remedies available in court; although a UN Committee may inquire into individual complaints and make a public recommendation, these recommendations cannot compel any agency to act in a particular way.<sup>135</sup> Indeed, as Naylor has noted, Australia is 'famously backward in its implementation of the usual internationally-accepted human rights'.<sup>136</sup>

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<sup>132</sup> *International Covenant on Civil and Political Rights* (ICCPR) opened for signature 23 March 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 10(1).

<sup>133</sup> UNHRC, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)* (1992) [2].

<sup>134</sup> See *Human Rights Act 2004* (ACT) s 19(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22 discussion in Naylor, above n 121.

<sup>135</sup> See Naylor, above n 121; Naylor, Debeljak and Mackay, above n 121.

<sup>136</sup> Bronwyn Naylor, *Prisons, Overcrowding and Rights* (Castan Centre Symposium, 2014) 5. It should be noted that the Australian Government has now indicated its intention to sign the *Optional Protocol to the Convention Against Torture* (OPCAT); see Alexandra Beech, 'OPCAT: Australia Makes Long-awaited Pledge to Ratify International Torture Treaty', *ABC News* (online), 9 February 2017 <<http://www.abc.net.au/news/2017-02-09/australia-pledges-to-ratify-opcat-torture-treaty/8255782>>. For discussion of the implications of this, see Bronwyn Naylor, *Protecting Human Rights in*

In addition, the standard guidelines for corrections in Australia, which were last revised in 2012, precede the 2015 revisions to the SMR and therefore make no mention of the changes implemented by the Mandela Rules, stating simply that ‘males and females shall in principle be segregated’.<sup>137</sup> It is therefore timely to update the Guidelines to ensure that they reflect internationally accepted best practice.

### A NSW

NSW currently has two policies in place relating to transgender inmates. The first is found in s 7 of New South Wales Corrective Services ‘Operations Procedure Manual’,<sup>138</sup> while the second is found in the ‘Offender Classification and Case Management Policy and Procedures Manual’.<sup>139</sup> The latter of these policies specifically deals with the classification of female inmates. These policies appear to be the most comprehensive in Australia in terms of detail and what they attempt to cover, although it would be beneficial to undertake research with transgender prisoners to determine their views on the appropriateness of the policies in NSW, as well as other jurisdictions. The NSW policies regulate the reception, screening, induction and initial placements of transgender inmates, as well as access to medical care, rehabilitation and integration, searches and urinalysis, clothing, escorts, and identification.

Upon reception at a correctional facility, reception staff must inform the General Manager or Security Manager that a transgender

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Detention: Rights, Monitoring and OPCAT’ (2016) 41 *Alternative Law Journal* 151.

<sup>137</sup> Australian Corrective Services Ministers’ Conference, above n 122, [1.44].

<sup>138</sup> NSW Government, ‘Section 7.23 Management of Transgender and Intersex Inmates’ (Operations Procedures Manual, Corrective Services NSW, December 2015).

<sup>139</sup> Corrective Services NSW, ‘12.2 – Classification of Female Inmates’ (Offender Classification & Case Management Policy and Procedures Manual, March 2015).

or intersex inmate has been received into custody.<sup>140</sup> Once received into a facility, transgender and intersex inmates are to be kept separate from other inmates and provided their own cell, as well as separate access to shower and toilet facilities.<sup>141</sup>

Under the NSW policies, it is a mandatory requirement that transgender inmates are treated as the gender with which they identify.<sup>142</sup> This treatment includes the right to be housed in a facility that aligns with their identified gender, unless it is determined that the person would be more appropriately placed in a facility aligning with their biological sex.<sup>143</sup> Transgender inmates are to be addressed by their chosen name that aligns with their identified gender and are also to be referred to with the gender reference appropriate to their identified gender.<sup>144</sup> In this context, there is anecdotal evidence that some correctional staff may use ‘dead names’, ie a transgender person’s birth name, as a form of punishment.

In addition to these basic comforts that are afforded naturally to non-trans people, transgender inmates in NSW are given consideration as to the gender of the prison officer who conducts strip searches, pat downs and urinalysis,<sup>145</sup> and are also provided with the opportunity to dress in clothing appropriate to their recognised gender.<sup>146</sup>

Interestingly, the NSW prisoner escort policy confirms Blight’s proposition that transgender inmates in a male facility are at higher risk than those in a female facility.<sup>147</sup> The NSW policy demonstrates

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<sup>140</sup> Corrective Services NSW, ‘6.2 – Reception of Inmates at Reception Centre’ (Offender Classification & Case Management Policy and Procedures Manual, August 2015) 5.

<sup>141</sup> *Ibid.*

<sup>142</sup> NSW Government, above n 138, 3.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.* 4.

<sup>145</sup> *Ibid.* 5.

<sup>146</sup> *Ibid.* 6.

<sup>147</sup> Blight, above n 1, 3.

this by allowing transgender inmates in a female facility to be escorted with other female inmates on the condition that there are no safety or security concerns.<sup>148</sup> In a male facility, however, transgender inmates ‘are to be kept separate from all other inmates during escorts to avoid the risk of physical or sexual assault by other inmates in transit’.<sup>149</sup>

In relation to an inmate’s ability to access medical treatment, such as hormone therapy, those inmates who begin treatment prior to their incarceration must have their hormone therapy continued. For those who have not commenced treatment prior to incarceration, a case plan will be developed to accommodate and assess the person’s request.<sup>150</sup> NSW appears to be the only jurisdiction where it is made explicitly clear that hormone therapy and/or gender reassignment surgery may be sought at any time while in custody.<sup>151</sup>

## B *Victoria*

As noted above, Victoria is one of only two jurisdictions in Australia with specific human rights legislation. In addition, s 47 of the *Corrections Act 1986* (Vic) provides a number of prisoners’ rights, including ‘the right to have access to reasonable medical care and treatment necessary for the preservation of health’.<sup>152</sup> Corrections Victoria sets out what are known as ‘Commissioner’s Requirements’ in respect of operational matters that require specific detail to ensure correctional practices are applied consistently. Commissioner’s Requirements must be adopted by all staff who provide correctional services in Victoria.<sup>153</sup> Part 2 of the Commissioner’s Requirements,

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<sup>148</sup> NSW Government, above n 138, 4.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.* 6. See also AHRC, above n 4, 70.

<sup>151</sup> AHRC, above n 4, 70.

<sup>152</sup> *Corrections Act 1986* (Vic) s 47(f). For discussion of the extent of this right, see *Castles v Secretary to the Department of Justice* [2010] VSC 310. For discussion of that case, Naylor, above n 121; Naylor, Debeljak and Mackay, above n 121.

<sup>153</sup> Victoria State Government, *Commissioner’s Requirements – Part 2* (23 May 2016).

which regulates prisoner management, outlines a policy relating to the management of prisoners with intersex conditions or transsexualism.<sup>154</sup> This policy was first issued in June 2008 and was updated in March 2016. The policy's guiding principle stipulates that transgender prisoners 'must be treated with the same respect and dignity accorded to any other prisoner and must not be discriminated against or harassed on the grounds of their medical condition, gender identity or related issues'.<sup>155</sup>

The policy begins by discussing the issues related to gender identity and gender and distinguishing the differences between intersex conditions and transsexualism, acknowledging that, due to the lack of consensus in terminology, corrections officers need to be aware of different terminological distinctions amongst inmates and be 'respectful of individuals' own language'.<sup>156</sup> Next, the different medical issues are explored and the policy acknowledges the extent to which people with transsexualism can be treated, including hormone treatment and surgical intervention, as well as basic aids such as peer support and counselling.<sup>157</sup> Further, in an attempt to ensure that gender issues adopt best practice, the policy describes the protocol for resolving doubt about the genuineness of a person's assertion that they are a particular gender. In these circumstances, an assessment is made by the prison medical officer and possibly, upon written consent, the person's medical practitioner. If this is not possible, a specialist facility may be consulted.<sup>158</sup>

The policy subsequently outlines the correctional management procedures for prisoners, which aim to fulfil the policy's guiding principle and address the issues identified at the beginning of the policy.<sup>159</sup> Specifically, a prisoner will be initially received into a prison which conforms with the gender specified on the prisoner's

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<sup>154</sup> Corrections Victoria Commissioner, 'Management of Prisoners with Intersex Conditions or Transsexualism' (Commissioner's Requirements, March 2016).

<sup>155</sup> Ibid [3.2].

<sup>156</sup> Ibid [5.1]-[5.4].

<sup>157</sup> Ibid [5.5].

<sup>158</sup> Ibid [5.6].

<sup>159</sup> Ibid [6].

warrant. If matters related to ‘transsexualism’ or intersex conditions are raised, the prison medical officer is notified, upon which the prisoner’s placement is reviewed by the Sentence Management Branch (SMB). Until this takes place, the prisoner will ordinarily be kept separate from the general population in a single cell with separate toilet and shower facilities, in order to ensure their safety.<sup>160</sup> The SMB will assess the prisoner and develop a plan to address the issues of safety and placement. Issues relating to medical treatment will be referred to the treating medical officer at the prison.<sup>161</sup>

The placement of transgender prisoners within the prison, whether with another inmate or not, is ultimately decided with a view to ‘ensuring the safety and welfare of the prisoner and other prisoners, as well as the security and good order of the prison’.<sup>162</sup> Transgender prisoners are given the same access to rehabilitation, work and education programs as other prisoners, as well as access to community support agencies.<sup>163</sup> In relation to privacy, prisoners are given access to shower, toilet and laundry facilities, which seek to maximise their safety and dignity. However, the policy does not expressly state that these facilities are separate from the general population.<sup>164</sup> This is concerning, given the potentially serious implications if the facilities are not separate, as the preceding discussion demonstrates.

Prisoners are required to wear standard prison issue clothing, but they have access to underwear appropriate to their gender. Cosmetics are also made available in female prisons.<sup>165</sup> In conforming with a prisoner’s gender identity, they must be referred to by their chosen name and the corresponding pronoun.<sup>166</sup> When in transit, transgender prisoners may be escorted separately from other prisoners, due to

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<sup>160</sup> Ibid [6.2].

<sup>161</sup> Ibid [6.3.3]-[6.3.5]. See also AHRC, above n 4, 70.

<sup>162</sup> Ibid [6.4].

<sup>163</sup> Ibid [6.5], [6.12].

<sup>164</sup> Ibid [6.6].

<sup>165</sup> Ibid [6.7].

<sup>166</sup> Ibid [6.8].

safety concerns.<sup>167</sup> Finally, strip searches and urinalysis are to be conducted by an officer of the gender nominated by the prisoner. The policy also requires that the sensitivities of individual officers be considered when allocating responsibility. This requirement is of great importance, given the vulnerability of transgender people to sexual assault within the correctional system. Accordingly, officers need to ‘be aware that strip searching may therefore reinvolve traumatic previous and current experiences of sexual and physical violence’.<sup>168</sup>

### C *Queensland*

The QCS website includes the following information in its ‘Custodial Operations Practice Directive’:

When a prisoner who identifies as transgender is admitted to a corrective services facility the General Management of the corrective services facility must:

- ensure the prisoner is immediately accommodated in a single cell or separated on a safety order in a way that ensures appropriate management of any risks posed in relation to the prisoners, including risk of harm to the prisoner until an assessment for determining the prisoner’s placement can be made;
- forward the prisoner’s details for purposes of the assessment to the Assistant Director-General or General Manager, Operational Service Delivery.<sup>169</sup>

It has been reported in the media<sup>170</sup> that, in 2015, QCS met with

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<sup>167</sup> Ibid [6.9]–[6.10].

<sup>168</sup> Ibid [6.11].

<sup>169</sup> QCS, *Custodial Operations Practice Directive — Admissions and Induction*, implemented 31 March 2014 <[http://www.correctiveservices.qld.gov.au/Resources/Procedures/Standard\\_Operating\\_Procedures/documents/admission.pdf](http://www.correctiveservices.qld.gov.au/Resources/Procedures/Standard_Operating_Procedures/documents/admission.pdf)>.

<sup>170</sup> Andrew Shaw, ‘Queensland Transgender Advocates Meet with Corrective Services to Review Prison Guidelines’, *Gay News Network* (online), 24 October 2015 <<http://gaynewsnetwork.com.au/checkup/queensland-transgender-advocates-meet-with-corrective-services-to-review-prisoner-guidelines-19356.html>>.

transgender advocates in an attempt to discuss the first update of prison guidelines relating to transgender prisoners since 1993, although it is noted that the information above is contained in a document dating to 2014. At the time, Queensland held nine transgender prisoners and the purpose of the meeting was to review the policies that governed their care. A second meeting was scheduled for 3 February 2016, but we were unable to determine whether this meeting proceeded or, if so, its outcomes. Searches of the QCS website revealed that the management of transgender prisoners is regulated in accordance with operational instructions pursuant to the standard operating procedure for prisoner management.<sup>171</sup> However, these instructions were, unfortunately, not publicly accessible.

Kane found that transgender offenders in Queensland were housed based on their external genitalia and are refused hormone therapy unless documentation can be provided which demonstrates a pre-incarceration diagnosis.<sup>172</sup> The reasoning behind this was reportedly that a policy which relies on self-identification to determine a person's transgender status is vulnerable to abuse and deception by inmates. Authorities must therefore rely on evidence that proves a person's alleged transgender status.<sup>173</sup> However, as previously discussed in Part II, practical difficulties arise specifically for transgender inmates relating to their ability to provide proof of their transgender status.

In its analysis of each jurisdiction's policies (some of which precede the information described in this article), the AHRC found that the following rules applied in Queensland:

A request for hormone treatment or gender reassignment surgery will only be considered if the treatment or surgery commenced prior to

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<sup>171</sup> Queensland Corrective Services, *Custodial Operations Standard Operating Procedure – Prisoner Management* (2012) <[http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender\\_Management/documents/ofmpropriismngmt.shtml#1.1](http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmpropriismngmt.shtml#1.1)>.

<sup>172</sup> Kane, above n 86, 65.

<sup>173</sup> Samiec, above n 59, 39.

incarceration.

The Assistant Director-General and Senior Director have the discretion to refuse.

Blanket refusal of treatment for transgender prisoners who have not commenced treatment prior to incarceration.<sup>174</sup>

The tribunal decision in respect of Sinden discussed above also gives significant insight into the attitude which supports transgender prison policies in Queensland. It was argued that allowing inmates to undergo sex change procedures would cause ‘operational issues within the prison environment’,<sup>175</sup> which would ultimately disrupt the ‘security and good management’<sup>176</sup> of the prison.

In 2009, Samiec concluded that the procedure adopted by QCS in relation to transgender prisoners ‘falls short of providing adequate protection for transgender prisoners in all of the areas the procedure encompasses – placement, treatment and management’.<sup>177</sup> Given that the current policies are not publicly available, we cannot determine whether they have since been amended to improve the care and protection of transgender inmates.

#### D *South Australia*

In 2011, the then Chief Executive Officer of Correctional Services in South Australia (now in charge of Corrective Services NSW), Peter Severin, stated that: ‘the department [did] not have a specific policy covering transgendered prisoners and such prisoners were managed on a case-by-case basis’.<sup>178</sup> This comment came in response to the case of Richards described above.

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<sup>174</sup> AHRC, above n 4, 70 (references omitted).

<sup>175</sup> *Sinden v State of Queensland* [2012] QCAT 284 [31].

<sup>176</sup> *Ibid* [36].

<sup>177</sup> Samiec, above n 59, 44.

<sup>178</sup> Hunt, above n 83.

In 2015, a spokesperson from the Department of Correctional Services made a comment to a South Australian newspaper that a policy relating to transgender and intersex offenders had been operating since 2014.<sup>179</sup> The spokesperson said that the policy takes into consideration individual preferences and psychosocial needs of offenders and includes ‘the perceived risks to the health and safety of the individual, other prisoners and the good order of the prison’.<sup>180</sup> The AHRC also found that prisoners who wish to commence or continue hormonal treatment ‘are referred to SA Health, whose responsibility it is to consider these requests’.<sup>181</sup> However, searches of the South Australian Corrective Services website did not reveal any publicly available policies or procedures relating to the management of transgender prisoners.<sup>182</sup>

## E *Western Australia*

In 2013, the then Minister for Corrective Services in Western Australia, Joe Frances, revealed that there was no specific policy related to the management of transgender prisoners.<sup>183</sup> In 2014, the Western Australian Department of Corrective Services’ *Policy Directive 85 Prisoner Reception — Procedures* stated in relevant part:

### 4.7 Transsexual prisoners

4.7.1 Initial placement will be facilitated in accordance with Section 3.2 [Prison placement].

4.7.2 Where a prisoner received into the prison system claims to be transsexual or where staff identify the prisoner as transsexual, the

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<sup>179</sup> Sean Fewster, ‘Transgender SA Prisoner Krista Richards Says Future Inmates Will Suffer If Tribunal Dismisses Her Equal Opportunities Case’, *The Advertiser* (online), 6 September 2015 <<http://www.adelaidenow.com.au/news/south-australia/transgender-sa-prisoner-krista-richards-says-future-inmates-will-suffer-if-tribunal-dismisses-her-equal-opportunities-case/news-story/5e4eda066857f9368dae55fa47858f06>>.

<sup>180</sup> Ibid.

<sup>181</sup> AHRC, above n 4, 70.

<sup>182</sup> Rodgers, Asquith and Dwyer, above n 2, have likewise stated that South Australia’s policy for transgender prisoners is not publicly available.

<sup>183</sup> Rodgers, Asquith and Dwyer, *ibid*, 12.

prisoner is to be housed in a single cell with separate shower and ablution facilities until a placement decision is made in accordance with Adult Custodial Rule 18 — Assessments and Sentence Management of Prisoners.

These procedures, which are very limited in scope, appeared to be in operation at the time of writing. However, the Western Australian Department of Corrective Services indicated in April 2016 that procedures for the placement, care and management of transgender prisoners were being drafted.<sup>184</sup>

## F *Tasmania*

Under s 6(3) of the *Corrections Act 1997* (Tas), ‘the Director of Corrective Services may make standing orders for the management and security of prisons and for the welfare, protection and discipline of prisoners and detainees’.<sup>185</sup> Director’s Standing Order (DSO) 2.15, which relates to transgender prisoners and detainees, was under review at the time of writing.<sup>186</sup> It should be noted, though, that there are nearly 100 DSOs, covering issues relating to safety and security, prisoner management, programs and industry, prisoner services, corporate administration and miscellaneous issues. Of these, only eight DSOs are available to the public. It is therefore unlikely that the public will have access to DSO 2.15 following its review. As in Victoria, there is a right to medical treatment enshrined in the *Corrections Act 1997* (Tas).<sup>187</sup> According to the AHRC, transgender prisoners who commenced hormone treatment prior to incarceration may have this continued ‘if this is recommended by Correctional Health Services’,<sup>188</sup> but prisoners are not allowed to commence such treatment in custody or undergo gender reassignment surgery.

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<sup>184</sup> Amanda Banks, ‘Transgender Sex Worker “A Risk To Public”’ *The West Australian* (online), 21 April 2016 <<https://au.news.yahoo.com/thewest/wa/a/31408605/transgender-sex-worker-a-risk-to-public/#page1>>.

<sup>185</sup> *Corrections Act 1997* (TAS) s 6(3).

<sup>186</sup> Tasmanian Government, *Policies and Procedures* <[http://www.justice.tas.gov.au/prisonservice/Policies\\_and\\_Procedures](http://www.justice.tas.gov.au/prisonservice/Policies_and_Procedures)>.

<sup>187</sup> *Corrections Act 1997* (Tas) s 29(1)(f).

<sup>188</sup> AHRC, above n 4, 70.

## G *Northern Territory*

Blight stated in 2000 that there was a policy in respect of transgender prisoners operating in the Northern Territory.<sup>189</sup> However, in January 2015, the Executive Director of the Darwin Community Legal Service (DCLS), Caitlin Perry, made submissions to the AHRC, stating that:

legislation governing the NT Department of Correctional Services is silent with respect to management of transgender inmates. Further, there is no policy addressing this issue. The Department has advised DCLS that current practice is to classify transgender inmates according to sex at birth, rather than gender identity, unless medical evidence is provided indicating that this is not appropriate.<sup>190</sup>

Perry concluded by saying that, considering the NT has the highest rate of incarceration in Australia,<sup>191</sup> ‘it is particularly pertinent that the Department of Correctional Services, develop, implement and make publicly available a policy on the treatment of transgender inmates’.<sup>192</sup> At the time of writing, there was no such policy publicly available, in spite of the earlier statements made by Blight to this effect.

## H *ACT*

The ACT developed a policy in relation to transgender prisoners before it had a prison. This policy was made pursuant to ss 14 and 79 of the *Corrections Management Act 2007* (ACT) and ss 169A and 169B of the *Legislation Act 2001* (ACT). The ACT Government

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<sup>189</sup> Blight, above n 1.

<sup>190</sup> Caitlin Perry, Submission No 1 to Australian Human Rights Commission, 12 January 2015, 3.

<sup>191</sup> See ABS, above n 12. In March 2017, the NT imprisonment rate was 935 per 100,000, compared with a national average of 218. The next highest was Western Australia, at 332. When disaggregated by Indigenous status, the Western Australian imprisonment rate for Indigenous people is the highest in Australia.

<sup>192</sup> *Ibid.*

finalised the *Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007* (ACT) in December 2007. This was replaced in 2009 by the *Corrections Management (Reception and Management of Transgender and Intersex Prisoners) Policy 2009* (ACT). Surprisingly, this was a more restrictive policy in some respects. For example, it omitted the following statement which had been in the 2007 policy: ‘Transgender and intersex prisoners in correctional centres will be treated with respect and dignity’.<sup>193</sup> The 2009 policy also removed the provision that such prisoners be ‘given access to a private toilet and shower facilities’.<sup>194</sup>

In May 2014, the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs released an extensive audit report into the conditions of detention of women in the ACT prison.<sup>195</sup> Part of this report focused on the individual needs of gender diverse detainees.<sup>196</sup> Dr Watchirs made the following four recommendations relating to the 2009 policy (which was then in operation):

- that ACT Corrective Services amend the *Corrections Management (Reception and Management of Transgender and Intersex Prisoners) Policy* to further recognise the needs of gender diverse detainees who do not identify as exclusively male or female;
- that ACT Corrective Services amend the *Corrections Management (Reception and Management of Transgender and Intersex Prisoners) Policy* to include a reasonable time frame for making a determination regarding the placement of detainees under the Policy;
- that the ACT Government amend sections 109 and 114 of the *Corrections Management Act 2007* (ACT) to provide that transgender and intersex detainees may elect to be strip searched by either male or female correctional officers, adding that corrective services staff should be consulted before any change is made; and

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<sup>193</sup> *Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007* (ACT) [1.4].

<sup>194</sup> *Ibid* [3.2].

<sup>195</sup> Helen Watchirs et al, *Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre* (ACT Human Rights Commission, April 2014).

<sup>196</sup> *Ibid* 187-194.

- that ACT Corrective Services engage with experts and support groups to consider options for providing advice to management on placement issues, and awareness training for staff and detainees regarding issues faced by sex and gender diverse detainees.<sup>197</sup>

The report also noted that the '[p]olicy provides detailed guidance on the issue of placement of transgender and intersex detainees ... which recognises the complexity of the decision-making process, and the need to consider the safety and human rights of these detainees and others.'<sup>198</sup>

In October 2014, the ACT Government updated its policy again.<sup>199</sup> The underlying principle of this policy, which was in force at the time of writing, is that 'transgender and intersex detainees may be vulnerable in the mainstream detainee population'.<sup>200</sup> Some of the underlying principles that were outlined in the 2007 policy have been removed, as the relevant components have now been incorporated into the *Corrections Management Act 2007* (ACT).<sup>201</sup>

Issues relating to accommodation, prisoner searches and urinalysis, medical provisions, rehabilitation and reintegration are all set out in the 2014 policy. The policy notes that transgender (and intersex) detainees will have their preferred identity documented on reception, and that '[s]elf-identification as a member of a sex other than a person's gender of birth is the only criterion for recognition as transgender'.<sup>202</sup> For clarity, the policy clearly states that medical interventions need not have been performed for a person to be recognised as transgender.

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<sup>197</sup> Ibid 194.

<sup>198</sup> Ibid 190.

<sup>199</sup> *Corrections Management (Reception and Management of Transgender and Intersex Detainees) Policy 2014* (ACT) (ACT 2014 Policy).

<sup>200</sup> Ibid 1.

<sup>201</sup> See *Corrections Management Act 2007* (ACT) ss 7, 9; *Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007* (ACT) [1.1]-[1.5]. See also *Human Rights Act 2004* (ACT) s 19.

<sup>202</sup> ACT 2014 Policy, above n 199, 2 (emphasis added).

Under the 2014 policy, transgender detainees ‘should be accommodated in an area appropriate to their identified gender’,<sup>203</sup> unless there are overriding concerns about safety. Issues to be considered in the placement of transgender detainees include:

- the person’s identified gender;
- the nature of their offence and criminal history;
- their correctional history; and
- risks to the safety of the detainee and others.

The policy indicates that, ‘where practicable’,<sup>204</sup> transgender and intersex detainees will be placed in a single cell or room, or with other detainees who self-identify as transgender or intersex. Searches and urinalysis are to be conducted by a corrections officer of the same gender as the detainee, as recorded in their classification on induction, subject to the factors set out above.

Where detainees wish to continue or commence medical treatment to alter their birth gender, the decision about appropriate treatment will be taken by custodial staff together with ‘the Doctor’. However, the ‘General Manager, Custodial Operations’ has the discretion, following consultation, to recommend that such treatment be ceased/refused if there are ‘doubts... regarding any risk to the security and good management of the [prison]’.<sup>205</sup> Finally, the policy stipulates that transgender and intersex detainees will have access to the same programs as other detainees, as well as access to services specific to their needs.

The changes to the 2014 policy do not appear to have taken the

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<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid 3.

recommendations of the ACT Human Rights Commission into account. Furthermore, ss 109 and 114 of the *Corrections Management Act* have not been amended following the recommendation in the report. The ACT Government should review its policy in light of the Human Rights Commission report to ensure its policy complies with best practice and relevant human rights protections.

## VI CONCLUSION

The experiences of Sophia Bursett in the popular Netflix program *Orange is the New Black* have shone a spotlight on the experiences of transgender prisoners. As set out in the introduction to this article, there are no clear data on the number of transgender people in Australian prisons, but the figure is likely to be somewhere between 40 and 246 people. This may seem to be a relatively small number in a prison population which now exceeds 40,000, but the specific needs of transgender prisoners and the disproportionate disadvantages that such prisoners commonly face, warrant particular attention. To that end, this article has sought to highlight the relevant laws and policies in operation around Australia. It is acknowledged, however, that further research is required. For example, there is no Australian research involving the perspective of transgender prisoners themselves, which is a clear gap that needs to be filled. Research is also required to examine the extent to which prison environments ensure that relevant policies are actually implemented in practice by correctional staff. For example, prison overcrowding may limit the practicability of measures such as ensuring transgender have access to separate shower facilities.<sup>206</sup>

This article has also demonstrated a clear need for legislative reform to better acknowledge transgender people in sentencing. As

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<sup>206</sup> For discussion of the human rights implications of prison overcrowding, see eg, Bartels and Boland, above n 121; Anita Mackay, 'Overcrowding in Australian Prisons: The Human Rights Implications' (2015) 128 *Precedent* 37.

discussed in Part IV, state and territory sentencing and corrections legislation remains predominantly silent on the special needs of transgender people. Sentencing legislation acknowledges the specific circumstances of young offenders<sup>207</sup> and, to a more limited extent, Indigenous offenders.<sup>208</sup> The existence and needs of another special class of offenders should likewise be explicitly acknowledged in sentencing legislation as a result of them having different needs than other offenders. An example of future reform might be to add the concept of gender identity as a relevant consideration when sentencing. This alone has the potential to prevent incidences where a transgender person is incarcerated incorrectly. For example, one of the objects of the ACT sentencing legislation is ‘to maximise the opportunity for imposing sentences that are constructively adapted to individual offenders.’<sup>209</sup> In general, such an object cannot be met where legislative regimes fail to even mention such a specific group of offenders they purport to help.

Judicial officers should receive relevant education and training. Even in the absence of specific legislative guidance, they should exercise their judicial discretion to seek to ensure that their bail and sentencing decisions promote the safety of transgender people and the pursuit of individualised justice, as occurred in the cases of Fox/Palmer and Lester discussed above.

All states and territories should also introduce specific provisions relating to transgender prisoners in their relevant corrections legislation, rather than leaving this issue to be regulated by policy (which may not even be publicly available). The ACT model contained in s 79 of the *Corrections Management Act 2007* (ACT) provide an example for other jurisdictions.

Current management policies relating to transgender inmates were publicly available in NSW, Victoria and the ACT. All three

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<sup>207</sup> See, eg, *Crimes (Sentencing) Act 2005* (ACT) ch 8A.

<sup>208</sup> See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

<sup>209</sup> *Crimes (Sentencing) Act 2005* (ACT) s 6(c).

jurisdictions have demonstrated significant efforts in trying to address the issues faced by transgender people in prison by implementing comprehensive policies, although there has still not been any response to the recommendations of the ACT Human Rights Commissioner. Furthermore, NSW is the only jurisdiction where trans prisoners may commence treatment and/or gender reassignment surgery at any time during their incarceration.

Policies apparently exist in Queensland and South Australia, but were not available and for this reason very little can be said about their content, let alone effectiveness. However, the literature surrounding Queensland's policy is troubling, as prisoners appear to be placed in a facility on a traditional and now outdated assessment of gender, that is, based entirely on the person's genitalia. Additionally, Queensland's negative attitude and discretion for blanket refusal of hormone therapy is particularly concerning, given the physical and psychological consequences of inadequate medical intervention.

Western Australia appears to currently be drafting a new policy for transgender inmates, noting that a rather limited policy has only been in effect since 2014. Tasmania is currently reviewing its policy, although it is anticipated that it will not be made publicly available on completion. The policy therefore cannot be criticised or praised. Finally, the Northern Territory does not appear to have a formal management policy currently in place, and as a result, was subject to recent criticism in 2015. The Northern Territory must be proactive in introducing an effective management policy; otherwise, it risks exposing inmates to harm in all its forms, as well as discrimination and blatant denials of basic human rights. The issues that apply to Indigenous 'sistergirls' and 'brotherboys' are particularly significant in this context. As recently as 2013, South Australia, Western Australia and the Northern Territory did not have any relevant policies, while Queensland had not updated its for 20 years.

The fact that there has been so much activity in the last few years is to be welcomed and demonstrates that the issue is starting to

receive attention among correctional agencies. However, the issues identified by Blight in 2000 are likely to be an ongoing issue in Australia's prison systems today and '[t]here [still] exists an opportunity for all States and Territories to review current policies, or to create policies on the management of transgender inmates'.<sup>210</sup> The issues of choosing the appropriate institution, classification procedures, sexual assault and self-harm, medical intervention and proper recording procedures for transgender inmates in the prison population all still need to be addressed.<sup>211</sup>

In its 2015 report, the AHRC recommended that all states and territories should promptly 'develop and implement policies on the placement of trans and gender diverse prisoners in correctional services and for access to hormone therapy to be based on medically-identified need, not discretion'.<sup>212</sup> The developments in NSW, Victoria and the ACT provide some guidance for jurisdictions seeking to catch up, although it is doubtless a case of too little too late for the people already affected by inadequate correctional policy. There is a need to ensure all current and new policies adopt appropriate terminology and enable hormone therapy to be commenced while in custody. The Guidelines should also be updated to make reference to transgender prisoners, as well as giving effect to the changes introduced by the Nelson Mandela Rules.

Some jurisdictions clearly have more work ahead of them than others, but one thing is clear. There is an undeniable need in Australia for appropriate legislation and policies to manage the unique issues transgender prisoners experience. A failure to do so will see history repeat itself and instances of sexual assault and self-harm, as well as breaches of anti-discrimination legislation and international human rights law, will continue to occur.

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<sup>210</sup> Blight, above n 1, 6.

<sup>211</sup> Ibid.

<sup>212</sup> AHRC, above n 4, 3.

