

LGBTIQ Legal Service's submission

Cultural Review of the Adult Custodial Corrections System

December 2021



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ACKNOWLEDGEMENT OF COUNTRY

St Kilda Legal Service acknowledges that we work on the land of the Boon Wurrung and Wurundjeri people of the Kulin nation. We pay respect to their Elders – past, present, and emerging – and acknowledge the important role Aboriginal people continue to play in our community.

GLOSSARY

Terminology	Definition
Brotherboy	Brotherboy is an Aboriginal English word that is broadly similar in meaning to 'transgender or trans man'. Brotherboys often identify as or live as men, and in some traditional communities gay women can also be included. Not all Aboriginal people who identify as transgender or gay call themselves Brotherboys. Brotherboys are distinct from the wider LGBTI community with their own customs and identities.
Cisgender	This refers to people whose gender identity is in line with the social expectations of their sex assigned at birth. It is a term used to describe people who are not transgender.
Deadnaming	The use of the birth or other former name of a trans or non-binary person without the person's consent.
Gender affirming treatments	Refers to interventions that assist people undergo a gender transition and can include hormone therapy, surgery, facial hair removal, interventions for the modification of speech and communication, and genital tucking or packing, or chest binding.
Homophobia	A term used to describe the irrational fear, hatred, aversion to or discrimination against people who are homosexual, or same-sex attracted, or who are perceived to be homosexual or same-sex attracted.
LGBTIQ+	An acronym for lesbian, gay, bisexual, transgender (trans and gender diverse), intersex, queer, the '+' symbol acknowledges the intersectional forms of discrimination experienced by LGBTIQ people.
Misgendering	Refers to someone, especially a transgender person, using a word, pronoun or form of address, that does not correctly reflect that person's gender identify.
Non-binary	Genders that sit outside of the female and male binary are often called non-binary. This includes people whose gender is not exclusively female or male. A person might identify solely as non-binary, or relate to non-binary as an umbrella term and consider themselves genderfluid, genderqueer, trans masculine, trans feminine, agenda, bigender, or something else.
Sistergirl	Sistergirl is an Aboriginal English word that is broadly similar in meaning to 'transgender or trans woman'. Sistergirls often identify as or live as women and in some traditional communities gay men can also be included. Not all Aboriginal transgender or gay people call themselves sistergirls. Sistergirls are distinct from the wider LGBTI community with their own customs and identities.
Trans and Gender Diverse (TGD)	This is an umbrella term that describe people whose gender is different to what was presumed for them at birth. TGD people may position 'being trans' as a history or experience, rather than an identity, and consider their gender identity as simply being female, male or a non-binary identity. Some trans people connect strongly with their trans experience, whereas others do not. Processes of gender affirmation may or may not be part of a trans or gender diverse person's life.
Trans and Gender diverse (TGD) person's gender	This term refers to how a TGD self identifies and refers to their own gender.
Transition	Describes both a public act and a process. It involves the permanent and public adoption of the style and presentation of the gender different to that of a person's birth-assigned sex. It usually includes a change of name, chosen style of address and pronouns, as well as adopting the dress and style of presentation of a person's innate gender. It may also involve gender reassignment surgery and/or hormone replacement therapy (HRT). Not all who transition undergo medically assisted gender reassignment.
Transphobia	A term used to describe the irrational fear and hatred of people who are trans or gender diverse.

Who We Are

St Kilda Legal Service

St Kilda Legal Service (**SKLS**) has provided free legal services for over 40 years to people experiencing disadvantage in the Cities of Port Phillip, Bayside, Stonnington and parts of Glen Eira. SKLS is committed to redressing inequalities within the legal system through casework, legal education, community development and law reform activities.

SKLS prioritises assisting vulnerable clients with legal matters associated with poverty, drug addiction, mental illness and homelessness. SKLS provides a generalist legal service together with three specialist programs: the Community Partnerships Program, the Family Violence Program and a state-wide LGBTIQ+ Legal Program.

The LGBTIQ Legal Service

The LGBTIQ Legal Service (**LLS**) was established in 2018 as a free targeted legal services for lesbian, gay, bisexual, trans and gender diverse, intersex and queer (**LGBTIQ+**) in Victoria. The LLS is the only Victorian community legal service that provides state-wide targeted LGBTIQ+ legal information, advice, representation, community legal education and systemic reform. The service focuses on legal issues that are affected by sexuality, gender identity or other aspects of LGBTIQ+ identities, and aims to reduce barriers affecting LGBTIQ+ Victorians access the legal system.

The LLS provides targeted legal assistance and referrals for TGD people in Victorian prisons. In 2019 the LLS launched the Roberta Perkins Law Project (**RPLP**) in partnership with Transgender Victoria, to target trans, gender diverse and non-binary (**TGD**) clients. The RPLP had not intended to focus on the needs of TGD people in prison however the program quickly identified this as an area of complex unmet legal needs for TGD in Victoria. While the RPLP has ended the LLS continues to prioritise the legal needs of TGD people and continues to deliver the only targeted legal assistance for TGD people in prison.

Executive summary

We note that the submission does not address all areas outlined in the Cultural Review of the Adult Custodial Corrections System Discussion Paper (the **Discussion Paper**). This submission addresses the following aspects of the review:

1. Legal and Policy Frameworks;
2. The influence of workplace culture on the wellbeing and safety of other people in custody;
and
3. Workforce skills, training, supervision and support.

Part One of the submission focuses on the review of key legal and policy frameworks affecting TGD people in prison. It outlines the need to establish a Prisoners Legal Service to address the complex legal needs of people in prison, as well as funding a specific LGBTIQ+ prisoners legal program to respond to the legal needs of TGD people in prison. In addition, this section highlights the need for further independent research into specific needs and experiences of both TGD and LGBTIQ+ people in prison.

Part One of this submission also explores the legal and policy reforms needed to address the ineffective TGD prison placement guidelines, aiming to urgently enable TGD people in Victorian prisons to be placed in prisons aligned with their gender and in accordance with their placement preferences. It also addresses the practises of separating TGD prisoners, often resulting extended

periods in restrictive solitary confinement and the impacts of ongoing practice of routine strip searches. This section also explores the barriers and impacts of restricting TGD prisoners from effectively being able to legally change their name and acknowledgement of sex on their birth certificates.

Part Two of this submission explores the experiences of discrimination, harassment and transphobia within the prison system. This section explores the increased risk to TGD people's safety and barriers to obtain effective responses to safety concerns. This section also outlines the necessity of accessing appropriate sexual assault, mental health, housing and support services for TGD people, especially for TGD people who are not placed in prisons that are not aligned with their gender.

Part Three explores the barriers to accessing appropriate health care and gender affirming treatments in prison. This section emphasises the importance of providing informed and accessible health care services for TGD people in prison and highlights the necessity of providing Medicare subsidies to all people in prison and expanding the scheme to include gender affirming treatments.

Finally, in Part Four, the submission addresses the need for ongoing and regular workforce training to assist all Corrections staff working with TGD people.

A summary of the submission's recommendations is outlined below.

Recommendations

This submission does not address all aspects of the Discussion Paper. We have focused on some of the key aspects that our TGD clients have identified as having some of the greatest impact on their experiences of incarceration.

RECOMMENDATION 1: We endorse the recommendation for '*Resourcing legal services for people in prison*' outlined in the Human Rights Law Centre's submission and also recommend that the Victorian Government fund an LGBTIQ+ legal program to address the complex legal needs of LGBTIQ+ people who are in prison, and providing referral pathways to LGBTIQ+ post-release supports to reduce the risk of recidivism, prevent incarceration and further criminalisation.

RECOMMENDATION 2: That the Victorian Government fund independent research to explore the complex needs, human rights, health, safety and impacts of transphobia on TGD people in prison, with research centring upon the experiences of TGD people in prison. This research must also focus on the development of effective policies and processes to ensure TGD people are placed in prisons aligned with their gender and the impact of post-release support services to reduce recidivism.

RECOMMENDATION 3: That the Victorian Government fund independent research to explore the complex needs, safety issues, human rights, health and post-release support services available to LGBTIQ+ people in prison, with research centring upon the experiences of LGBTIQ+ people in prison.

RECOMMENDATION 4: That the Victorian Government urgently review the placement of all TGD people in Victorian adult prisons and prioritise the safe transfer of TGD people wishing to be transferred to prisons aligned with their gender.

RECOMMENDATION 5: That the Victorian Government urgently review the current placement policies for TGD people in prison, exploring effective TGD prison placement regimes in other jurisdiction that prioritise the placement of TGD people into their preferred prison.

RECOMMENDATION 6: That the Victorian Government ensure that all applications to be transferred to a prison aligned with a TGD person's gender be processed within a three month timeframe and provide written reasons that explain the assessment process for all decisions.

RECOMMENDATION 7: We endorse the recommendation to strictly prohibit solitary confinement in prison outlined in the Human Rights Law Centre submission and also recommend that the Victorian Government urgently review the placement of all TGD people in separation units and the equivalent of solitary confinement units, including the SWAN 2 Unit in DFPC, and placing TGD people with their consent, into less restrictive and safe living conditions that allow TGD people to participate in prison life.

RECOMMENDATION 8: We endorse the recommendation to end routine strip searches in the Human Law Centre's submission and also recommend that the Victorian Government require that any Corrections officers undertaking strip searches, as an absolute last resort, must be of the gender that the TGD person has requested. All Corrections officer conducting any strip searches on TGD people in prison must have completed annual training on the practical modalities and trauma informed approaches to conducting strip searches of TGD people.

RECOMMENDATION 9: That the Victorian Government repeal ss 47I, 47P, 47F and 47N of the *Corrections Act 1987* (Vic) and all corresponding restrictions for 'restricted persons' as defined under s4 of the BDMR Act, to enable all TGD people in prison, or who are classified as 'restricted persons', to apply to change name and acknowledge of sex on birth certificates through the same requirements outlined for TGD people in the general community. The Department of Justice and Community Safety (DJCS) should review information sharing requirements under the BDMR Act to enable notification of these changes if there is a reasonable concern that these changes could be used to further unlawful activity or purpose.

RECOMMENDATION 10: That Corrections Victoria should implement specific training, reporting and disciplinary procedures to address the culture of transphobic practises, including but not limited to the deadnaming and misgendering TGD people. All training, reporting mechanisms and disciplinary procedures should:

- be developed in consultation with TGD people who are or have been in prison;
- aim to improve the safety and reduce the experiences of deadnaming, misgendering and transphobic or homophobic harassment by Corrections staff; and
- be independently evaluated and reviewed, in consultation with TGD people, who are or have been in prison, on a regular basis.

RECOMMENDATION 11: That Corrections Victoria review and update IT systems and processes, to limit access to TGD person's deadname and previous gender and develop relevant policies that stipulate that access to the deadnames of TGD people is to be strictly limited to need-to-know basis, regardless of whether a TGD person has been able to legally change to their name or acknowledgement of sex on their birth records. This review must be undertaken in consultation with TGD people in prison.

RECOMMENDATION 12: That the Victorian Government establish an independent review of all safety policies, procedures and disciplinary measures to improve the safety, risk assessments and responses to reports regarding safety incidents and risks for LGBTIQ+ people in prison. This should be undertaken in consultation with LGBTIQ+ people in prison. A regular and ongoing, independent review, evaluation and annual training on safety related policies and procedures should be undertaken and include consultation with LGBTIQ+ people in prison.

RECOMMENDATION 13: That Corrections Victoria establish independent LGBTIQ+ Cultural Safety Liaison Officers for each prison to oversee the implementation of policies, procedures and staff training to improve the safety and cultural competency of Correctional facilities. This position must involve an ongoing independent consultative role with LGBTIQ+ people in prison, establishing a safe and confidential mechanisms for LGBTIQ+ people to identify and address ongoing safety, harassment and discrimination issues by both Corrections staff and other people in prison, and identify areas for Corrections staff to increase their cultural competency when working with LGBTIQ people.

RECOMMENDATION 14: That Corrections Victoria ensure all people in Victorian prisons, including TGD people in men's prisons, have access to specialist sexual assault counselling services, including where appropriate Centre Against Sexual Assault (CASA) counselling services.

RECOMMENDATION 15: That Corrections Victoria train all forensic counselling, psychiatric nurses and psychiatric Corrections staff in TGD mental health to ensure TGD people can access appropriate mental health care in Victorian prisons, and remove any barriers to allow TGD people access to community based mental health professionals and counsellors to enable the continuity of mental health care for TGD people in prisons.

RECOMMENDATION 16: That the Victorian Government fund ongoing, independent and community lead, TGD prison support and post-release programs accessible through all Victorian prisons.

RECOMMENDATION 17: That Corrections Victoria ensure people have access to LGBTIQ+ specific support and counselling services, including free, unlimited access to independent LGBTIQ+ specialist phone counselling, crisis support and other confidential support services within all Victorian prison facilities.

RECOMMENDATION 18: That Corrections Victoria expand the delivery of women's support services that are contracted to Victorian women's prisons, including women's housing, to provide the same level of assistance received by trans women that are placed in men's prisons in Victoria.

RECOMMENDATION 19: That Corrections Victoria ensure all Victorian prisons should have general practitioners that are trained in TGD healthcare and are able to prescribe initial and ongoing hormone therapy in line with the WPATH standards of care. This would increase the choice of healthcare services available to TGD people and reduce waiting time for access to hormone therapies.

RECOMMENDATION 20: That Corrections Victoria ensure that the Justice Health's policy for the health care of prisoners who are trans, gender diverse and intersex, clearly defines reasonable timeframes for referrals to gender affirming healthcare services, renewed prescriptions for gender affirming medication and access to gender affirming treatment plans, to reduce the detriment caused by excessive delays to both services and medication.

RECOMMENDATION 21: That the Justice Health's policy for the health care of prisoners who are trans, gender diverse and intersex, in line with the WPATH standards of care, recognises the necessity, and enables access to gender affirming treatments, as part of the essential medical needs and a crucial aspect of TGD physical and mental health care.

RECOMMENDATION 22: That Corrections Victoria make immediate and direct contact with existing community-based general practitioners, accessing copies of treatment plans for gender affirming medications and requiring Corrections Victoria to continue the provision of the same medications and prescribed dosage that TGD people were receiving in the community.

RECOMMENDATION 23: We endorse the four *Equivalency of Health Care* recommendations outlined in the Human Rights Law Centre submission, and also recommend that the Victorian Government should call on the Federal government to expand the Medicare Pharmaceutical Benefits Scheme to cover gender affirming treatments and care, including surgeries that should be recognise such care as medically necessary.

RECOMMENDATION 24: That all staff in Correctional facilities undertake annual and ongoing LGBTIQ+ inclusion training to increase cultural competency, empathy and understanding of LGBTIQ+ people and reduce experiences of homophobia and transphobia within Victorian prisons. All training should be developed in consultation with LGBTIQ+ people who have experienced incarceration and reviewed and evaluated annually.

RECOMMENDATION 25: That Corrections Victoria ensure all Corrections staff complete additional annual training to increase the understanding of TGD Sistergirls and Brotherboys experiences, and the policies and practical techniques relevant to the management, classification and placement of TGD people in prison. All training should be developed in consultation with TGD people who have experienced incarceration and reviewed and evaluated annually.

Introduction

St Kilda Legal Service (SKLS) welcomes the Victorian Government's (the Government) Cultural Review of Adult Correction Centres and appreciate the opportunity to make this submission.

Since 2019 the LGBTIQ Legal Service (LLS) has provided targeted legal assistance, through case work and advice, to approximately 15 TGD people in adult prisons across Victoria. The experience of our clients' has provided the LLS with unique insight into the cultural and legal issues that currently affect TGD people in Victorian prison. This work has largely been assisted by the expertise of the Beyond Bricks and Bars project, now a part of Flat Out Inc. This project provides case management and support to TGD who are or have experienced incarceration and is currently supporting 25 TGD people in Victoria.

There is limited research or data on the prevalence or experience of TGD people in Australian prisons. Some experts suggest that there may be up to 400 TGD in prisons across Australia.¹ However, despite the lack of research, it is widely recognised that TGD people are more vulnerable and are a higher risk of physical and sexual violence and harassment in prison environments.² The Australian Human Rights Commission (AHRC) recognised that:

"[t]he capacity for correctional services to meet the needs of LGBTI people is an evolving area of public policy, particularly related to providing safe environments for transgender people."³

¹ Bartels, L. and Lynch S., 'Transgender Prisoners in Australia: An examination of the issues, law and policy' (2017) 17 *Flinders Law Journal* 185, 228.

² See Association for the prevention of torture, *Towards the effective protection of LGBTI people deprived of their liberty: a monitoring guide* (December 2018) France.; Lambie, S., *Rethinking gendered prison policies: Impacts on transgender prisoners*, ECAN Bulletin, Issue 16, August 2012; Asquith, N., Dwyer, A., and Rodgers, J., 'Cisnormativity, criminalisation, vulnerability: Transgender people in prisons', (Feb 2017) TILES Briefing Paper, 12, University of Tasmania; Jeremy Kane, 'Sistergirl Inside: Doubly Colonised, Doubly Trapped' (2013) 1 *Griffith Journal of Law and Human Dignity* 63

³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights: National Consultation Report* (2015) 69.

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity⁴ (the **Yogyakarta Principles**) provides guidance on the application of State's existing human rights obligations for the protection and dignity of LGBTIQ+ people. Principle 9 of the Yogyakarta Principles provides guidance on the right to treatment with humanity and dignity while in detention, recognising that a person's sexual orientation and gender identity is integral to each person's dignity.⁵ Key considerations for TGD people in prisons focus on the safe and inclusive placement of TGD people in prisons, addressing the increasing risk of physical and sexual violence and transphobia, and access to appropriate healthcare services and supports.⁶ However in Australia, the higher rates of incarceration of First Nations people requires TGD initiatives to also prioritise the particular the needs of Brotherboys and Sistergirls.⁷

In Victoria the treatment, classification and placement of TGD people in adult prison's is guided by the Commissioner's Requirements, the management of prisoners who are trans, non-binary or intersex (March 2021)⁸ (the **Commissioner's Requirements**). The Victorian Health Justice Policy, currently under review, outlines the management of TGD health care needs in Victorian prisons. This submission critiques the effectiveness of the Commissioner's Requirements through our client's own experiences of incarceration and makes recommendations to increase the safety and welfare of all TGD people in Victorian prisons.

The scope of this submission

The scope of our submission derives from our legal case work for TGD people in adult Victorian prisons. Our casework primarily reflects the experiences of trans women who have been placed in men's prisons. This submission aims to highlight the experiences our clients have shared with us and make recommendations that require the involvement and consultation with TGD people in prison. We note that we do not have any direct case work experience with intersex people who have been incarcerated, and as a result we have not addressed issues relating to the incarceration of intersex people in Victorian prisons. We also note that while this submission focuses on the experiences of TGD people in prison. We recognise that some of the recommendations could be implemented to benefit broader members of the LGBTIQ+ community who are in prison.

We note that all case studies provided in this submission have been provided with our clients' consent and have been deidentified to protect confidentiality.

Reducing the reliance on prisons in Victoria

Nothing in this submission supports nor seeks to increase the reliance upon the incarceration of people as a solution to community safety. We strongly oppose the expansion of Victoria's prison system. We recognise prisons as sites of power imbalance and violence and would implore the Government to divert funding from building prisons into initiatives to divert people away from the

⁴ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <https://www.refworld.org/docid/48244e602.html> [accessed 30 November 2021]

⁵ Ibid at 9.

⁶ See Brömdal, A., Clark, K., Daken, K., Debattista, J., Gow, J., Hughto, Mullens, A., and J.,Phillips, T., (2019) 'Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people', *International Journal of Transgenderism*, 20:4, 321.

⁷ Jeremy Kane, 'Sistergirl Inside: Doubly Colonised, Doubly Trapped' (2013) 1 *Griffith Journal of Law and Human Dignity* 63, 63.

⁸ Corrections Victoria Commissioner (March 2021) Commissioner's Requirements, Part 2, No. 2.4.1 Management of prisoners who are trans, non-binary or intersex at www.corrections.vic.gov.au/commissioners-requirements-part-2

legal system and the fund initiatives to support the meaningful engagement of TGD people within our communities.

The importance of trans and gender diverse expertise

We would like to thank Flat Out Inc's Beyond Bricks and Bars project for their invaluable feedback on this submission and their tireless support of TGD people who are currently incarcerated in Victoria. Finally, we encourage the Review to speak directly with TGD people who have experienced incarceration during the current review.

PART ONE: Legal and policy frameworks

The first part of this section addresses the need to provide dedicated legal services for people in Victorian prisons and fund further research to increase our understanding of the needs and policy solutions for TGD people in prison. This section goes on to outline further legislative and policy reforms needed to support TGD people in prison access appropriate placement in Victorian prisons, increase access to making legal name and acknowledge of sex on birth certificates for TGD people in prison and considerations regarding strip searching TGD people in prison.

1.1 Access to an LGBTIQ+ prisoners' legal program

We endorse and support the Human Rights Legal Centre recommendation for a dedicated Victorian prisoners' legal service to be established;

"That the Victorian Government create and resource a legal service dedicated to providing legal advice and representation for people in prison, and properly resource Aboriginal Legal Services to provide such services to Aboriginal and Torres Strait Islander people in prison."

We also recommend that a specific LGBTIQ+ prisoners' legal program be established to respond to the identified need for targeted legal services for LGBTIQ+ people who are in prison.

The LLS experience

Over the last two years the LLS has assisted between 12 - 15 TGD clients who were incarcerated, providing over 100 instances of legal assistance to these clients. TGD clients have been referred through word of mouth recommendations within Victorian adult prisons and our partnership with Flat Out's Beyond Bricks and Bars project. Legal assistance services have included applications to change name and gender and to transfer placement to a different gendered prison placement, personal injuries claims, discrimination matters, criminal law matters, sentencing appeals and Centrelink disputes. These legal matters are often complex, with most clients having experienced extensive trauma, both before and during incarceration. The LLS has established strong relationships with pro bono referral relationships to undertake more complex litigation and strategic advocacy. The LLS works closely with the Beyond Bricks and Bars project to provide a holistic service response, addressing both legal and non-legal support and advocacy needs for TGD clients in prison. The LLS is focused on building collaborative partnerships with other prison advocacy programs in the legal assistance sector and private law firms to support the needs of TGD people in prison.

RECOMMENDATION 1: We endorse the recommendation for '*Resourcing legal services for people in prison*' outlined in the Human Rights Law Centre's submission and also recommend that the Victorian Government fund an LGBTIQ+ legal program to address the complex legal needs of LGBTIQ+ people

who are in prison, and providing referral pathways to LGBTIQ+ post-release supports to reduce the risk of recidivism, prevent incarceration and further criminalisation.

1.2 Further research required

This submission is based upon the LLS casework experience, representing our clients' experiences within Victorian adult prisons. We recognise there is limited knowledge on the number, treatment and unique needs of TGD people in Australian prisons.⁹ While research has repeatedly identified the increased risk of sexual violence, suicidality and mental health of TGD people in prison there is still limited data on the prevalence and impact of incarceration on TGD people in Australia. Further research is also needed to assess the effectiveness of relevant policies affecting TGD people in prison.¹⁰ In 2020 St Kilda Legal Service's LGBTIQ Legal Needs Analysis Report (the **LGBTIQ Legal Needs Report**) identified the need to centre the experiences of TGD people in prisons in future research.¹¹ There has been no Australian research that has involved the perspective of TGD people themselves.¹²

RECOMMENDATION 2: That the Victorian Government fund independent research to explore the complex needs, human rights, health, safety and impacts of transphobia on TGD people in prison, with researching centring upon the experiences of TGD people in prison. This research must also focus on the development of effective policies and processes to ensure TGD people are placed in prisons aligned with their gender and the impact of post-release support services to reduce recidivism.

While this submission has focused exclusively on the needs of TGD people we acknowledge that there is very little research that highlights the complex and unique needs of lesbian, gay, bisexual, queer and intersex people who are incarcerated in Australia.

RECOMMENDATION 3: That the Victorian Government fund independent research to explore the complex needs, safety issues, human rights, health and post-release support services available to LGBTIQ+ people in prison, with research centring upon the experiences of LGBTIQ+ people in prison.

1.3 Prison placement of trans and gender diverse people

The placement of TGD people in prisons that are not aligned with their gender can have a huge impact on their physical and psychological wellbeing, increasing their vulnerability and risk of experiencing sexual violence, harassment and abuse on an ongoing basis.¹³ Under Principle 9 of the Yogyakarta Principles which outlines the Right to Treatment with Humanity while in Detention, States shall;

“Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse.”

The Commissioner's Requirements also state that TGD people “should be imprisoned in the prison of their gender rather than their sex assigned or assumed at birth.”¹⁴ It recognises that the gendered

⁹ Above n1, 229.

¹⁰ Ibid.

¹¹ St Kilda Legal Service and Thorne Harbour Health, (2020) LGBTIQ Legal Needs Analysis: reflections on the legal needs and future planning of our pilot project two-year pilot program, 19 at <https://lgbtiqlegal.org.au/wp-content/uploads/2020/07/LGBTIQ-Legal-Needs-Analysis.pdf>

¹² Above n 1, 229.

¹³ Association for the prevention of torture, Towards the effective protection of LGBTI people deprived of their liberty: a monitoring guide (December 2018) France, 69 at http://www.hrc.co.nz/files/9714/2550/8291/APT_2014_LGBTI_monitoring_framework.pdf

¹⁴ See section 6.1.1 of the Commissioner's Requirements.

nature of prisons exposes TGD people to risk,¹⁵ which increases if placed in a prison not aligned to their gender.¹⁶

Despite the guidelines on TGD placement in the Commissioner's Requirements very few TGD people have been placed in prisons that have aligned with their gender in Victoria.

To our knowledge no TGD person in Victorian has ever been transferred from one prison to another one that was aligned with their gender.

The assessment of TGD placement is determined through the consideration of a person's gender identity¹⁷ as well as the standard classification considerations of people in prison, as per section 6.3.2 of the Commissioner's Requirements and the *Corrections Act 1986* (VIC). Through each assessment, whether prior to custody, upon reception or when requesting transfer after transitioning during custody to another prison that is aligned with their gender, TGD people are consulted and their views on their placement in prison considered by the Sentence Management Division (**SMD**).¹⁸

Our client's experience of the assessment of prison placement is that;

- the Commissioner's Requirements for the consideration of a person's gender identity are generally not followed when determining the initial placement of a TGD person in prison;
- the overwhelming majority of TGD people are placed in prisons based on their assumed sex at birth and not their gender;
- the existing policies are probative and too broad to assist the TGD people obtain the appropriate placement into prisons aligned to their gender; and
- the safety of other cisgendered people in prison is repeatedly prioritised over the safety and experiences of TGD people in prison

1.3.1 Safety as the paramount consideration in prison placement

When making any decision regarding the placement of TGD people in prison the Commissioner's Requirements repeatedly recognise that:

*'[i]n the placement of trans, gender diverse and intersex prisoners, the safety and welfare of the prisoner and of other prisoners are of paramount consideration.'*¹⁹

Section 3.3 of the Commissioner's Requirements outline the guiding principles to assess the risk associated with the placement of TGD people. The guidelines focus on the increased risk to the safety of both TGD and cisgendered people when TGD people are placed in either prisons that are aligned or not aligned with their gender. Central to the assessment of risk is considering whether a TGD person's physical characteristics will be aligned with the gender of the prison that they are seeking to be placed in, i.e. whether a trans woman has a penis or breasts, or if a trans man has a vagina.

Our clients have repeatedly reported that the assessment for placement focuses on and prioritises the safety of cisgender people in prison, and the perceived risk that TGD people pose to cisgender people in prison. Under these guidelines the risk TGD people are perceived to pose to cis gendered people

¹⁵ Section 3.2 of the Commissioner's Requirements.

¹⁶ Section 3.3 of the Commissioner's Requirements.

¹⁷ See Section 6.3.4 of the Commissioner's Requirements (considerations when Corrections Victoria Sentence Management Division has prior knowledge of a persons TGD identity before their reception into prison custody) and section 6.4.6 of the Commissioner's Requirements (for the determination of initial placement of a TGD person in prison).

¹⁸ Sections 6.4.3 and 6.4.6 of the Commissioner's Requirements.

¹⁹ Sections 3.3; 6.3.7; 6.4.7; 6.5.1 and 6.6.6 of the Commissioner's Requirements.

increases if their physical sex characteristics don't align to the gender of the prison they are seeking to be placed in. However, our clients instruct that the safety considerations and the history of physical and sexual violence our clients have experienced whilst in prison seems to hold little consideration throughout this process.

Client Stories

Experiences of violence against trans women are invisible

Our clients instruct that the risk assessments undertaken to decide the placement of TGD people in prison almost always focuses on the harm that TGD people could inflict upon other cisgendered prisoners rather than considerations of the safety and welfare of TGD people. Our clients recognise this practise as a form of transphobia, that reinforces the myth that TGD people are a risk to the safety of cisgendered people.

Trans women have instructed that Corrections Victoria have raised concerns about the impact of placing trans women with cisgendered women who have experienced violence perpetrated against them by men. These comments not only make our clients feel like their gender is not being recognised, and they are being considered as men in a women's prison, but also makes our clients feel like they are the problem. Our clients further instruct that there is limited consideration of the daily harassment and abuse that they have experienced placed in a men's prison, or the trauma that they have experienced because of violence perpetrated against them by cisgendered men.

Our clients believe that the risk assessment process required for placement of TGD people in prison marginalises trans women's safety and welfare, with their own experiences of trauma and violence becoming invisible within the process.

1.3.2 Application to transfer prisons

If TGD people are not placed in the appropriately gendered prison upon their initial reception, or they commence transitioning once they are in prison, they are able to apply to transfer to an appropriately gendered correctional facility. However, to our knowledge no TGD person has been transferred to the appropriately gendered adult prison in Victoria.

When applying to be transferred to a prison aligned to their gender our clients have instructed experiencing:

- excessive delays in applications being processed with applications taking in excess of 12 months to be processed;
- being asked explicit and intrusive questions regarding the functioning of genitalia and reproductive capacity, leaving TGD people feeling humiliated and degraded throughout this process;
- being pressured into signing consent for Corrections Victoria to review their medical files and assess their hormone levels and erectile functions;
- Corrections Victoria refusing to consider final placement decisions while TGD people are on remand on the basis that they won't complete a final risk assessment, although noting in the Commissioner's Requirement prevents this from occurring, and decisions regarding the placement and classification of other prisoners are often finalised on remand;
- not being able to transfer to some low security women's prison if they are a registered sex offender because some prisons do not accommodate women with a sex offending history; and

- educational courses required for parole applications may not be available if they transferred to a prison that aligned with their gender.

Stella's Story

Transfer application could delay her parole application

Stella is a trans woman who had been placed into a men's prison in Victoria. She applied to be transferred to a minimum security women's prison to complete her sentence so that she would be in a prison that aligned with her gender. The application took over 12 months and there was no indication that it would be resolved soon. Stella was going to be eligible for parole soon and knew that she had to spend time in a minimum security prison before she could apply for parole. She had to make the decision to apply for a minimum security men's prison, rather than continue to wait for the outcome of her application to a women's minimum security prison and possibly jeopardise her ability to apply for parole at the earliest possible stage. When Stella discussed her concerns with the SMD they indicated that they would be happy to process her application to a low security men's prison quickly, and this was done within a couple of weeks, while the SMD had still not responded to her application to transfer to a women's prison which had been made over a year ago.

RECOMMENDATION 4: That the Victorian Government urgently review the placement of all TGD people in Victorian adult prisons and prioritise the safe transfer of TGD people wishing to be transferred to prisons aligned with their gender.

RECOMMENDATION 5: That the Victorian Government urgently review the current placement policies for TGD people in prison, exploring effective TGD prison placement regimes in other jurisdiction that prioritise the placement of TGD people into their preferred prison.

RECOMMENDATION 6: That the Victorian Government ensure that all applications to be transferred to a prison aligned with a TGD person's gender be processed within a three month timeframe, and provide written reasons that explain the assessment process for all decisions.

1.4 Separation and solitary confinement

Placing TGD people in protective custody and other forms of separation is regularly used as a strategy to increase protection for TGD in prisons.²⁰ Section 6.3.7 of Commissioner's Requirements outlines the practise of separating TGD people from other people (in a single bed cell with a toilet and shower) prior to a SMD finalising placement decisions. The section requires that;

*"Prisoners who have been segregated, will be managed under the least restrictive conditions consistent with the reasons for the separation and to the extent necessary to minimise the risk associated with that reason."*²¹

This requirement is not being followed. We note TGD people are currently being placed in prolonged and extremely restrictive separation conditions in Victorian prisons.

²⁰ See above n 13.

²¹ Section 6.3.7 of the Commissioner's Requirements.

Australian research has identified that TGD people are often placed in solitary confinement or ‘protective custody’ for extended periods of time under the pretext of safety and protective reasons.²² In the 2020 Victorian whole of government LGBTIQ strategy consultation (**the LGBTIQ+ Strategy Directions Paper**) concerns were also raised over TGD people’s safety and extended periods of solitary confinement within Victorian prisons.²³

We endorse the following recommendation made by the Human Rights Law Centre:

The Corrections Act 1986 (Vic) should be amended to strictly prohibit the use of the solitary confinement in prisons, and clearly define the limited, narrow and exceptional circumstances in which a person may be lawfully separated from other people in prison.

The placement of TGD people in solitary confinement or ‘protective’ custody often marks the inability to address the complex security and protection needs of TGD people in prisons.²⁴ It treats TGD people as the problem rather than adequately addressing safety measures and the appropriate placement of TGD people in prisons. As Lamble notes these practices effectively become a de facto form of punishment for TGD people in prison, resulting in reduced access and participation in prison life, including educational and recreational activities.²⁵ Finally, such practises can amount to torture under International law but also have significant and unnecessary impacts upon the mental and physical wellbeing of TGD people.²⁶

Our clients experience of separation policies

Our clients report that they have been subjected to excessive periods of separation or isolation against their wishes. Our clients instruct that this practise is often used by Corrections officers when they cannot adequately manage or protect TGD people in prison other people in the prison.

RECOMMENDATION 7: We endorse the recommendation to strictly prohibit solitary confinement in prison outlined in the Human Rights Law Centre submission and also recommend that the Victorian Government urgently review the placement of all TGD people in separation units and the equivalent of solitary confinement units, including the SWAN 2 Unit in DFPC, and placing TGD people with their consent, into less restrictive and safe living conditions that allow TGD people to participate in prison life.

1.5 Strip searching

Routine strip searching has the potential to cause extreme distress and discomfort for any person in prison. The United Nations Special Rapporteur on Torture recognised that humiliating and invasive body searches may constitute torture or ill-treatment, especially for transgender people in prison.²⁷ Due to the psychological and physical complexities of gender dysphoria and the high rates of

²² See Brömdal, A., Clark, K., Daken, K., Debattista, J., Gow, J., Hughto, Mullens, A., and J.,Phillips, T., (2019) ‘Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people’, *International Journal of Transgenderism*, 20:4, 321.

²³ Victoria State Government, LGBTIQ+ Strategy Directions Paper, 2020, 12 at https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7116/0677/9477/LGBTIQ_Strategy_Directions_Paper.PDF

²⁴ Above n 13, 9.

²⁵ Above n13, 8.

²⁶ Above n 23.

²⁷ Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 36.

transphobia, trauma and sexual violence experienced, both before and during incarceration,²⁸ routine strip searches have the potential to cause even greater distress and harm to TGD people than the general prison population.²⁹

We endorse the following recommendation of the Human Rights Law Centre in relation to the prohibition of routine strip searches:

“Ending the routine strip searching of people in prison by amending the Corrections Act 1986 (Vic) so that it strictly prohibits routine strip searching and provides that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.”

Acknowledging the impacts of past trauma and the high risk of sexual violence and abuse occurring in prison, we hold grave concerns that the guidelines for strip searching TGD people in the Commissioner’s Requirements³⁰ will not adequately preserve the dignity and safety of TGD people in prison.

1.5.1 Choosing gender of Corrections officer conducting a search

Under the *Corrections Act 1986 (Vic)* and the *Corrections Regulations 2019 (Vic)* strip searches are required to be conducted in the least intrusive manner, maintaining privacy and dignity. The Commissioner’s Requirements outlines that wherever possible TGD people should be able to choose the gender of the person conducting the strip search.³¹ In 2017, Victorian Ombudsman recognised the implementation of this policy as a procedure that sought to ensure that TGD people are treated with dignity.³² However, the final decision regarding the gender of the Corrections officers undertaking the strip searches is at the discretion of the General Manager.³³

Our clients have experienced:

- that the process outlined for strip searching TGD people under the Commissioner’s Requirements is rarely followed;
- generally not being able to choose the gender of the person who strip searches them; and
- having to avoid opportunities such as engaging in work programs if they are required to undergo routine strip searches.

RECOMMENDATION 8: We endorse the recommendation to end routine strip searches in the Human Law Centre’s submission and also recommend that the Victorian Government require that any Corrections officers undertaking strip searches, as an absolute last resort, must be of the gender that the TGD person has requested. All Corrections officer conducting any strip searches on TGD people in prison must have completed annual training on the practical modalities and trauma informed approaches to conducting strip searches of TGD people.

²⁸ Rates of sexual violence will be explored in section 2.3 of this submission.

²⁹ Above n 12, 76.

³⁰ Section 6.13 of the Commissioner’s Requirements. We acknowledge that this policy applies to Urinalysis as well as strip searching however commenting on this is beyond the scope of our submission. We have no experience from our case work regarding this.

³¹ Section 6.13.2 of the Commissioner’s Requirements. This section also includes the process for undertaking urinalysis.

³² Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) 5, 97.

³³ Section 6.13.4 of the Commissioner’s Requirements.

1.6 Change of name and acknowledgement of sex

The legal recognition of a TGD person's identity is a significant and crucial step in affirming their gender. In Victoria significant law reform initiatives have been implemented to reduce the unnecessary requirements of completing sex reassignment surgery and providing documents from medical professionals to legally change the name and sex on a person's birth certificate.³⁴ Under the *Births, Deaths and Marriages Registration Act 1996* (Vic) (**BDMR Act**) TGD adults are now only required to submit a statutory declaration in support of an application to change their name³⁵ and acknowledgement of sex on their birth certificates.³⁶ However for TGD people in prison a restrictive assessment process must be completed before the Secretary of the DJCS (**the Secretary**) can approve a request by a TGD person to make an application to change either their name or acknowledgement of sex on their birth certificates. We believe that the requirements for TGD people in prison are too restrictive and are unnecessary.

1.6.1 Change of name and acknowledgement of sex for TGD prisoners

Under the BMDR Act TGD people in prison are recognised as 'restricted persons',³⁷ and are required to obtain the written approval of the Secretary³⁸ before making an applying to change either their name³⁹ or sex.⁴⁰ Sections 47I and 47P of the *Corrections Act 1986* (Vic) provides a broad discretion to the Secretary to refuse applications if satisfied that the change of name or of acknowledgement of sex in all the circumstances is not necessary or reasonable. It further states that the Secretary must not be approved if it would be reasonably likely -

- (a) to be a threat to prison security; or
- (b) to jeopardise the safe custody or welfare of any prisoners; or
- (c) to be used to further an unlawful activity or purpose; or

³⁴ See the *Births, Death and Marriages Registration Amendment Act 2019* (Vic).

³⁵ Section 25 of the *Births, Death and Marriages Registration Amendment Act 2019* (Vic).

³⁶ Section 30A of the *Births, Death and Marriages Registration Amendment Act 2019* (Vic). The applicant must have their birth registered in Victoria.

³⁷ S4 of the *Births, Deaths and Marriages Act 1996* (Vic) defines "restricted person" which also includes a detainee within the meaning of section 482A of the *Children, Youth and Families Act 2005*; a prisoner within the meaning of section 3(1) of the *Corrections Act 1986*; a prisoner on parole within the meaning of section 79HA of the *Corrections Act 1986*; an offender within the meaning of section 265A of the *Serious Offenders Act 2018*; or a registrable offender within the meaning of section 3(1) of the Sex Offenders Registration Act 2004.

³⁸ Section 30FB *Births, Deaths and Marriages Registration Act 1996* (Vic) requires that an application for the change of the acknowledge of sex on a birth certificate must be accompanied by the appropriate approval. Section 4 of the *Births, Deaths and Marriages Registration Act 1996* (Vic) defines 'approval' for the making of an acknowledgement of sex application must be made by the Secretary under section 488Q of the *Children, Youth and Families Act 2005*; the Secretary under section 47P of the *Corrections Act 1986*; the Adult Parole Board under section 79HD of the *Corrections Act 1986*; the Post Sentence Authority under section 265D of the *Serious Offenders Act 2018*; or the Chief Commissioner of Police under section 70S of the *Sex Offenders Registration Act 2004*.

³⁹ Section 47H *Births, Deaths and Marriages Registration Act 1996* (Vic).

⁴⁰ Sections 47N and 47NF of the *Births, Deaths and Marriages Registration Act 1996* (Vic) make it an offence for a person in prison to make an application to change their name or acknowledgement of sex, respectively, without obtaining the prior approval to make the application by the Secretary of the DJCS.

(d) to be regarded as offensive by a victim of crime or an appreciable sector of the community.’

To our knowledge, we are not aware of any applications to apply to change name or acknowledge of sex that have been approved by the Secretary.

Legally changing one’s name and acknowledgement of sex on a birth certificate, while an incredibly important step in a TGD person’s transition, is also largely an administrative process and should not be restricted by the need to obtain the prior approval of the Secretary. The consideration of the person’s safety and risk to others in prison is already addressed in the Commissioner’s Requirements for the placement and management of TGD people in prison. In regard to the consideration of the offense that it may cause the victim of a crime, or an appreciable section of the community, the BDMR Act already restricts the registration of ‘offensive names’⁴¹ or ‘offensive sex descriptor’.⁴²

Preventing a change of name or sex because of the offense it may cause the victim or the community is akin to punishing a person again for the crime that they are already serving time for. This criterion also appears to be complicit in endorsing the high levels of misinformation and transphobia against TGD people in the general community. It is unacceptable and out of step with recent law reforms that have sought to enhance the dignity and participation of TGD people in our general community. Finally, the requirements place an onerous and almost insurmountable challenge to TGD people seeking to transition while incarcerated, forcing them to adhere to a criterion that is far beyond what TGD people encounter in the general community.

RECOMMENDATION 9: That the Victorian Government repeal ss 47I, 47P, 47F and 47N of the *Corrections Act 1987* (Vic) and all corresponding restrictions for ‘restricted persons’ as defined under s4 of the BDMR Act, to enable all TGD people in prison, or who are classified as ‘restricted persons’, to apply to change name and acknowledge of sex on birth certificates through the same requirements outlined for TGD people in the general community. The Department of Justice and Community Safety (DJCS) should review information sharing requirements under the BDMR Act to enable notification of these changes if there is a reasonable concern that these changes could be used to further unlawful activity or purpose.

1.6.2 Application process to change name or sex acknowledgement

Our clients have made repeated applications to change their name and acknowledgement of sex. They have instructed that they have experienced the following:

- Corrections staff requesting consent to review their medical files as a part of the application process;
- Corrections staff have undertaken invasive and inappropriate questioning regarding the genitalia of a TGD person, as part of the application process;
- delays in processing applications, with the Secretary taking over 12 months to finalise applications;
- decisions by the Secretary have taken so long that people have made new applications as they were concerned that they were not going to receive a decision from the Secretary; and
- very limited, if any, reasons have been provided when applications have been refused, making the basis of refusing applications unclear and making it extremely difficult for to address concerns in future applications.

⁴¹ Section 28(3) of the *Births, Deaths and Marriages Registration Act 1996* (Vic).

⁴² Section 30F of the *Births, Deaths and Marriages Registration Act 1996* (Vic).

Allissa's Story

Application to change their name and sex

Allissa is a trans woman who commenced transitioning after she was incarcerated in an adult male prison in Victoria. Allissa experienced persistent misgendering and deadnaming by both Corrections Officers and fellow prisoners. She decided to make an application to change her name legally, in part, to reduce the negative impacts that this had been causing her. She made an application to legally change her name as part of her transition process. The Secretary refused to approve the application on the basis that the nature and high profile of her offending would be reasonably likely to cause offense to the victim of her crime or an appreciable section of the community. The Secretary noted that she was already recognised in the prison by her chosen name, and she could apply to legally change her name when she was released from prison. Allissa made another application to change her name, and it was denied again. She requested the reasons for why the application was refused. The DJCS reiterated that a change of name was not, in all the circumstances, necessary and reasonable, would be reasonably likely to be used to further an unlawful activity or purpose, or be regarded as offensive by the victim of the crime or an appreciable sector of the community. However, no further reasons were provided. This is preventing Allissa from being able to address any perceived concerns that the Secretary may have with her application. It is unlikely Allissa will be able to legally change her name while she is in prison and will continue to endure ongoing harassment, misgendering and deadnaming while she remains in custody.

Allissa's case study also highlights the potential impact of policies that deny TGD people the ability to change their name or sex while in prison including the impacts it may have upon the post-release safety of TGD people. While TGD people may have transitioned in prison, the inability to legally change their name and sex on legal documents significantly increases the likelihood that their TGD identity will be outed upon release. This is because their legal name and sex may no longer be congruent with their gender presentation. This will considerably increase the risk of that person experiencing transphobic violence and harassment.

1.6.3 Excessive delays in application process

Our clients have experienced delays in excess of a year before receiving a decision from the Secretary in relation to applications to change their name or acknowledgement of sex. In some cases, these people in prison have not received an outcome and have chosen to submit a fresh application.

Reanna's Story

Excessive delays in the application to process

Reanna is a transgender woman who is currently incarcerated in a Victorian men's prison. While in prison, she began to affirm her gender. One important step she wished to take was to change her name and acknowledgement of sex on her birth certificate to reflect her gender and current name. Reanna has made two separate applications for approval of the Secretary to legally change her name and sex marker on her birth certificate. The initial applications were refused by the Secretary, with no reasons given, while the second application is still pending. The first change of name application took approximately 11 months for a decision to be made. The refusal to allow Reanna to legally change her name and acknowledgement of sex has resulted in the continuation of a traumatic environment in which she is routinely misgendered and deadnamed by Corrections staff, despite Reanna declaring her preferred names and pronouns, and this being widely known within the prison. As the law

currently stands, Reanna may never be allowed to legally change her name or sex marker whilst incarcerated and will likely have to wait until her release.

PART TWO: The needs, experiences and safety concerns of TGD people in prison

This section outlines the experiences of discrimination and transphobia, increased safety risks and barriers to reporting incidents and the need to access specialist support services for TGD people in prison.

2.1 Experiences of Discrimination and Transphobia

It is well evidenced that TGD people continue to experience extremely high rates of discrimination, violence and transphobia in both the general community and correctional centres.⁴³ In Victoria, TGD people are protected from discrimination on the basis of their gender identity under both State⁴⁴ and Federal legal provisions.⁴⁵ The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the human rights of TGD people in the general community and also applies to people in prison.⁴⁶ The Commissioner's Requirements emphasise that these protections apply to TGD people in prison, and stating that TGD people in prison

"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."⁴⁷

However, both international and national research continues to highlight the high levels and significant impacts of discrimination and transphobia that TGD people experience in prison.⁴⁸

Our clients have reported experiences of systemic, cultural and interpersonal instances of discrimination and transphobia with examples, including;

- Corrections officers using derogatory language to address and describe TGD people such as 'tranny', 'it', 'a thing,' and making comments such as, '*they'll always be a man*' (in reference to a trans woman);
- Corrections staff demonstrating general transphobic and homophobic attitudes and making offensive comments about TGD people;
- Corrections staff continuously deadnaming and misgendering TGD people;
- Corrections staff failing to record or address repeated safety concerns of TGD people in prison;
- Corrections staff refusing to recognise or record relationships between trans women and cisgender men in prison;
- Trans women being refused access to educational programs designed for women because they are designed for women;
- Corrections staff delaying referrals to gender affirming medical services due to transphobic attitudes;
- Corrections staff increasing surveillance and monitoring of TGD people in prison; and

⁴³ See above n 1.

⁴⁴ Section 6(d) of Victorian *Equal Opportunity Act 2010* (Vic)

⁴⁵ Section 5B of the *Commonwealth Sex Discrimination Act 1984*.

⁴⁶ Article 8 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁴⁷ See section 5.6 of the Commissioner's Requirements.

⁴⁸ See above n 24.

- Not having access to gendered services, such as women’s housing and sexual assault services, because they are placed in men’s prison.

Our clients’ experiences of discrimination in relationships

Our clients have instructed that they have experienced increased transphobia and homophobia when they have been involved in relationships as trans women with other cisgendered men in prison. Our clients instructed that Corrections officers would neglect to recognise their relationships, refuse to record their relationships or keep inadequate records. This has impacted our clients who have had partners transferred to a different prison and were required to have their relationships officially recorded to be able to access inter-prison calls if one of them has been transferred to another prison. Our clients have instructed that they believe these actions were motivated by transphobia and homophobia attitudes of the Corrections officers. Adding to this our clients reported Corrections officers making disapproving, judgemental and homophobic comments about their relationships, refusing to recognise them as heterosexual relationships and rather referring to them as gay relationships between two men.

2.2 Use of correct name and gender

The Commissioner’s Requirements states that TGD prisoners ‘should be addressed according to the name by which they wish to be known, including the use of pronouns appropriate to their gender identity’.⁴⁹ However the 2020 LGBTIQ Strategic Directions Paper identified the ongoing misgendering⁵⁰ and deadnaming⁵¹ that TGD people experience in Victorian prisons as a significant concern.⁵²

The use of chosen names and pronouns is fundamental to ensuring TGD people are treated with respect and dignity. Deadnaming and misgendering impacts TGD people in prison by:

- denying the recognition of their gender and identity
- reflecting patterns of degrading and transphobic treatment, denying TGD people a sense of integrity, respect and safety while incarcerated
- constituting forms of ongoing discrimination, vilification and harassment
- using this as a form of ongoing violence against TGD people
- increasing the risk of experiencing violence, abuse and humiliation
- causing detriment to TGD mental health and wellbeing

Our clients have experienced:

- daily misgendering and deadnaming by Corrections officers and other people in prison
- Corrections officers frequently referring to TGD people by their deadnames in a malicious or reckless manner
- Corrections officers may inadvertently deadname or misgender a TGD person as a result of having access to this information through the PIMS/E*justice system.
- some Corrections officers will only refer to TGD people by their surnames, refusing to use their chosen name, and while referring to all cis gendered people by their first names
- some Corrections officers will only use the chosen names or surnames and correct pronouns of the TGD people that they like and have a rapport with, whilst continuing to deadname and misgender other TGD people in prison.

⁴⁹ Section 6.11.2 of the Commissioners Requirements.

⁵⁰ “Mis-gendering” – Refers to someone, especially a transgender person, using a word, pronoun or form of address, that does not correctly reflect that person’s gender identify.

⁵¹ “Deadnaming” – The use of the birth or other former name of a trans or non-binary person without the person’s consent.

⁵² Above n 24, 12.

RECOMMENDATION 10: That Corrections Victoria should implement specific training, reporting and disciplinary procedures to address the culture of transphobic practises, including but not limited to the deadnaming and misgendering TGD people. All training, reporting mechanisms and disciplinary procedures should:

- * be developed in consultation with TGD people who are or have been in prison;
- * aim to improve the safety and reduce the experiences of deadnaming, misgendering and transphobic or homophobic harassment by Corrections staff; and
- * be independently evaluated and reviewed, in consultation with TGD people, who are or have been in prison, on a regular basis.

2.2.1 Recording chosen names and pronouns in prison records

The Commissioner's Requirements stipulate that the preferred names and pronouns of a TGD person should be recorded in the Prisoner Information Management System (PIMS)/E*Justice and on their identification card.⁵³ Our clients report that:

- Corrections officers can still access and see their legal names (deadnames) on PIMS
- PIMS cannot currently list a person's chosen name as their primary name
- in some cases, a person's preferred name will appear alongside deadnames

Our clients experience: Corrections Officer access to deadnames

Our clients instruct that having their deadnames accessible to Corrections officers increases the likelihood of Corrections officers, inadvertently or intentionally, deadnaming and misgendering TGD people in prison. However, our clients have also reported that some Corrections officers will purposely use a TGD person's deadname persistently once they are aware of it, to purposely humiliate and degrade them.

Reducing the visibility and access to a person's deadname and limiting this information to a need-to-know basis, may reduce the propensity of deadnaming and misgendering and enhance the dignity and safety TGD people experience in prison.

RECOMMENDATION 11: That Corrections Victoria review and update IT systems and processes, to limit access to TGD person's deadname and previous gender and develop relevant policies that stipulate that access to the deadnames of TGD people is to be strictly limited to need-to-know basis, regardless of whether a TGD person has been able to legally change to their name or acknowledgement of sex on their birth records. This review must be undertaken in consultation with TGD people in prison.

2.3 Safety risks and reporting incidents

TGD people experience far higher rates of physical and sexual violence compared to the general community, with some rates of sexual violence or coercion reported at four times that experienced by the general community.⁵⁴ In 2015 the Australian Human Rights Commission recognised that these vulnerabilities are magnified when TGD persons are incarcerated.⁵⁵ In Australia far higher

⁵³ Section 6.11.4 of the Commissioners Requirements.

⁵⁴ Callander D, Wiggins J, Rosenberg S, Cornelisse VJ, Duck-Chong E, Holt M, Pony M, Vlahakis E, MacGibbon J, Cook T. (2019) *The 2018 Australian Trans and Gender Diverse Sexual Health Survey: Report of Findings*, Sydney, NSW: The Kirby Institute, UNSW Sydney, 10.

⁵⁵ Above n 2, 69.

rates of both physical and sexual violence are reported by TGD people in prison, with incidents often involving both prison guards and prisoners.⁵⁶ One study found that TGD people and Sistergirls in prison experienced daily forms of sexual harassment and coercion.⁵⁷ However, these experiences of mistreatment and violence are compounded by the prison's general indifference to the safety concerns raised by TGD people.⁵⁸ In 2017, Victorian Ombudsman found that TGD people, are often at more risk within custodial environments than the general population, and noted that prisons need to take account of these vulnerabilities when planning action to prevent cruel, inhuman and degrading treatment.⁵⁹

Kim's story

Appealing sentence in relation to the harm experienced in prison

Kim is a trans woman that has been placed in a men's prison in Victoria. Kim reported repeated experiences of threats, sexual violence, physical assaults, stalking and harassment by other people in the prison. These experiences resulted in extensive psychological and physical injuries, as well as incidents of self-harm and attempted suicides.

The level of violence, abuse and mismanagement of her safety while in custody was so extensive that Kim has lodged an application for leave to appeal against the length of her sentence. The basis of the appeal is on the extreme and continued difficulties that she experiences as a woman who has been placed in a men's prison. The application is currently pending.

2.3.1 Reporting incidents and safety concerns

Our clients have raised concerns that Corrections officers do not respond to their reports of threats, harassments and assaults adequately. We understand from our clients' experiences that;

- reported safety risks and incidents are often minimised by Corrections staff, resulting in failures to assess and respond to safety risks appropriated
- if protective measures are implemented, they are often limited and ineffective
- reports of safety risks and incidents are often not recorded by Corrections staff
- the general lack of responsiveness to the safety concerns of TGD people results from the Corrections staff transphobic attitudes

Fi's story

Reporting incidents of sexual violence and harassment

Fi is a trans woman who has been placed in a men's prison in Victoria. After Fi had been sexually assaulted she reported the incident to a prison doctor. The doctor's response was to tell Fi that she should '*get used to that sort of thing around here*' and no further action was taken. Fi went on to report other incidents of sexual harassment from other people in prison to Corrections officers. Their

⁵⁶ See Asquith, N., Dwyer, A., and Rodgers, J., 'Cisnormativity, criminalisation, vulnerability: Transgender people in prisons', (Feb 2017) TILES Briefing Paper, 12, University of Tasmania

⁵⁷ Simpson, P.L., Wilson, M., Butler, T., Richters, J., Yap, L., Grant, L., Richards, A., and Donovan, B. You're a woman, a convenience, a cat, a poof, a thing, an it?: Transgender women negotiating sexual coercion in NSW male prisons (2017)

⁵⁸ See above n 23.

⁵⁹ Above n 56, 91.

response was to tell her that if she continued to make complaints she would be moved to another unit. The incident was not investigated, and no further action was taken.

Our clients have reported that safety incidents are often recorded poorly, which can result in our clients' safety concerns appearing unfounded, as there are limited or no previous records of safety complaints. One of our clients instructed that the inadequate responses to her reports of repeated safety concerns resulted in her having to find ways to protect herself from regular physical assaults from other people in prison.

2.3.2 Reporting safety issues to the Police and Prosecuting matters

Corrections staff have offered to contact the Victoria Police for our clients to make official statements regarding continued threats, instances of harassment and assault. However, our clients instruct they are generally unwilling to report these incidents to Victoria Police as it is likely to increase risks to their safety.

Amber's story

Lack of safety when reporting abuse

Amber is a trans woman that has been placed in a men's prison in Victoria. During her placement Amber reported incidents to Victoria Police of physical and sexual violence perpetrated against her by men in prison. Amber reported that Corrections officers failed to implement any protective measures to protect her and witnesses to the incidents from the persistent threats and intimidation tactics that were being used to stop the case from proceeding. Amber and the other witnesses were left to defend themselves against the threats and intimidation. In addition to this, Corrections staff allowed inter-prison mail to be circulated that was intended to threaten and intimidate Amber and other witnesses to drop the criminal investigation. As a result of the ongoing threats, Victoria Police were forced to drop the charges, as witnesses refused to continue to participate in the investigation.

RECOMMENDATION 12: That the Victorian Government establish an independent review of all safety policies, procedures and disciplinary measures to improve the safety, risk assessments and responses to reports regarding safety incidents and risks for LGBTIQ+ people in prison. This should be undertaken in consultation with LGBTIQ+ people in prison. A regular and ongoing, independent review, evaluation and annual training on safety related policies and procedures should be undertaken and include consultation with LGBTIQ+ people in prison.

RECOMMENDATION 13: That the Victoria Government establish independent LGBTIQ+ Cultural Safety Liaison Officers for each prison to oversee the implementation of policies, procedures and staff training to improve the safety and cultural competency of Correctional facilities. This position must involve an ongoing independent consultative role with LGBTIQ+ people in prison, establishing a safe and confidential mechanisms for LGBTIQ+ people to identify and address ongoing safety, harassment and discrimination issues by both Corrections staff and other people in prison, and identify areas for Corrections staff to increase their cultural competency when working with LGBTIQ people.

2.4 Access to specialist sexual assault services

While the Commissioner's Requirements recognise the impact of historical incidents of sexual violence and the high risk of sexual violence occurring while in prison, our clients have reported significant barriers to accessing appropriate sexual assault services while incarcerated.

Our client's experiences of accessing sexual assault services notes that:

- trans women in men’s prisons cannot access specialist sexual assault services while placed in men’s prisons, such as the Centre Against Sexual Assault (**CASA**) which would generally be available to them if they were in a women’s prison
- trans women have reported accessing crisis counselling via the Forensic intervention Unit, however the staff do not have expertise in sexual assault counselling
- available crisis counselling is capped to a limited amount of sessions
- some TGD people have had no access to sexual assault services after incidents of sexual violence in prison

RECOMMENDATION 14: That Corrections Victoria ensure all people in Victorian prisons, including TGD people in men’s prisons, have access to specialist sexual assault counselling services, including where appropriate Centre Against Sexual Assault (CASA) counselling services.

RECOMMENDATION 15: That Corrections Victoria train all forensic counselling, psychiatric nurses and psychiatric Corrections staff in TGD mental health to ensure TGD people can access appropriate mental health care in Victorian prisons, and remove any barriers to allow TGD people access to community based mental health professionals and counsellors to enable the continuity of mental health care for TGD people in prisons.

2.5 Access to TGD targeted support services

While the Commissioner’s Requirements allow access to appropriate community support agencies⁶⁰ there are currently limited TGD support services available through Victorian prisons. TGD targeted and inclusive support services include,⁶¹

- Undercurrent’s *Freckles*, LGBTIQ support group in DPFC
- Drummond Street Services’ *Futures Free from Violence*, LGBTIQ+ program for people who have used force or violence in intimate relationships, in DPFC
- Flat Out’s *Beyond Bricks and Bars* case management service for any TGD people who are currently or formerly incarcerated in Victoria.

Beyond Bricks and Bars is the only service that specifically supports TGD people in all Victorian prisons. This project is entirely reliant upon community donations.

RECOMMENDATION 16: That the Victorian Government fund ongoing, independent and community led TGD prison support and post-release programs accessible through all Victorian prisons.

RECOMMENDATION 17: That Corrections Victoria ensure people have access to LGBTIQ+ specific support and counselling services, including free, unlimited access to independent LGBTIQ+ specialist phone counselling, crisis support and other confidential support services within all Victorian prison facilities.

2.6 Access to women’s housing and support services

When trans women are placed in men’s prisons they are not able to access women’s specific housing services to assist them obtain post-release housing. Women’s housing services are only contracted to

⁶⁰ Section 6.15 of the Commissioner’s Requirements.

⁶¹ Please note that COVID-19 restrictions may have interrupted access to these programs.

the women’s prison in Victoria, and therefore inaccessible to trans women in men’s prisons. Housing is a crucial element to support people leaving prison and preventing recidivism.

RECOMMENDATION 18: That Corrections Victoria expand the delivery of women’s support services that are contracted to Victorian’s women’s prisons, including women’s housing, to provide the same level of assistance trans women that are placed in men’s prisons in Victoria.

PART THREE: Access to trans and gender diverse healthcare in prison

This section outlines our clients’ experiences of accessing gender affirming health care services, medications, and the importance of access to Medicare subsidies in TGD people in prison.

3.1 Choice of gender affirming medical services

Principle 17 of the Yogyakarta Principles states that:

“Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity.”⁶²

While the *Corrections Act 1986* (Vic) affords people in prison “access to reasonable medical care and treatment necessary for the preservation of [their] health,”⁶³ the healthcare needs of TGD people are complex and ongoing. The increased safety risks, impacts of transphobia, lack of trained staff and accessible services create additional barriers to accessing consistent and appropriate TGD healthcare in prison.⁶⁴ This can have a detrimental impact on both TGD physical and mental health.⁶⁵

In accordance with the United Nations Standard Minimum Rules for the treatment of prisons (the Mandela rules) people in prison have the right to the same standards of health care as for people in the community.⁶⁶ However our clients report:

- the Monash Gender Clinic and the Austin Gender Clinic are the only health services that they can be referred to start hormone therapy⁶⁷
- the waiting list for an initial consultation at one of the approved specialist gender clinic is between 8 – 18 months
- delays in accessing initial hormone therapy are often compounded by Corrections staff allegedly losing or taking an unreasonable amount of time to process referrals to gender clinics
- there are concerns that the delays in referrals to gender clinics have been motivated by transphobic attitudes of some of the Corrections staff

In accordance with the World Professional Association for Transgender Health (**WPATH**) standards of care, TGD adults can access an initial assessment and continuing care for hormone therapy through informed consent models of care by any general practitioner.⁶⁸ In the general community the initial

⁶² Above n 4, 22.

⁶³ Section 47(f) *Corrections Act 1986* (Vic).

⁶⁴ See Above n 83, Above n 12, 87.

⁶⁵ See above n 1.

⁶⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 24.

⁶⁷ See above n 24.

⁶⁸ Cundill, P., Hormone Therapy for trans and gender diverse patients in the general practitioner setting (July 2020) 49 *Australian Journal of General Practitioners*, 7, 385. See also Standards of Care for the health of Transsexual, Transgender and Gender non-conforming people, *The World Professional Association for Transgender Health*, version 7 (2021) 41.

assessment and prescriptions for TGD hormone therapy is not restricted to access through specialist gender clinics but is available through any general practitioner.

3.1.1 Access to hormone therapies and gender affirming treatments

Inconsistent and interrupted access to hormone therapies can reverse physical and hormonal changes. This can result in the development of physical characteristics that are not aligned with a TGD person's gender, increased experiences of gender dysphoria and risk of suicidality.

Our clients' have instructed that inconsistent access to appropriate hormone therapy as an ongoing issue. Our clients' report experiencing:

- extended delays in processing prescriptions for hormone therapy
- forced suspension of daily hormone therapy for extended periods of time due to delays in the provision of medications
- being prescribed lower levels of hormone therapy when entering custody compared to the levels prescribed to them in the general community
- being denied access to hormone therapy medications (ie. hormone therapy gels) due to its alcohol content, even though the medications pose less risk of side effects
- being denied access to gender affirming treatments (ie. hair growth treatments) because they have been classified as non-essential medical treatments
- Corrections medical staff often lack any knowledge of TGD health, and may not understand the impact of delayed and denied access gender affirming medications and treatments

WPATH considers that gender affirming treatments related to transitioning are “not optional in any meaningful sense but are understood to be medically necessary for the treatment of the diagnosed condition.”⁶⁹ Gender affirming care is broader than hormone therapies and surgeries, and includes treatments such as facial hair removal, facial plastic reconstruction and voice therapy and/or surgery to increase the physical characteristics of a person's gender.⁷⁰ Such treatments are recognised as significantly improving TGD mental health, and should not be deemed as an unnecessary part of TGD person's healthcare.⁷¹

RECOMMENDATION 19: That Corrections Victoria ensure all Victorian prisons should have general practitioners that are trained in TGD healthcare and are able to prescribe initial and ongoing hormone therapy in line with the WPATH standards of care. This would increase the choice of healthcare services available to TGD people and reduce waiting time for access to hormone therapies.

RECOMMENDATION 20: That Corrections Victoria ensure that the Justice Health's policy for the health care of prisoners who are trans, gender diverse and intersex, clearly defines reasonable timeframes for referrals to gender affirming healthcare services, renewed prescriptions for gender affirming medication and access to gender affirming treatment plans, to reduce the detriment caused by excessive delays to both services and medication.

RECOMMENDATION 21: That the Justice Health's policy for the health care of prisoners who are trans, gender diverse and intersex, in line with the WPATH standards of care, recognises the necessity, and

⁶⁹ Ibid.

⁷⁰ See World Professional Association for Transgender Health, Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. - WPATH World Professional Association for Transgender Health (Dec 2016) access at <https://www.wpath.org/newsroom/medical-necessity-statement>.

⁷¹ Ibid.

enables access to gender affirming treatments, as part of the essential medical needs and a crucial aspects of TGD physical and mental health care.

RECOMMENDATION 22: That Corrections Victoria are required to make immediate and direct contact with existing community-based general practitioners, accessing copies of treatment plans for gender affirming medications and requiring Corrections Victoria to continue the provision of the same mediations and prescribed dosage that TGD people were receiving in the community.

3.2 Access to national healthcare subsidies

Currently, people in prison are unable to access the Medicare Benefits Schedule, the Pharmaceutical Benefits Scheme or the National Disability Insurance Scheme. This means the healthcare available to people in prison is below the standard of that available to people in the wider community.

We endorse the Recommendations outlined in the Human Rights Law Centre submission outlining improvements to access to healthcare in prisons and also recommend that the current Medicare subsidies and states that:

“The review should recommend that the State Government;

- 1. calls on the federal government to grant an exemption under section 19(2) of the Health Insurance Act 1973 (Cth) to allow health care providers in prisons to claim Medicare subsidies;*
- 2. ensuring that people in prison have access to the National Disability Insurance Scheme and are assessed for eligibility for the National Disability Insurance Scheme upon entry to a prison;*
- 3. transitioning the responsibility for delivering healthcare in prisons from Corrections Victoria to the Department of Health;*
- 4. resourcing and supporting Aboriginal Community Controlled Organisations to deliver culturally appropriate health services to Aboriginal and Torres Strait Islander people in prison and to facilitate continuity of care upon release.”*

We note that gender affirming treatments are not fully covered by Medicare and the Pharmaceutical Benefits Scheme.⁷² This means that TGD people are often left with significant out of pocket expenses such that these treatments are accessible only to TGD people who can afford them. For example, Medicare only covers a small proportion of the costs of vaginoplasty and chest reconstruction surgery. Even if Medicare is expanded to cover people in prison it would be of limited assistance to ensure access to appropriate gender affirming care for TGD people.

RECOMMENDATION 23: We endorse the four *Equivalency of Health Care* recommendations outlined in the Human Rights Law Centre submission, and also recommend that the Victorian Government should call on the Federal government to expand the Medicare Pharmaceutical Benefits Scheme to cover gender affirming treatments and care, including surgeries that should be recognise such care as medically necessary.

PART FOUR: Workforce skills and training

This section addresses the need for ongoing and regular workplace training on working with TGD people in prisons.

⁷² See ACON (2019). A Blueprint For Improving The Health and Wellbeing of the Trans and Gender Diverse Community in NSW, AIDS Council of New South Wales, Sydney, Australia.

4.1 Workforce training

The Yogyakarta Principles recognise the importance of training on human rights standards and LGBTIQ+ awareness raising to prevent human rights abuses.⁷³ Training can assist LGBTIQ+ people in prison live free from “torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.”⁷⁴ The Special Rapporteur on Torture has also called on States to “undertake specific training and capacity-building programmes designed to sensitize law enforcement authorities and detention facility staff to the specific circumstances and unique needs of female and LGBT prisoners, and standards such as the Bangkok Rules.”⁷⁵

This submission has identified the ongoing experiences of violence, discrimination and transphobia that our clients have experienced in Victorian adult prisons. It highlights a lack of understanding, empathy and transphobic attitudes held by Correctional staff.

RECOMMENDATION 24: That all staff in Correctional facilities undertake annual and ongoing LGBTIQ+ inclusion training to increase cultural competency, empathy and understanding of LGBTIQ+ people and reduce experiences of homophobia and transphobia within Victorian prisons. All training should be developed in consultation with LGBTIQ+ people who have experienced incarceration.

RECOMMENDATION 25: That Corrections Victoria ensure all Corrections staff complete additional annual training to increase the understanding of TGD Sistergirls and Brotherboys experiences, and the policies and practical techniques relevant to the management, classification and placement of TGD people in prison. All training should be developed in consultation with TGD people who have experienced incarceration and reviewed and evaluated annually.

Between 2015 – 2016 only one staff member at DPFC completed LGBTIQ+ inclusion training.⁷⁶ In 2017, a further 30 correctional staff completed training sessions delivered by Transgender Victoria.⁷⁷ The Victorian Ombudsman identified the need for all Corrections officers to complete training on TGD people in prison.⁷⁸ In 2020 the LGBTIQ+ Strategy Directions Paper also identified the need for Corrections staff to engage in regular training, highlighting the impact that LGBTIQ+ training can have to create safer environments, supporting change within institutional cultures and challenging both personal and institutional bias that negatively affects LGBTIQ+ people.⁷⁹

We appreciate the opportunity to make this submission. If you have any further questions, please contact Hilary Knack, Manager of LLS by email to hilary@skls.org.au.

⁷³ Above n 4, 16.

⁷⁴ Ibid, 17.


⁷⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 24 February 2016, para. 70 the Bangkok rules are....

⁷⁶ Above n 53, 97.

⁷⁷ Ibid.

⁷⁸ Ibid, 106.

⁷⁹ Above n 23, 12.



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